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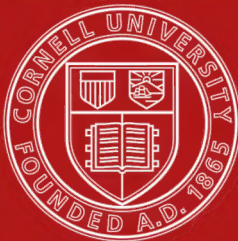
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A TREATISE
ON
W I L L S

BY
THOMAS JARMAN, Esq.

THE SIXTH EDITION

BY
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IN TWO VOLUMES

VOL. I

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PREFACE

TO THE SIXTH EDITION.

IN preparing this edition it has been found necessary to make extensive alterations and additions. Mr. Jarman based his division of the subject on the law of devises, and his scheme of arrangement provided no place for some important topics connected with wills of personalty. Several new chapters have therefore been added, and some of the old chapters have been re-arranged. Mr. Sanger is primarily responsible for the new chapters dealing with Legacies, Annuities, Ademption and Satisfaction, Absolute Interests in Personalty, and Life Estates and Interests; and for the section on Gifts Over in Chapter XXXVI. He has also undertaken the task of revising several of the chapters in the second volume (Chapters XLVII.—LII., LV., LVII. and LVIII. in this edition) which it was necessary to abridge in order to provide space for the new matter. The chapter on Conversion has been re-arranged; Powers of Appointment have been made the subject of a separate chapter; the chapter on Description of Persons and Things includes (in addition to some new matter) matter which in previous editions was scattered through several chapters; and new chapters have been added dealing with Gifts by Reference, Alternative and Substitutional Gifts, and Trusts. It will be noticed that in several chapters (including Chapters IV., VI., VIII., XVI., XVII., XXV., XXIX., XXXVII., XXXIX., XLIII. and LIV.), new sections have been added for the purpose of dealing with various questions not referred to in previous editions.

Owing to the large number of recent decisions on the Rule against Perpetuities it has been made the subject of a separate chapter, and some new sections have been added with the view of bringing out the distinction between (i) "perpetuity" in the sense of an inalienable interest, (ii) "perpetuity" in the old-fashioned sense of an unbarrable entail, and (iii) those future interests in property which are void for remoteness under the modern Rule against Perpetuities. These distinctions are not without practical importance, for a charitable bequest may be void for remoteness although it can never be void as a "perpetuity" (see p. 367); and the better opinion is (although the law is at present settled otherwise) that a restraint on anticipation, being an exception to the rule forbidding the creation of inalienable interests, is never void on the ground of "perpetuity," and is only void on the ground of remoteness if it is annexed to an interest which is itself void for remoteness (see p. 305 n.). Another instance of the confusion which has been produced by a failure to distinguish between "perpetuity" (in the sense of an inalienable interest) and "remoteness," is to be found in the decision (since overruled) in *Birmingham Canal Co. v. Cartwright* (11 Ch. D. 562). In the present edition the rule in *Whitby v. Mitchell* is treated as derived from the old Rule against Perpetuities; this is in accordance with the opinion of Mr. Fearne and the Real Property Commissioners. The opinion of some eminent writers (including Mr. Charles Butler and Mr. Joshua Williams) that it is derived from the so-called doctrine of double possibilities, has, it is to be hoped, received its quietus from the decision in *Re Nash* (see Addenda, p. cccv.). The opinion of Mr. Fearne and the Real Property Commissioners has also been followed with regard to the doctrine of cy-près, and it is therefore treated as an exception to the old Rule against Perpetuities. Mr. Lewis and Mr. Gray consider it to be an exception to the modern Rule against Perpetuities, but this mode of treatment (which makes the doctrine of cy-près an unintelligible anomaly) is due to the refusal of those learned writers to recognize the existence of the old Rule against Perpetuities.

Some difficulty has been felt in dealing with the question whether the modern Rule against Perpetuities applies to contingent remainders, owing partly to Mr. Jarman's undecided views on the subject, and partly to some recent decisions. Mr. Jarman's attitude is not difficult to account for. Long before he wrote, the landowners had been decisively beaten in their protracted struggle with the courts, and had abandoned all attempts to create perpetual settlements of land, in the nature of unbarrable entails, by limiting the land to their unborn descendants, as purchasers, in succession, and similar devices. The rule forbidding these settlements, or "perpetuities" as they were formerly called, had become so firmly established by the middle of the eighteenth century that it was seldom referred to, except as a rule which conveyancers were bound to observe in framing strict settlements of land: so it gradually came to be stated in the form in which we now know it—the rule in *Whitby v. Mitchell*—and its true origin was forgotten. In the meantime, however, the courts had found it necessary to invent a new rule, to check the creation of future interests, either in real or in personal property, by executory devises and bequests, trusts, and other methods unknown to the ancient common law; this new rule was framed by analogy to the old Rule against Perpetuities (which made it impossible to tie up land longer than a life in being and the minority of an unborn person), and when the old rule retired from active service, the new rule became known as the Rule against Perpetuities. Mr. Jarman was much puzzled by the ambiguity of the word "perpetuity," and was unable to make up his mind whether the rule in *Whitby v. Mitchell* (as we now call it) was distinct from the modern Rule against Perpetuities, or whether the two rules were identical. His doubts were not unnatural, for he had made no special study of the subject. His contemporary, Mr. Lewis, had not this excuse, for his work on the Rule against Perpetuities is a book displaying extraordinary industry and learning, but he thought it so important that there should be only one Rule against Perpetuities, of universal application, that he entirely misunderstood the nature of the old rule

forbidding the creation of "perpetuities" in the obsolete sense of the term, and boldly maintained that "perpetuity" meant the same thing in 1716 as it did in 1843. His misapprehension was similar to that of the playgoer who came away from a performance of Shakespeare's *King Henry V.* with the firm belief that lawn-tennis was played in the fifteenth century. Having started wrongly, Mr. Lewis fell into further error: he denied that the rule which we call the rule in *Whitby v. Mitchell* ever existed as an independent rule; and when he found, in Mr. Fearne's well-known work, the statement that a contingent remainder which tends to a perpetuity is void, he thought that this referred to the modern Rule against Perpetuities, and was thus led to the erroneous conclusion that contingent remainders are subject to that rule. Mr. Lewis's double mistake was pointed out by Mr. Joshua Williams, a writer of far greater historical learning and acumen than Mr. Lewis, more than sixty years ago; nevertheless, Mr. Lewis's views on the question of contingent remainders have been accepted as accurate, during the last few years, by several judges of first instance. The result is that the law is in a state of confusion and uncertainty. The Court of Appeal, in *Whitby v. Mitchell*, followed Mr. Joshua Williams unreservedly, so far as was necessary for the decision of that case; it remains to be seen whether their successors, when the question comes before them, will follow him the rest of the way, and overrule *Re Frost* and the dicta in *Re Ashforth*.* The older authorities, on which Mr. Joshua Williams based his opinion, do not seem to have been referred to in those cases, and they have therefore been collected in Chapter X. (pp. 369-370).

Another illustration of the truth of Lord Coke's saying, *ignoratis terminis ignoratur et ars*, is to be found in the doctrine of domicile, in connection with the rules governing testate and intestate succession. When questions caused by the

* It is respectfully submitted that the actual decision in *Re Ashforth* is correct, as the ultimate limitation was an executory devise and not a contingent remainder. The first ground given for the decision in *Re Frost* is erroneous: see *Re Nash*, [1910] 1 Ch. 1; the second ground is also erroneous, being based on the same singular misapprehension of Mr. Fearne's meaning as that made by Mr. Lewis.

conflict of laws on this point first began to arise, our judges had recourse to the Roman law for illumination. Unfortunately they do not seem to have fully grasped the technical meaning of *domicilium* in Roman law, or the all-important distinction between *domicilium* and *origo*, or the reasons which made *domicilium* of practical importance in Roman law; the Roman empire, during the time of the great juriconsults, embraced the whole of the civilized world, and therefore no conflict of laws, in our sense of the term, was possible. If our judges had paid more attention to these matters, they might possibly have come to the conclusion that the doctrines of the Roman law threw no light on the problem which they had to consider, and that in case of conflict between the laws of two independent states with reference to the succession to a man's personal property after his death, the question ought to be governed by the law of his nationality, and not by that of his domicil. This rule would harmonize with the assumption which is made by most Englishmen when they go to live in a foreign country without any idea of abandoning their nationality, and if it had been adopted as a principle of English law the Privy Council would have been in a position to decide the case of *Bremer v. Freeman* (see p. 11) in accordance with the dictates of common sense. The adoption of the principle would have had other minor advantages: we should have been spared the lengthy and irrelevant citations from the civilians which encumber the pages of our reports; and the doctrine of *Renvoi* would have lost half its terrors.

The Editors have ventured to comment on some modern cases which seem to be not altogether consistent with first principles: such as *In bonis Gentry* (p. 170), *Burton v. Newbery* (p. 200), *Re Tyler* (p. 212), *Wallis v. Sol.-Gen. for New Zealand* (p. 245), *Re Dean* (p. 297), *Re Lord Chesham's Settlement* (p. 697), *Re Waterhouse* (p. 805), *Re Oliver's Settlement* (p. 851), *Bouch v. Sproule* (p. 1223), *Re Hubbuck* (p. 1241). The case of *Re Waidanis* is referred to on p. 935, and *Leach v. Jay* on p. 950.

In previous editions of this work, an attempt was made to distinguish the editors' additions by enclosing them in square brackets, but the attempt was not altogether successful, for in many cases alterations were made in such a way as to convey an erroneous impression of Mr. Jarman's meaning. This mode of distinguishing Mr. Jarman's text has not been employed in the present edition, except in Chapters XLVIII., XLIX. and LI. ; in the other chapters Mr. Jarman's text is distinguished by quotation marks, and care has been taken to reprint it, without alteration, from the first edition. The Editors think that Mr. Jarman's original language should be preserved as far as possible in all cases where his statements of principle have, so to speak, become classical, and also where he expressed an opinion on points which are still contested or doubtful.

Owing to various unforeseen causes, the work has taken a long time in passing through the press, and the addenda are correspondingly numerous. The reader is requested to note them up in the body of the book.

Mr. Sydney Edward Williams, of Lincolns Inn, is responsible for the index, and Mr. Lawrence Duckworth, of the Middle Temple, is responsible for the table of cases.

LINCOLNS INN,
June, 1910.

PREFACE

TO THE FIRST EDITION.

SIXTEEN years have now elapsed since the writer diffidently presented to the profession his first publication on Testamentary Law, in the form of an edition of Powell on Devises, with a supplementary treatise on the Construction of Devises. The reception given to this work was such as abundantly to compensate for the severe labour which it exacted, and under which the health of its Editor more than once sank. This was followed, after the interval of a few years, by the Tenth Volume of the Precedents in Conveyancing, being the portion of that work which was devoted to the same subject. The materials afforded by these publications have been freely used in the present work ; but considering the very large accessions since made to the adjudications on testamentary law, and that it has not escaped the activity of modern legislation, it will be obvious that many of the various subjects embraced by so extensive a range of disquisition, now present themselves under a different aspect, requiring, not only very large additions to the matter which composed the former works, but the rejection of no inconsiderable portion of that matter ; and the Writer is not ashamed to avow, that another, though certainly a less extensive, head of alteration arises from the changes which experience has wrought in some of the opinions of his earlier days. The result is, that probably more than one-half of the present treatise is entirely original ; and the writer therefore feels that he has to subject his performance (as partially new) to the criticism

of his professional brethren, whose kind consideration he again bespeaks, convinced that those who are the most competent to detect error, will be the most generous and indulgent in the appreciation of the difficulties which beset the inquirer into the principles of one of the most intricate branches of the law. To those difficulties have been added the daily interruptions of professional avocation, which have long delayed, and have sometimes threatened wholly to prevent, the present publication. The recent act has created some additional embarrassment to a writer on Wills, by introducing new principles of construction, partial in their application; for, by drawing a line between wills of an earlier and those of a later date, the legislature has diminished the importance, without permitting the rejection or the neglect, of the old law. On these subjects, conciseness and compression have been specially aimed at, and some additional labour has been willingly incurred, in order to avoid incumbering the present work unnecessarily with matter, which every passing day tends to render less practically useful.

THOMAS JARMAN.

NEW SQUARE, LINCOLN'S INN,
December, 1843.

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—— v. Wynn, [1725] 3 Br. P. C. 95	424, 1883
Wynne v. Fletcher, [1858] 24 Beav. 430	1546
—— v. Hawkins, [1782] 1 Br. C. C. 179	462, 869
—— v. Littleton, [1681] 2 Ch. Rep. 51 ; 1 Vern. 3	973
—— v. Wynne, [1840] 2 M. & Gr. 8	1475
Wytcherley v. Andrews, [1871] L. R. 2 P. & D. 327	560
Wyth v. Blackman, [1748-83] 1 Ves. sen. 196 ; Amb. 555. 1590, 1602, 1656, 1661, 1954	
Wythe, v. Henniker, [1834] 2 My. & K. 635	2041, 2070, 2094
—— v. Thurlston, [1750] ; same case as Wyth v. Blackman	

Yalden, In re, [1851] 1 D. M. & G. 53	463, 562, 762, 1184
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Yarnold <i>v.</i> Moorhouse, [1830] 1 R. & My. 364 ; 32 R. R. 223	1512
— <i>v.</i> Wallis, [1840] 4 Y. & C. 160 ; 10 L. J. Ex. Eq. 5	2011
Yarrow <i>v.</i> Knightly, [1878] 8 Ch. D. 736 ; 47 L. J. Ch. 874	1804
Yates, Re ; Bostock <i>v.</i> D'Eyncourt, [1891] 3 Ch. 53	1789, 1794
—, Re ; Yates <i>v.</i> Wyatt, [1901] 2 Ch. 438 ; 70 L. J. Ch. 725 ; 85 L. T. 398 ; 49 W. R. 646	890, 923, 1140
—, Re ; Throckmorton <i>v.</i> Pike, [1907] 96 L. T. 758	1107, 1108
— <i>v.</i> Clincard, [1599] Cro. Eliz. 704	1294
— <i>v.</i> Compton, [1725] 2 P. W. 308	883, 933, 1146
— <i>v.</i> Maddan, [1849–51] 3 Mac. & G. 540 ; 16 Sim. 413 ; 18 L. J. Ch. 310 ; 21 L. J. Ch. 24 ; 13 Jur. 331 ; 87 R. R. 184	1139, 1143
— <i>v.</i> Thomson, [1835] 3 Cl. & F. 544 ; 39 R. R. 40	9, 623
— <i>v.</i> University College, London, [1875] L. R. 7 H. L. 438 ; 45 L. J. Ch. 137	226, 865, 1462
— <i>v.</i> Yates, [1860] 28 Bea. 637 ; 29 L. J. Ch. 872 ; 6 Jur. (N. S.) 1023 ; 3 L. T. 9	742, 756, 1145, 1231, 1242, 1243, 1244
Yates' Trusts, Re, [1852] 21 L. J. Ch. 281 ; 16 Jur. 78	2182
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Yeats <i>v.</i> Yeats, [1852] 16 Bea. 170 ; 96 R. R. 80	1709
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Yerbury's Estate, Re ; Ker <i>v.</i> Dent, [1889] 62 L. T. 55	255
Yockney <i>v.</i> Hansard, [1844] 3 Hare, 620 ; 8 Jur. 822	1123
Yonge <i>v.</i> Furse, [1855] 20 Bea. 380 ; 24 L. J. Ch. 643 ; 109 R. R. 460	1231, 2042
Youde <i>v.</i> Jones, [1844] 14 Sim. 131 ; 8 Jur. 547 ; 13 M. & W. 534	428
Youman's Will, Re, [1901] 1 Ch. 720 ; 70 L. J. Ch. 430	1813, 1821, 1861
Young, In re ; Trye <i>v.</i> Sullivan [1885] 28 Ch. D. 705 ; 52 L. T. 754	57, 846, 1064
— <i>v.</i> Davies, [1863] 2 Dr. & Sm. 167 ; 1 N. R. 419 ; 32 L. J. Ch. 372 ; 9 Jur. (N. S.) 399 ; 8 L. T. 80 ; 11 W. R. 452	429, 431, 1142, 1198, 1321, 1590, 1798, 1848, 2129
— <i>v.</i> Grove, [1847] 4 C. B. 668 ; 16 L. J. C. P. 216 ; 72 R. R. 687	255
— <i>v.</i> Hassard, [1841] 1 Dr. & War. 638 ; 58 R. R. 335	178
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— <i>v.</i> Holloway, [1895] P. 87 ; 64 L. J. P. 55	560
— <i>v.</i> Macintosh, [1843] 13 Sim. 445 ; 7 Jur. 383	906, 907
— <i>v.</i> Martin [1843] 2 Y. & C. C. C. 582 ; 7 Jur. 1147 ; 60 R. R. 292 ..	872
— <i>v.</i> Robertson, [1862] 8 Jur. (N. S.) 825 ; 4 Macq. 314, 337	1354, 2135, 2182, 2183, 3555
— <i>v.</i> Sheppard, [1847] 10 Bea. 207 ; 16 L. J. Ch. 247	479
— <i>v.</i> Turner, [1861] 1 B. & S. 550 ; 30 L. J. Q. B. 268	1724, 2194
— <i>v.</i> Young, [1859] 26 Bea. 522	2080
Young's Settlement, Re, [1855] 18 Bea. 199 ; 104 R. R. 430	561, 1458
Younge <i>v.</i> Coombe, [1798] 4 Ves. 101	692
— <i>v.</i> Furse, [1857] 8 D. M. & G. 756 ; 26 L. J. Ch. 352 ; 3 Jur. (N. S.) 803 ; 5 W. R. 394	1526, 1527, 1531, 1534, 1540
Younghusband <i>v.</i> Gisborne, [1844–46] 1 Coll. 400 ; 8 Jur. 750 ; 15 L. J. Ch. 355 ; 10 Jur. 419 ; 66 R. R. 120	885, 1503, 1504
Zouch <i>d.</i> Forse <i>v.</i> Forse, [1806] 7 East, 186 ; 3 Smith, 191	1213
— <i>v.</i> Lambert, [1793] 4 Br. C. C. 326 ; s.c. nom. Dicks <i>v.</i> Lambert, 4 Ves. 725	498

ADDENDA.



- Page 2, n. (e). *Re Hoyles*, [1910] W. N. 153.
- „ 2, n. (l). *Add*: “ See *Re Earl of Caithness*, 7 T. L. R. 354.”
- „ 3. *After the last paragraph, add*: “ If a testator, domiciled in England, devises immoveable property situate abroad to trustees in England upon trust for sale, and a beneficiary dies while the property is still unsold, his interest is liable to the English death duties: *Att.-Gen. v. Johnson*, [1907] 2 K. B. 885.”
- „ 11, n. (g). *Add*: “ The statement is, of course, only true so far as the will attempts to dispose of moveable property (ante, p. 1.)”
- „ 12, n. (w). In *Lyne v. De la Ferté*, 102 L. T. 143, a testamentary instrument which, being wrongly dated, was *prima facie* invalid under French law, was admitted to probate under Lord Kingsdown's Act, the defect being remediable under French law.
- „ 24, n. (o). See the case of *Gesling v. Viditz*, referred to in the Law Magazine for November, 1909, p. 34, and Law Quarterly Review, xxvi. 277.
- „ 30, n. (e). *Add*: “ In *In bonis Morony*, 1 L. R. Ir. 483, words which had been omitted by mistake were supplied by the Court of Probate: see post, p. 581, n. (b).”
- „ 31, nn. (n) and (o). *Low v. Guthrie*, [1909] A. C. 278; *Finny v. Govett*, 25 T. L. R. 186.
- „ 40, nn. (h) and (i). *Estate of Vines*, [1910] P. 147.
- „ 45, n. (b). *Reeves v. Reeves*, [1909] 2 Ir. R. 531.
- „ 46, n. (m). *Add*: “ See *Re West*, [1909] 2 Ch. 180, stated post, p. 1106. As to letters of administration, see *Boxall v. Boxall*, 27 Ch. D. 180; *Ellis v. Ellis*, [1905] 1 Ch. 613; *Craster v. Thomas*, [1909] 2 Ch. 348.”
- „ 49, n. (v). *Low v. Guthrie*, [1909] A. C. 278; *Finny v. Govett*, 25 T. L. R. 186.
- „ 59. *Add* the following note before note (i), with a reference to it at the end of the paragraph stating the terms of the M. W. P. Act, 1893: “ See *Re James*, [1910] 1 Ch. 157, the effect of which is shortly stated in the addendum to p. 83.”
- „ 64, n. (e). *Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58.
- „ 64, n. (g). *Add*: “ As to the question whether the Act affects the construction of wills, see post, p. 1810. See also *Re Pullen*, [1910] 1 Ch. 564.”
- „ 65. *Before the last paragraph insert a new paragraph, as follows*: “ Hence a man had no power, even under the old law, of disposing by will of his wife's chattels real or paraphernalia, for if not disposed of by him inter vivos, they survived to her (*Williams*, R. P. 21st ed., p. 527; P. P. 16th ed., p. 491). As to paraphernalia, see post, p. 2028.”
- „ 72. The reader may notice that both spellings, *pur auter vie*, and *pur autre vie*, occur in the text. Mr. Jarman used the latter spelling. It is a small matter, but the editor prefers *pur auter vie*; it is the spelling of Littleton, Coke and Blackstone, and seems to be historically correct. *Pur auter vie* means “ for the life of another man,” not “ for other life,” just as *en auter droit* means “ in right of another person,” not “ in other right.” *Auter* appears to be a corrupt form of *autrui*, which, Professor Maitland tells us, was the correct word for “ another person ” in the fourteenth century, as it is in modern French (Introduction to the Year Books published by the Selden Society, p. xlix). Professor Maitland seems to have felt a doubt as to the meaning of the phrases *en auter droit* and *pur auter vie* which it is difficult to share, having regard to the way in which Littleton and Coke render them.
- „ 74-5. Mr. Theobald (*Wills*, 7th ed. p. 523) seems to dissent from Mr. Jarman's view as to the devisability of a quasi-entail. Mr. Hayes, however, was of the same opinion as Mr. Jarman (*Conv. i.* 198).

- Page 79. *After the second paragraph, add:* "A condition binding land may be created by devise: *Wigg v. Wigg*, 1 Atk. 383; *Warren v. Lee*, Dyer, 126 (b): *Re Kirk*, 21 Ch. D. 435: post, p. 1462."
- .. 82, n. (y). *Add:* "See p. 938, n. (a)."
- .. 83. Where a married woman has a contingent power of appointment, and makes a will specifically exercising it, and by subsequent events the power is destroyed and the property becomes hers absolutely, the will operates as a disposition of the property under sect. 3 of the Married Women's Property Act, 1893: *Re James*, [1910] 1 Ch. 157.
- .. 99. *After the first paragraph, add a new paragraph as follows:*—"The effect of a gift to husband and wife, either by themselves or concurrently with other persons, is discussed on pp. 1785-6."
- .. 134, n. (r). *Re Thistlethwaite*, 11 T. L. R. 206.
- .. 144, n. (w). *North v. North*, 25 T. L. R. 322.
- .. 146, n. (r). *Add:* "In fact the testator cannot afterwards ratify the unauthorized destruction so as to make it a valid revocation: *Gill v. Gill*, [1909] P. 157."
- .. 146, n. (t). It seems that the presumption may be rebutted by evidence that the testator in conversation from time to time referred to the will as being in force: *Estate of Mackenzie*, [1909] P. 305, where, however, all parties consented to the grant.
- .. 148, n. (f). *Estate of Irvin*, 25 T. L. R. 41.
- .. 149, n. (j). *North v. North*, 25 T. L. R. 322.
- .. 153, n. (e). *Lafone v. Griffin*, 25 T. L. R. 308. In *Gill v. Gill*, [1909] P. 157, a small piece of the will had been torn off without the testator's authority and was missing: its contents were proved by oral evidence: Bargrave Deane, J., held that the proper practice was not to insert the missing words in the probate, but to annex to it a document showing what they were.
- .. 163, nn. (b) and (c). The reference should be to Chap. XXII.
- .. 167, n. (c). See *Re Percival*, 59 L. T. 21: *Re Freeman*, [1910] 1 Ch. 681.
- .. 172, n. (x). As to the implied revocation of a donatio mortis causâ by a subsequent will, see *Hudson v. Spencer*, [1910] W. N. 157.
- .. 172, n. (a). *Reeves v. Reeves*, [1909] 2 Ir. R. 521.
- .. 175, n. (w). *Reeves v. Reeves*, [1909] 2 Ir. R. 521.
- .. 177, n. (g). *Add:* "Followed in *Reeves v. Reeves*, [1909] 2 Ir. R. 521."
- .. 178, n. (l). *Add:* "See *Hordern v. Hordern*, [1909] A. C. 210; and *Re Freeman*, [1910] 1 Ch. 681, where *Randfield v. Randfield*, 8 H. L. C. 225 is cited; but that case relates to contradictory gifts contained in the same instrument, not to revocation properly so called; see post, p. 574."
- .. 178, n. (p). See *Stretton v. Fitzgerald*, 23 L. R. Ir. 310, 466.
- .. 186, n. (h). *Hordern v. Hordern*, [1909] A. C. 210.
- .. 188. *Insert before the first paragraph:* "A direction in a codicil that the will is to be construed and take effect as if the name C. D. were therein inserted instead of the name A. B., is not necessarily read literally, even if emphatic words, such as 'in all respects,' or 'throughout,' are added: *Re Percival*, 59 L. T. 21. If for example the object of the direction is merely to substitute C. D. for A. B. as executor, it will not revoke a gift of a share of residue to A. B. beneficially: *Re Freeman*, [1910] 1 Ch. 681."
- .. 201, n. (g). *Re Donald*, 53 Sol. J. 673.
- .. 204, n. (a). See *Re Donald*, 53 Sol. J. 673.
- .. 212. *Insert before the last paragraph:* "It seems that in the administration of a charitable trust, a majority of the trustees can bind the minority: *Re Whiteley*, [1910] 1 Ch. 600."
- .. 212, n. (g). As to the principle of *Christ's Hospital v. Grainger*, see *Re Barker*, 25 T. L. R. 753.
- .. 215, n. (y). *Dunne v. Duignan*, [1908] 1 Ir. R. 228: *Re Redish*, 26 T. L. R. 42.
- .. 215, n. (a). *Re Donald*, [1909] 2 Ch. 410: *Re Barker*, 25 T. L. R. 753 (gift for improving condition of soldiers).
- .. 216, n. (m). *Re Charlesworth*, 101 L. T. 908.
- .. 217, n. (u). See *Re Mirrlees' Charity*, [1910] 1 Ch. 163, where it was held that a scheme expressed in general terms did not authorize the expenditure of money for charities out of the jurisdiction.
- .. 218. *After the second paragraph, add:* "In *Re Williams*, 26 T. L. R. 307, the question arose whether a bequest for the purpose of being applied in paying off the debts of dissenting chapels within a certain area was confined to

- chapels built or debts incurred during the testator's lifetime : it was held that it was not.
- "Where a testator bequeaths a lumpsum for a charitable purpose, he may by appropriate words show an intention that it is not to be spent as part of the annual income of the charity, but invested so as to create an endowment : as where he bequeaths £1000 to 'found' a bed in a hospital : *Att.-Gen. v. Belgrave Hospital*, [1910] 1 Ch. 73."
- Page 218, n. (g). *Re Elliott*, 102 L. T. 528.
- "222, n. (m). But a bequest to provide dinners for persons who are not necessitous may indirectly operate as a charitable gift : *Re Charlesworth*, 101 L. T. 908.
- "222, n. (v). It has been formally decided that the livery companies of the City of London are not charities : *Re Meech's Will*, [1910] 1 Ch. 426.
- "225, n. (u). *Add* : "*Re Harbison*, [1902] 1 Ir. R. 103, post, p. 897 : *Re The Friends' Free School*, [1909] 2 Ch. 675."
- "226, n. (a). See *Macduff v. Spence's Trustees*, [1909] Ct. Sess. Ca. 178.
- "226, n. (g). *Re Parkes*, 25 T. L. R. 523 : *Re Hill*, 53 Sol. J. 228.
- "226, n. (h). *Re Hill*, 53 Sol. J. 228.
- "229, n. (v). *Re Ogden*, 25 T. L. R. 382.
- "231, n. (c). *Paterson's Trustees v. Paterson*, [1909] Ct. Sess. Ca. 485.
- "234, n. (u). *Add* : "So where the trust is for educational purposes :—*Re The Friends' Free School*, [1909] 2 Ch. 675."
- "235, n. (k). As to the jurisdiction of the Charity Commissioners in relation to schemes, and the effect of sect. 17 of the Charitable Trusts Act, 1853, see *Holme v. Guy*, 5 Ch. D. 901 and cases there cited : *Re Weir Hospital*, [1910] W. N. 152. As to the Board of Education, see the Board of Education Act, 1899, sect. 2, and the Orders in Council made thereunder.
- "235, n. (kk). Where the objects of a scheme are described in general terms, they are *prima facie* confined to charities within the jurisdiction : *Re Mirrlees, Charity*, [1910] 1 Ch. 163.
- "237, n. (u). See *Re Donald*, [1909] 2 Ch. 410.
- "240, n. (k). *Add* : "The correctness of the decision may perhaps be doubted : see *Att.-Gen. v. Shadwell*, [1910] 1 Ch. 92. In *Re Wilson*, 25 T. L. R. 465, a bequest to a charitable institution which before the death of the testator had been divided into two institutions, was apportioned between them."
- "249, n. (k). *Add* : "The domicile of the testator is of course immaterial : *Re Hoyles*, [1910] W. N. 153 : ante, p. 2."
- "250, n. (l). As to mortgages of land abroad, see *Re Hoyles*, [1910], W. N. 153.
- "263, n. (e). See *Re West*, [1909] 2 Ch. 180 (specific bequest).
- "271, n. (v). *Re Knox*, [1910] 1 Ir. R. 21, following *Boyle v. Boyle*, Ir. R. 11 Eq. 433.
- "272, n. (x). As to bequests of money secured by mortgage on land in a British colony, see *Re Hoyles*, [1910] W. N. 153.
- "278, n. (b). *Add* : "The suggestion made by Fry, J., in *Re Parry and Daggs* (supra) that the principle has existed from the earliest times and that the rule in *Shelley's Case* rests on it, is erroneous. The statement of the Real Property Commissioners (cited post, p. 374), that at the common law, properly so called, there was no rule against perpetuities, and the statement of Mr. Gray (Perp., § 141a, (e)) that the question of perpetuity did not arise until the sixteenth century, are historically accurate."
- "286, n. (d). In *Re Nash*, [1910] 1 Ch. 1, the Court of Appeal said : "We are of opinion that the rule against limiting land to an unborn child for life with remainder to his unborn child applies to equitable so well as to legal estates. We think that the rule should be so expressed, and that the phrase 'possibility upon a possibility' should not be used." See an article by the present editor in the Law Quarterly Review for October, 1909, where an attempt is made to trace the history of the so-called doctrine of a possibility on a possibility.
- "287, n. (h). Since this note was written an article by the present editor has been published in the Law Quarterly Review for October, 1909, in which an attempt is made to explain the origin of the theory that the rule in *Whitby v. Mitchell* is derived from the so-called doctrine of double possibilities. It may now be regarded as settled by the decision of the C. A. in *Re Nash*, [1910] 1 Ch. 1 (supra) that the rule in *Whitby v. Mitchell* is not derived from the so-called doctrine of double possibilities.

Page 295, n. (r). The section applies to equitable estates in fee : *Re Shrubb*, [1910] W. N. 143.

„ 306, n. (x). *Add*: “The rule in *Doe v. Eyre* (post, pp. 1365, 1436) does not apply to a gift over which is void for remoteness: see post, pp. 1437, 1457 : Farwell on Powers, 303, citing *Re Brown and Sibly*, 3 Ch. D. 156.”

„ 310, n. (w). *Re Davies and Kent's Contract*, [1910] 2 Ch. 35.

„ 341, n. (l). As to the cases in which the presumption that a woman is past child-bearing is made, see *Re White*, [1901] 1 Ch. 570, where *Re Hocking*, [1898] 2 Ch. 567 is referred to.

„ 356, n. (m). The decision in *Re Bowles* was approved by the Court of Appeal in *Re Davies and Kent*, [1910] 2 Ch. 35.

„ 363, n. (s). See addendum to p. 306, n. (x), supra.

„ 368, n. (a). The general principle stated in the text assumes that the trust for payment of debts or incumbrances is the primary trust, as in *Lord Southampton v. Marquis of Hertford*, *Bateman v. Hotchkin*, *Bacon v. Proctor*, *Briggs v. Earl of Oxford*, and *Tewart v. Lawson*. If the trust for payment of debts is preceded by or mixed up with other trusts, so that the amount applicable for payment of debts depends on the operation of trusts which are themselves too remote, as in *Scarisbrick v. Skelmersdale*, then the whole trust is void, including the trust for payment of debts.

„ 385, n. (x). *Mackay's Trustees v. Mackay*, [1909] Ct. Sess. Ca. 139.

„ 390, n. (w). *Re Perkins*, 101 L. T. 345.

„ 400, n. (v). *Re Brown*, 26 T. L. R. 257.

„ 410, n. (e). *Re M'Affee*, [1909] 1 Ir. R. 124.

„ 414, n. (x). *Add*: “Whether a devise of pits of clay would carry pits opened between the date of the will and the death of the testator, was discussed in *Brown v. Whiteway*, 8 Ha. at p. 150.”

„ 415, n. (c). *Re Alexander*, [1910] W. N. 36.

„ 428, n. (g). *Add*: “See *Re Currie's Settlement*, [1910] 1 Ch. 329.”

„ 458, n. (d). *Macduff v. Spence's Trustees*, [1909] Ct. Sess. Ca. 178.

„ 472, n. (s). See *Cope v. Henshaw*, 35 Bea. 420.

„ 481, n. (x). *Add*: “See *Briggs v. Penny*, 3 De G. & S. 525 : 3 Mac. & G. 546, post, pp. 880, 910.”

„ 485, n. (d). *Add*: “stated post, pp. 559, 560.”

„ 498, n. (b). As to the limitations of the doctrine laid down in *Re Stewart*, see *Re Innes*, [1910] 1 Ch. 188.

„ 505, n. (x). *Add*: “See *Re Brown*, 26 T. L. R. 257, where evidence was admitted to prove that the testator habitually described as his ‘wife’ a woman to whom he was not legally married. And see p. 400.”

„ 515, n. (d). *Re Gregson's Trusts*, 2 H. & M. 504.

„ 560, n. (y). See further as to estoppel by res judicata, *Peareth v. Marriott*, 22 Ch. D. 182 : *Badar Bee v. Hahib Merican Noordin*, [1909] A. C. 615.

„ 683, n. (n). *Re Currie's Settlement*, [1910] 1 Ch. 329.

„ 692, n. (b). *Adshead v. Willetts*, 29 Bea. 358.

„ 697, n. (d). In *Re Parker*, [1910] 1 Ch. 581, Parker J., followed *Foley v. Burnell*, and distinguished *Re Lord Chesham's Settlement*.

„ 698, n. (f). After the note on *Re Lord Chesham's Settlement* was in type, a short paragraph appeared in the Law Magazine and Review for November, 1909, stating that during the argument of the appeal, Farwell, L.J., drew attention to the fact that “the very same point on the very same settlement had been decided in the very same way by Chitty, J., some twenty years ago (*In re Lord Chesham*).” This is not quite accurate: the settlement was the same, but the circumstances and the point were different. When the settlement came before Chitty, J., in 1886, the third Baron Chesham was living, and he was tenant for life of the chattels; he was also residuary legatee under the will of the second Baron, and the question was whether he could, under the doctrine of election, be required to compensate the persons to whom the testator had purported to bequeath the chattels; Chitty, J., held that they could not be removed from the mansion house without a breach of trust, and that the tenant for life, therefore, had no assignable interest in them. It is difficult to see how the learned judge could have decided otherwise. When the matter came before the Court of Appeal, the third Baron and his eldest son were both dead, and there was no tenant for life of the chattels; the question was whether the chattels had vested absolutely in the eldest son of

- the third Baron on his attaining twenty-one in his father's lifetime. The decision of Chitty J., had no bearing on this point, and even if it had, it would not have enabled the Court of Appeal to disregard the artificial rule of construction laid down by the House of Lords in *Foley v. Burnell*. See *Re Parker*, [1910] 1 Ch. 581.
- Page 699, n. (g). As to the meaning of the expression "actual possession," see *Re Petre's Settlement Trusts*, [1910] 1 Ch. 290.
- „ 699, n. (i). For "entitled in possession" read "entitled to the possession:" and add at the end of the note: "As to the meaning of 'entitled in possession' in a clause of forfeiture (name and arms clause), see *Re Edwards*, [1910] 1 Ch. 541."
- „ 704, n. (x). As to estates pur autre vie, see *Northen v. Carnegie*, 4 Dr. 587, shortly stated in the addendum to p. 1212, n. (n).
- „ 714. *At the end of the first paragraph*, add: "The Intestates Estates Act, 1884, which extends the law of escheat to equitable interests in real estate, applies to the proceeds of sale of land devised upon trust for sale to pay debts, legacies, etc.: *Re Wood*, [1896] 2 Ch. 596."
- „ 729, n. (b). See also *Jones v. Bailey*, [1910] 1 Ir. R. 110, where conversion was effected by an originating application for sale under the Irish Land Purchase Acts.
- „ 740. *Insert before the last paragraph*: "The general principle is that conversion of land under a power of sale has no retrospective effect, and does not divest the interest of the person entitled beneficially to the land at the time of conversion, but merely changes his interest from an interest in real estate to an interest in personal estate, so that his personal and not his real representatives would upon his death become entitled: per Neville, J., in *Re Dyson*, [1910] 1 Ch. 750."
- „ 749, n. (u). *Add*: "See *Re Wood*, [1896] 2 Ch. 596; *supra*, addendum to p. 714."
- „ 763, n. (qq). As to what amounts to an option to reconvert by a remainderman, see *Smith v. Gumbleton*, 54 Sol. J. 181.
- „ 776, n. (s). If the will merely contains a power of sale, under which the property is sold after the death of the heir, the proceeds of sale devolve as realty: *Re Dyson*, [1910] 1 Ch. 750.
- „ 791, n. (l). *Shields v. Shields*, [1910] 1 Ir. R. 117.
- „ 792, n. (p). *Shields v. Shields*, [1910] 1 Ir. R. 117.
- „ 795. *After the last paragraph*, add: "A power of appointment may be void because it transgresses the Rule against Perpetuities (ante, p. 309), or because it is contrary to public policy: thus a power directly tending to encourage a separation between husband and wife would no doubt be void: see *Marlborough v. Marlborough*, [1901] 1 Ch. 165; *Re Morgan*, 26 T. L. R. 398, and cases cited post, p. 1464."
- „ 916, n. (c). *Tapp and London and India Docks Co.*, 74 L. J. Ch. 523.
- „ 921, n. (k). The profits of the business are applicable as income of the residuary estate: *Re Elford*, [1910] 1 Ch. 814.
- „ 932. *After the last paragraph*, add: "The general rule with regard to the exercise of a discretionary power of conversion is referred to ante, p. 740. The question whether the existence of a discretionary power, exercisable in favour of a particular beneficiary, can have the effect of postponing the period of distribution, was referred to in *Hordern v. Hordern*, [1909] A. C. 210."
- „ 938, n. (a). *Add*: "See *Bunbury v. Doran*, Ir. R. 9 C. L. 284, where a disposition of land in terms appropriate to a gift inter vivos, was held to operate as a devise."
- „ 1106. *After the last paragraph*, add a new paragraph as follows: "It seems that if a pecuniary legacy is paid under a mistake, the person who has received it is not liable for interest, unless he is entitled, under the will, to the income of another fund, in which case he is bound to bring into account interest on the sum erroneously paid to him: *Gittins v. Steele*, 1 Sw. 199. See *Re West*, *supra*."
- „ 1110. *At the end of the second paragraph*, add: "In *Re White*, 101 L. T. 780 (stated shortly ante, p. 1106, n. (r)), Joyce, J., distinguished *Laundy v. Williams*, 2 P. W. 478, which he said was a case of general legacies, and held that in the case before him the bequest of £1000 was a portion of the particular residue, from which it would seem that if a legacy of £1000 is given to A.

for life and after his death to B., and A. dies within a short time after the testator, B. is only entitled to interest from a year after the testator's death. This is clearly right on principle. It is, however, not quite clear how such a case differs from the case of *Re White*. The learned judge seems to have relied on *Re Waters*, 42 Ch. D. 517, but the question in that case was quite different, ante, p. 1109 n. (l)."

Page 1131, n. (g). See *Re Morrison*, 26 T. L. R. 395.

„ 1133. After the second paragraph, add: "The effect of a bequest 'subject to death duties' was discussed in *Re Morrison*, 26 T. L. R. 395."

„ 1137, n. (o). See *Re Cottrell*, [1910] 1 Ch. 402, where the testator directed a capital sum to be set apart to meet an annuity, and the assets were insufficient to provide this sum and pay the pecuniary legacies, but were sufficient to pay the value of the annuity and the legacies.

„ 1147, n. (s). Add: "The annuitant is not entitled to have the value of the annuity paid over to him: *Wright v. Callender*, 2 D. M. & G. 652. But if the question arises between the annuitant and the pecuniary legatees the rule is different: *Re Cottrell*, [1910] 1 Ch. 402."

„ 1156, n. (a). Add: "Where a person made a donatio mortis causâ of deposit notes for £2000 to A. and two days afterwards made a will by which he gave A. a legacy of £2000, it was held that the legacy did not operate as a satisfaction of the donatio: *Hudson v. Spencer*, [1910] W. N. 157."

„ 1183, n. (m). After *Re Wilcock*, [1898] 1 Ch. 95, add: *Re Currie's Settlement*, [1910] 1 Ch. 329.

„ 1184, n. (p). See also *Shields v. Shields*, [1910] 1 Ir. R. 117.

„ 1201, n. (g). *Re Longworth*, [1910] 1 Ir. R. 23.

„ 1208. After the first paragraph, add: "A gift to a woman during widowhood, is equivalent to a gift for life, or until the woman marries again: post, p. 1542; *Re Mason*, [1910] 1 Ch. 695. A gift to a woman 'so long as she remains unmarried,' has been held, on the authority of *Rishton v. Cobb* (5 Myl. & Cr. 145), to give her an absolute interest: *Re Howard*, [1901] 1 Ch. 412; but the principle of this decision is difficult to discover. It is clear that a gift to a woman until she shall marry, with a gift over on her marriage, gives her an interest during life, or until she marries: *Re Mason*, supra."

„ 1210, n. (a). For *Bevan v. White*, 11 Ir. Eq. 473, read *Bevan v. White*, 7 Ir. Eq. R. 473.

„ 1211. See addendum to p. 72, supra.

„ 1212, n. (n). In *Northern v. Carnegie*, 4 Dr. 587, incorporeal hereditaments were granted to C., his heirs and assigns, pur auter vie; C. conveyed them to trustees, their executors, administrators and assigns, upon trusts which failed as to one third part: it was held that there was a resulting trust of the beneficial interest for the testator's co-heiresses. The decision is criticised by Mr. Theobald (Wills, 7th ed. p. 525), but it is submitted that it is correct.

„ 1216, n. (a). Add: "And see *Re Webster*, 54 Sol. J. 602, where the authorities are discussed."

„ 1220, n. (h). Add: "As to apportionment between tenant for life and remainderman where an investment is purchased between two dividend days, see infra, p. 1221."

„ 1222, n. (qq). Add: "[1910] 1 Ch. 389."

„ 1237, n. (o). Add: "Including the profits of a business which the testator directs to be wound up and disposed of as soon as possible after his death: *Re Elford*, [1910] 1 Ch. 814."

„ 1253, n. (e). Add: "If the description of the person to whom the testator gives property is unambiguous, and can only apply to one person, it is not necessary to prove that the testator was aware of his existence: but if there is a latent ambiguity, or if the description does not accurately apply to any person, then, as a general rule, the claimant must prove that the testator knew of his existence: *Doe d. Thomas v. Beynon*, 12 A. & E. 431: *Grant v. Grant*, L. R. 5 C. P. 380, 727: *Re Taylor*, 34 Ch. D. 255. These cases are referred to with reference to the admissibility of parol evidence, ante, pp. 503 seq.

"It should be added that the manner in which a will is framed sometimes affords ground for deciding whether the testator had in his mind existing persons, or whether he intended to make a general scheme for the distribution

- of his property, to take effect according to the state of facts at his death : in the former case evidence of the state of facts at the date of the will is generally of importance in arriving at the testator's intention (ante. p. 503), while in the latter it is not. In *Daubeny v. Coghlan* (12 Sim. 507), the testator gave a legacy to the children of his niece Catherine A. and of his nephew, the late James C. ; he had had two nephews named James C., both of whom had long been dead, leaving no issue : he had only one nephew of the name of C. who had died leaving issue, namely Henry C. ; the children of Henry C. claimed the legacy ; on the face of the will it would seem clear that the testator had in mind existing persons, in which case the principle of *Camoy's v. Blundell* (post, p. 1264) would have applied, and the children of Henry C. would have been entitled, but the evidence was unsatisfactory, and the case was sent back for further inquiry."
- Page 1259, n. (z). See *Re Mason*, [1910] 1 Ch. 695.
- .. 1262, n. (s). Add : "*Bradshaw v. Bradshaw*, 2 Y. & C. 72 (explained in *Doe d. Hiscocks v. Hiscocks*, ante, p. 524) ; *Re Gregory's Settlement*, 34 Bea. 600. As to the principle laid down by Malins, V.-C. in *Webber v. Corbett*, L. R. 16 Eq. 515, namely that where there are two persons named L. W., and the testator refers to one of them by name and description, a subsequent mention of 'L. W.' without more, must refer to the L. W. previously mentioned, see ante, p. 522."
- .. 1263, n. (uu). Add : "*See Delmare v. Robello*, 1 Ves. jun. 412 ; *Andrews v. Dobson*, 1 Cox, 425 ; *Holmes v. Custance*, 12 Ves. 279 ; *In bonis Peel*, L. R. 2 P. & D. 46, and other cases cited pp. 527 seq."
- .. 1264, n. (y). Add : "As to the cases where the description is composed wholly of 'demonstration,' and there are more persons than one to whom the description applies, see ante, pp. 522 seq ; and as to the cases where there is a blank left for the name (as 'to —son of A. B.') see ante, p. 515, and *Re Gregson's Trusts*, 2 H. & M. 504."
- .. 1265, n. (f). Add : "In the case of *Thomas v. Thomas*, 6 T. R. 671, on which Lord Brougham laid great stress in *Camoy's v. Blundell* (ante, p. 1264), the decision seems to have proceeded chiefly on the notion, which may now be regarded as exploded, that the heir-at-law has a vested interest in his ancestor's land. It is the duty of the court to prevent an intestacy, if possible (see per Lord Northington in *Fox v. Collins*, 2 Ed. at p. 108), and the principle applies to real estate as well as to personalty. It is submitted that the case of *Thomas v. Thomas* (although it is certainly near the line) fell within the principle of *Smith v. Conej*, 6 Ves. 42, stated on p. 1260."
- .. 1275, n. (i). Add : "The decision in *Davies v. Hopkins*, 2 Bea. 276, would probably not be followed at the present day."
- .. 1284. Before the last paragraph, insert a new paragraph, as follows :—"The rule that a gift to a person by name, or to a person described as a 'wife' or 'husband' or to a person described by his relationship to the testator or another person, or by his station in life, is *prima facie* construed as referring to the person who answers that description at the date of the will, is discussed ante. pp. 396 seq. The question whether a person who does not really answer the description can take under a gift made to the 'wife' (or 'husband') of the testator or another person, is discussed ante, pp. 1257 seq."
- .. 1285, n. (x). Add : "See *Knox v. Wells*, 48 L. T. 655, ante, p. 1258."
- .. 1286, n. (z). *Elliott v. Elliott*, 11 Ir. Ch. R. 482.
- .. 1286, n. (e). Add : "and pp. 1257-9. See also *Schloss v. Stiebel*, 6 Sim. 1, ante, p. 1264."
- .. 1286, n. (f). Add : "As to *Rishton v. Cobb*, 5 Myl. & Cr. 145, see ante, p. 1259."
- .. 1299. After the second paragraph, add the following paragraph : "The question whether a devise of 'pits and veins of clay' in certain lands 'together with the rents and profits of such pits and veins,' passed pits, etc., open at the death of the testator, was discussed in *Brown v. Whiteaway*, 8 Ha. at p. 150."
- .. 1344, n. (l). Add : "See *Re Morgan*, 26 T. L. R. 398, and compare the cases on illegal conditions, post, p. 1464."
- .. 1437, n. (u). See Farwell on Powers, 303, citing *Re Brown and Sibly*, 3 Ch. D. 156.
- .. 1441, n. (y). *Re Edwards*, [1910] 1 Ch. 541.

- Page 1464, n. (z). See *Marlborough v. Marlborough*, [1901] 1 Ch. 165 : *Re Morgan*, 26 T. L. R. 398.
- „ 1476, n. (c). See *Re Edwards*, [1910] 1 Ch. 541.
- „ 1481, n. (n). *Add* : “ There is, however, a distinction between conditions precedent and conditions subsequent. Where the condition is a condition subsequent to the effect that the estate shall go over if the devisee ‘refuses or neglects’ within a certain time to assume the name and arms, then infancy is an excuse for non-performance : *Re Edwards*, [1910] 1 Ch. 541.”
- „ 1542, n. (v). *Add* : “ As to a gift during spinsterhood, see *Re Mason*, [1910] 1 Ch. 695.” At the end of the note, for “ see ante, p. 1130,” read “ see ante, pp. 1258, 1286.”
- „ 1545. *At the end of the last paragraph, add* : “ The circumstances in which performance of a name and arms clause is excused are considered at p. 1480–1. To the cases there cited add *Re Edwards*, [1910] 1 Ch. 541 in which the condition was subsequent.”
- „ 1546, n. (z). *Re Edwards*, [1910] 1 Ch. 541 (second point).
- „ 1608, n. (w). The question depends on the wording of the gift : if it is to “ my next-of-kin according to the statute,” effect will be given to a direction that they shall take “ equally,” or “ share and share alike ” ; but if the testator gives the property to be “ distributed ” or “ paid ” in manner directed by the statute, then a provision that the next of kin are to take “ equally ” or “ share and share alike ” is disregarded, and they take in the statutory shares : *Re Richards*, [1910] 2 Ch. 74.
- „ 1631, n. (d). *Re Richards*, [1910] 2 Ch. 74.
- „ 1678, n. (k). *Re Canney’s Trusts* is reported 101 L. T. 905.
- „ 1719, n. (g). *Add* : “ See *Doe d. Blesard v. Simpson*, 3 Sc. N. R. 774 ; 3 M. & Gr. 929 : *Doe d. Simpson v. Simpson*, 5 Sc. 770 ; 4 Bing. N. C. 333 : *Bacon v. Cosby*, 4 De G. & S. 261 (stated post, pp. 1923–4). ”
- „ 1728, n. (j). *Re Stawell’s Trusts*, [1909] 2 Ch. 239, reversing *Neville J., s.c.*, [1909] 1 Ch. 534.
- „ 1734, n. (s). *Add* : “ *Re Bankes*, 101 L. T. 778, where the younger children were named ; and see *Jermyn v. Fellows*, Ca. t. Talbot 93.”
- „ 1745, n. (v). *Re Jones*, [1910] 1 Ch. 167.
- „ 1777, n. (z). See *Smith v. Charles*, 13 W. R. 224, where the person described as the testator’s wife was within the prohibited degrees.
- „ 1785, n. (k). It was originally intended that Chapter XLI. should contain a section dealing with the effect of gifts to husband and wife, but by an oversight this section was omitted. As to the effect of the Married Women’s Property Act, 1882, on gifts by will to husband and wife and a third person, see *Re March*, 24 Ch. D. 222 : 27 Ch. D. 166 : *Re Jupp*, 39 Ch. D. 148.
- „ 1786, n. (r). *Add* : “ and observations of the C.A. in *Re March*, 27 Ch. D. 166.”
- „ 1786, n. (s). *Re Bryan*, 14 Ch. D. 516.
- „ 1792, n. (g). For “ *Gant v. Laurence*, Whitw. 395,” read “ *Gant v. Laurence*, Wighw. 395.”
- „ 1800, n. (i). *Add* : “ and in *Welland v. Townsend*, [1910] 1 Ir. R. 177 ; in both these cases it was held that the children took as joint tenants.”
- „ 1840, n. (c). This note should read : “ Ante, p. 1835.”
- „ 1922, n. (f). See *Parker v. Birks*, 1 K. & J. 156.
- „ 2010, n. (v). *Add* : “ See ante, p. 1216, and *Re Webster*, 54 Sol. J. 602.”
- „ 2014, n. (h). *Add* : “ If the residuary personal estate is insufficient to pay the estate duty on the specifically bequeathed personalty, the deficiency must be paid out of the undisposed of realty in exoneration of the specifically bequeathed personalty : *Re Pullen*, [1910] 1 Ch. 564, where *Shepherd v. Beetham* (supra) is distinguished.
- “ As to the effect of a direction to pay probate duty, where the testator dies after the commencement of the Finance Act, 1894, see *Re Rozer*, [1910] 2 Ch. 69.”
- „ 2025. The third paragraph should read thus :—“ The order of the application of the several funds liable to the payment of the testator’s liabilities, which include his funeral and testamentary expenses, as well as his debts (*Re Pullen*, [1910] 1 Ch. 564), is as follows : ”
- „ 2092, n. (r). In *Re Cottrell*, [1910] 1 Ch. 402, where the assets were insufficient

to make the appropriation, it was held that the annuitant was only entitled to the value of the annuity.

Page 2092, n. (t). Trustees refusing without reasonable cause to appropriate shares of residue are liable to pay the costs of an application to the Court : *Re Ruddock*, 102 L. T. 89.

„ 2093, n. (a). On the same principle, the descended lands of a testator are liable for his testamentary expenses, including the estate duty payable in respect of his specifically bequeathed personalty, in exoneration of the personalty so bequeathed : *Re Pullen*, [1910] 1 Ch. 564.

Volume I. ends at p. 1040.

THE LAW

WITH RESPECT TO

W I L L S.

CHAPTER I.

BY WHAT LOCAL LAW WILLS ARE REGULATED.

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I.—Distinction between Immoveable and Moveable Property.

Mr. Jarman states the general rule thus (a): “A will of fixed or immoveable property is generally governed by the *lex loci rei sitæ*; and hence, the place where such a will happens to be made and the language in which it is written, are wholly unimportant, as affecting both its construction and the ceremonial of its execution; the locality of the devised property is alone to be considered. Thus, a will made in Holland and written in Dutch must, in order to operate on lands in England, contain expressions which, being translated into our language, would comprise and destine the lands in question, and must be executed and attested in precisely the same manner as if the will were made in England (b). And, of course, lands in England belonging to a British subject domiciled abroad, who dies intestate, descend according to the English law” (c).

Realty ruled
by *lex loci rei
sitæ*.

(a) First edition, p. 1. It is hardly necessary to point out that the rule only applies so far as the will attempts to dispose of immoveable property; so far as it disposes of personal property, its operation and construction depend on a different rule: *infra*, p. 4.

(b) *Bovey v. Smith*, 1 Vern. 85. See also *Bowaman v. Reeve*, Pre. Ch. 577; *Drummond v. Drummond*, 6 Br. P. C. Toml. 601; *Coppin v. Coppin*, 2 P. W.

291; *Brodie v. Barry*, 2 V. & B. 131. To arrive at the intention of such a will, the technical terms of foreign law will be read in the sense which that law gives them, and will operate accordingly so far as the *lex loci* permits: *Studd v. Cook*, 8 A. C. 577; *Re Harman*, [1894] 3 Ch. 607.

(c) See *Doe d. Birtwhistle v. Vardill*, 5 B. & Cr. 438; *Birtwhistle v. Vardill*, 7 Cl. & F. 895, where it was held that a

CHAPTER I.

Power of
appointment.

Devise
invalid by
lex loci.

Foreign land.

Administra-
tion.

Scotland,
Ireland, &c.

Leaseholds
governed by
lex loci.

The same principle applies to a will made in exercise of a power to appoint immoveable property (*d*).

A disposition of immoveable property situate in England which is invalid by the law of England, is not made valid by the fact that it is permitted by the law of the testator's domicile. Thus, the invalidity of a devise of English realty under the Mortmain Acts is not affected by the testator's domicile (*e*).

Conversely, land situate abroad is subject to the local law, and any disposition of it by the will of a domiciled Englishman is subject to that law (*f*).

If a testator, domiciled abroad, makes a will by which real estate situate in England is vested in his executors, it is subject to the law of administration (as regards payment of debts, annuities, &c.) which prevails in the country of his domicile (*g*).

It will, of course, be remembered that so far as questions of domicile and locality are concerned, Scotland, Ireland and the British Colonies are foreign countries (*h*).

Leaseholds for years are for many purposes included under the denomination of immoveable property (*i*), so as to be governed by the lex loci and not by the lex domicilii. Thus, if a testator, domiciled abroad, disposes of leaseholds situate in England upon trusts which contravene the provisions of the Thellusson Act, these trusts are void (*j*). So if a person who owns leaseholds in England is domiciled abroad, the beneficial interest in them does not pass by his will unless it is executed in accordance with the requirements of the Wills Act (*k*). Conversely, if the will is executed in accordance with English law, but not in accordance with the law of the domicile, it is valid as to the testator's English leaseholds, although it may be invalid as to the remainder of his personal estate (*l*). And if

child who was legitimate by the law of his parents' domicile, but illegitimate according to English law, could not take land in England by descent. As to land in Italy, see *Earl Nelson v. Earl Bridport*, 8 Bea. 547. Our Courts will not entertain disputes regarding the devolution of title to immoveable property situate in a foreign country: *Re Hawthorne*, 23 Ch. D. 743. As to the exceptions to this rule, see *Deschamps v. Miller*, [1908] 1 Ch. 856. And as to the jurisdiction of English Courts over land abroad, see *British South Africa Co. v. Comp. de Moçambique*, [1893] A. C. 602.

(*d*) *Murray v. Champernowne*, [1901] 2 Ir. R. 232. See Chap. IX.

(*e*) *Duncan v. Lawson*, 41 Ch. D. 394.

(*f*) See *Re Piercy*, [1895] 1 Ch. 83; *Re Rea*, [1902] 1 Ir. R. 451.

(*g*) *Re Hewit*, [1891] 3 Ch. 568. See the cases cited *infra*, p. 9, n. (*j*).

(*h*) See *Re Johnson*, [1903] 1 Ch. 821; *Re Rea*, [1902] 1 Ir. R. 451.

(*i*) As to leaseholds situate in a British colony, see *Re Clinton*, 88 L. T. 17 (where, however, the point was not decided); *Re Moses*, [1908] 2 Ch. 235.

(*j*) *Freke v. Lord Carbery*, L. R., 16 Eq. 461. See *In bonis Gentili*, Ir. R., 9 Eq. 541; *Duncan v. Lawson*, 41 Ch. D. 394 (intestacy).

(*k*) *Pepin v. Bruyère*, [1900] 2 Ch. 504, [1902] 1 Ch. 24.

(*l*) *De Fogassieras v. Dupont*, 11 L. R. Ir. 123.

CHAPTER I.

a person domiciled in England bequeaths his residuary personality to persons in succession, leaseholds situate abroad forming part of the residue are subject to the *lex loci*, and if by that law the tenant for life is entitled to enjoy them in specie, they ought not to be converted under the rule in *Howe v. Earl of Dartmouth* (m).

But leaseholds are "personal estate" within the meaning of Lord Kingsdown's Act, subject, of course, to the general principle recognised in *Freke v. Lord Carbery* (n).

Lord Kingsdown's Act.

Estates *pur auter vie* are realty (o), and are, therefore, presumably immoveable property within the meaning of the rule now under discussion.

Estates *pur auter vie*.

Money representing the proceeds of sale of land in England, sold by order of the Court under the Partition Acts, is considered as real estate (p). Whether money subject to a trust for investment in land, or land subject to a trust for sale, is immoveable property within the meaning of the rule, does not seem to have been decided (q). Where the testator has an absolute power of disposition, so that he can alter the nature of the property, it would seem, on principle, that if he directs land to be turned into money, he can dispose of the money in any manner authorised by the law of his domicile (r).

Doctrine of conversion.

In *Freke v. Lord Carbery* (s), however, where a testator domiciled in Ireland bequeathed English leaseholds to trustees upon trust for sale and investment, and directed the investments to be held upon trust to accumulate the income for a period in excess of that allowed by the Thellusson Act, it was held by Lord Selborne that the act applied, and that the trust for accumulation was therefore partly invalid. *Sed quære* (t).

(m) *Re Moses*, [1908] 2 Ch. 235. The rule in *Howe v. Earl of Dartmouth*, 7 Ves. 137, is discussed in Chap. XXXIV.
(n) *Re Grassi*, [1905] 1 Ch. 584, post, p. 13.

(o) *Chatfield v. Berchtoldt*, L. R., 7 Ch. 192.

(p) *Grimwood v. Bartels*, 46 L. J. Ch. 788. See *Re Hawthorne*, 23 Ch. D. 743.

(q) It was held in *Murray v. Champenowne*, [1901] 2 Ir. R. 232, that a power to appoint the proceeds of land settled upon trust for sale but not yet sold, was properly exercised by a will valid in accordance with the *lex loci*, although invalid according to the law of the testator's domicile.

(r) *Re Piercy*, [1895] 1 Ch. 83; *Re Harman*, [1894] 3 Ch. 607. See *Gillies v. Longlands*, 4 De G. & S. 372; *Chand-*

ler v. Pocock, 15 Ch. D. 491, 16 Ch. D. 648, and the other cases cited in the chapter on Powers.

(s) L. R., 16 Eq. 461.

(t) It does not appear whether the decision turned on the fact that, although the testator was domiciled in Ireland, the trust was (as appears to have been the case) one to be administered according to English law (see *Cookney v. Anderson*, 31 Bea. 452; *Ewing v. Orr-Ewing*, 10 App. Ca. 453, and other cases cited in Lewin on Trusts, 11th edition, p. 49). On the question by what law a testamentary disposition of property is governed, it is submitted that the true principle is to be found in the following note, added in the third edition of this work (p. 4), by Messrs. Wolstenholme and Vincent :

CHAPTER I.

Trust to
purchase
land.

It follows from the principle above stated, that if a testator bequeaths personal estate to trustees upon trust to invest it in the purchase of land in a foreign country, to be settled to limitations permitted by the law of that country, the fact that they are illegal by the law of England is immaterial (*u*).

Conversely, if a testator domiciled abroad bequeaths money to an English corporation, to be laid out in the purchase of land in England, the validity of the bequest is not affected by the fact that such a bequest would have been illegal according to the law of England (*v*).

Choses in
action.

Choses in action are an anomalous description of property. For some purposes they have a locality and for others they have not (*w*). So far as the law of wills is concerned, questions with regard to choses in action arise chiefly in connection with gifts of property in a particular place (*x*), and with reference to the administration of assets (*y*). The rules with regard to appointments under powers also appear to be based on the principle that a trust fund has a locality, and that a testamentary appointment is therefore not necessarily governed by the law of the testator's domicile (*z*).

Trust funds.

Moveable
property.

The general rule, as stated by Mr. Jarman (*a*), is that "in regard to personal, or rather moveable property, the *lex domicilii* prevails (*b*).

"It is said (11 Jarm. Byth. Conv. 3rd ed., by Sweet, p. 15) that the *lex loci* must determine what part is real and what part personal; and that then the *lex domicilii* comes in and determines the distribution of that part of the property which the *lex loci* has determined to be personal. See also Deane on the Law of Wills, p. 15, citing *Price v. Dewhurst*, 4 My. & Cr. 81; Hayes & Jarm. Conc. Forms of Wills, 4th ed. p. 2, 5th ed. p. 25. The case of *Jerningham v. Herbert*, 4 Russ. 388, is in point on the same side; as also is a dictum of Sir J. Stuart in *Pearmain v. Twiss*, 2 Giff. 136." This note was cited in *Freke v. Lord Carbery*.

(*u*) *Fordyce v. Bridges*, 2 Ph. 497.

(*v*) *Canterbury (Mayor, &c., of) v. Wyburn*, [1895] A. C. 89. It appears that if the testator had paid the money to the corporation in his lifetime, they could have complied with the condition.

(*w*) See the decisions on s. 59 of the Stamp Act, 1891, especially *Smelting Company v. Comm. I. R.*, [1897] 1 Q. B. 175; *West London Syndicate v. Comm. I. R.*, [1898] 2 Q. B. 507; *Comm. I. R.*

v. Muller, [1901] A. C. 217; *Danubian Sugar Factories v. Comm. I. R.*, [1901] 1 K. B. 245. See also *Re Queensland Mercantile Co.*, [1892] 1 Ch. 219; *Kelly v. Selwyn*, [1905] 2 Ch. 117.

(*x*) Post, Chaps. IV., XXX.

(*y*) Post, Chap. LIV.; *Re Clark*, [1904] 1 Ch. 294.

(*z*) See Chap. XXIII., and post, p. 9.

(*a*) First edition, p. 2. It should be remembered that such expressions as "the *lex domicilii*" or "the law of England" are ambiguous; the question (which does not properly fall within the scope of this work) is discussed in Dicey, Conf. of Laws, 79. It is hardly necessary to say that in Roman law *lex domicilii* had not the meaning which we attribute to it: see Savigny, System, viii. § 356.

(*b*) *Preston v. Melville*, 8 Cl. & F. 1. In *Lynch v. Provisional Government of Paraguay*, L. R., 2 P. & D. 268, it was held that a change in the law of the domicile, in the nature of a privilege, made after the death of the testator, did not affect the jurisdiction of the English Court of Probate.

If, therefore, a foreigner dies domiciled in England, his personal property, in case he were intestate, will be distributed according to the English law of succession (c); and any will which he may have left, whether made in his native or in his adopted country, or elsewhere, must be construed according to the law of England (d); and it is scarcely necessary to observe, that stock in the public funds is undistinguishable in this respect from other personal property (e). And the moveable property of such a person which is out of England at the time of his death, will also, it seems, generally speaking, follow the domicile; but this, of course, depends on the laws of the state in which the property is situate, which may not (though the codes of many civilised states do (f)) accord with our own in this particular. Sometimes, however, a difficulty occurs in the application of the principle, from the fact that the foreign state, though it recognises the general doctrine, yet imposes restrictions on the testamentary power unknown to the law of the adopted country, and from which it may not permit its citizens to escape, in regard to property within its jurisdiction, by a mere change of domicile. For instance, the French law does not, like our own, permit a man to bequeath his entire property away from his wife and children (g). Now, if a Frenchman dies domiciled in England, is it quite clear that his moveable property in France would be subject to British law, so as to pass by such a will? In such cases the Code Napoleon seems to draw a distinction between the acquisition of a foreign domicile by mere residence,

(c) *Thorne v. Watkins*, 2 Ves. sen. 35; *Bempde v. Johnstone*, 3 Ves. 198; *Balfour v. Scott*, 6 Br. P. C. 550. As to the question whether the next of kin of a foreigner domiciled in England can include persons who would be illegitimate by English law, see *Re Goodman's Trusts*, 17 Ch. D. 266; *Re Grove*, 40 Ch. D. 216, and other cases cited in Chap. XLIII.

(d) *Anstruther v. Chalmers*, 2 Sim. 1; *Price v. Dewhurst*, 8 Sim. 299, 4 My. & Cr. 76; *Spratt v. Harris*, 4 Hagg. 405; *Reynolds v. Kortwright*, 18 Bea. 417. As to *Boyes v. Bedale*, 1 H. & M. 798, see Chap. XLIII.

(e) *Re Ewin*, 1 Cr. & J. 151. In this case the question was as to the liability of property to legacy duty, the discussion of which sometimes indirectly involves points as to domicile, alienage, &c. In previous editions of this work the effect of domicile on questions of legacy,

probate, and succession duty was treated of at some length, but as these questions do not belong to the subject of this treatise, and would demand considerable space for their adequate discussion, the notes have been omitted in this edition.

(f) See *Price v. Dewhurst*, 4 My. & Cr. 83. Mr. Jarman seems to have been under a misapprehension on this point: many foreign countries treat nationality, and not domicile, as determining the law of succession and testamentary disposition; for example, the law of France (*Re Trufort*, 36 Ch. D. 600), the law of Belgium (*Collier v. Rivaz*, 2 Curt. 855), the Italian code (Dicey, 721), and the law of Baden (*Re Johnson*, [1903] 1 Ch. 821). The law of Portugal seems to agree with that of England in this respect: see *Doglioni v. Crispin*, L. R., 1 H. L. 301.

(g) Vide post, p. 8, n. (a).

CHAPTER I.

Extent of rule.

and some other more decided acts of self-expatriation, such as that of becoming the naturalised subject of another state" (*h*).

Law of foreign domicile.

The general rule governs questions as to the validity of the will, with regard to the testamentary capacity of the testator (*i*), the bequeathable quality of the property bequeathed by it (*j*), and the formalities with which it was executed (*k*), as well as its construction (*l*).

The testamentary capacity of a foreign subject domiciled in England may be affected by a contract or other act entered into by him according to the law of his native country. Thus in *De Nicols v. Curlier* (*m*), two French subjects married in France subject to the law of community of goods; they came to England and acquired an English domicile; the husband died, having made an English will disposing of all his property: it was held that as to his moveables the rights of the wife were not affected by the change of domicile, and that she was entitled to the same share as she would have been entitled to if they had remained domiciled in France.

Foreign domicile.

The general principle above stated applies in the case of a foreign domicile. If, therefore, any person, whether a British subject or a foreigner, dies while domiciled abroad, the law of the place which at his death constituted his home will regulate the distribution of his moveable (*n*) property in England, in case of intestacy (*o*), i.e., should he happen to have left no instrument which, according to the law of his adopted country, would amount to a testamentary disposition of such property (*p*); and if he left a will, the same law will determine its validity with reference to the formalities of

(*h*) Liv. 1, tit. 1, chap. 2, s. 17. See *Hamilton v. Dallas*, 1 Ch. D. 257; and compare the cases of *De Nicols v. Curlier*, *infra*, and *Re Johnson*, post, p. 25.

(*i*) *Price v. Dewhurst*, 4 My. & Cr. 76. (*j*) *Kilpatrick v. Kilpatrick*, 6 Br. P. C. 584.

(*k*) *Robins v. Dolphin*, 1 Sw. & Tr. 37; *Dolphin v. Robins*, 7 H. L. C. 390; *Countess Ferraris v. M. of Hertford*, 3 Curt. 468; *Croker v. M. of Hertford*, 4 Moo. P. C. C. 339.

(*l*) See cases cited in n. (*d*), p. 5, ante.

(*m*) [1900] App. Ca. 21, overruling the decision of the Court of Appeal in *Re De Nicols*, [1898] 2 Ch. 60, and distinguishing *Lashley v. Hog*, 4 Paton, 581.

(*n*) Since the rule *mobilia sequuntur personam* is inapplicable to leaseholds

(see ante, p. 2), it follows (subject to the Wills Act, 1861, s. 2, presently stated, and which speaks of "personal" estate) that to dispose of leaseholds a will must be executed according to 1 Vict. c. 26, and that the will of a domiciled foreigner not so executed, though it may be proved here, and will enable the executor to sell leaseholds (*Hood v. Lord Barrington*, L. R., 6 Eq. 218), will not operate on the beneficial interest; the title of the executor is from the probate: the beneficial interest devolves as undisposed of: *Pepin v. Bruyère*, [1900] 2 Ch. 504, [1902] 1 Ch. 24.

(*o*) As to his next of kin, see *Re Goodman's Trusts*, 17 Ch. D. 266.

(*p*) *Somerville v. Lord Somerville*, 5 Ves. 750; and see *Hog v. Lashley*, 6 Br. P. C. Toml. 577.

its execution (*q*), the personal competence of the testator (*r*) and the efficacy of his testamentary dispositions (*s*), and will also regulate their construction (*t*).

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An English Court will, therefore, not grant probate of such a will (except in cases within the provisions of the Wills Act, 1861 (*u*)) unless it appear to be an effectual testamentary instrument according to the law of the domicile. And, by parity of reasoning, the English Court will grant probate of an instrument ascertained to be testamentary according to the law of the foreign domicile, though invalid and incapable of operation as an English will. Thus (*v*), probate was granted of the will of a married lady, who at the time of her death was domiciled in Spain (of which country she was, it seems, also a native), on its being shown that by the Spanish law a feme covert may, under certain limitations, dispose of her property by will as a feme sole.

Probate of foreign will.

And it is the constant practice of the Court of Probate, in its discretion (*w*), to grant ancillary probate or letters of administration cum testamento annexo of wills of testators domiciled in foreign countries, which have been previously proved there, without inquiring or permitting inquiry into the grounds of the foreign proceeding, though the bulk of the property of the deceased testator should happen to be in England (*x*). If no foreign grant has been made, the English Court of Probate will make a grant to the person entitled to it by the law of the domicile (*y*).

Foreign probate.

(*q*) *Stanley v. Bernes*, 3 Hagg. 373; *Moore v. Darell*, 4 Hagg. 346; *Craigie v. Lewin*, 3 Curt. 435; *Bremer v. Freeman*, 10 Moo. P. C. C. 306; *Stokes v. Stokes*, 78 L. T. 50, where the question was referred to: What would be the rule if the *lex domicilii* prescribed no formalities?

(*r*) *In bonis Osborne*, 1 Jur. N. S. 1220; *In bonis Maraver*, 1 Hagg. 498.

(*s*) *Whicker v. Hume*, 7 H. L. C. 124; *Thornton v. Curling*, 8 Sim. 310; *Campbell v. Beaufoy*, Johns. 320; *Kilpatrick v. Kilpatrick*, 6 Br. P. C. 584, cit.; *Dogliotti v. Crispin*, L. R., 1 H. L. 301; *Macdonald v. Macdonald*, L. R., 14 Eq. 60.

(*t*) *Bernal v. Bernal*, 3 My. & Cr. 559, n.; *Enohin v. Wylie*, 10 H. L. C. 1; *Wallace v. Att.-Gen.*, 35 Beav. 21; *Barlow v. Orde*, L. R., 3 P. C. 164 (lex loci admitting illegitimate with legitimate children); *Re Harman*, [1894] 3 Ch. 607 (will in French operating as an appointment under s. 27 of the Wills Act).

(*u*) Post, p. 11.

(*v*) *In bonis Maraver*, 1 Hagg. 498. As to the law of Spain respecting testamentary dispositions, vide *Moore v. Budd*, 4 Hagg. 346; *Re Hernando*, 27 Ch. D. 284.

(*w*) See *In b. Ewing*, 6 P. D. 19.

(*x*) *In bonis Read*, 1 Hagg. 474; *Hare v. Nasmyth*, 2 Add. 25; *In bonis Gayner*, 4 No. Cas. 696; *Enohin v. Wylie*, 10 H. L. Ca. 1; *In bonis Earl*, L. R., 1 P. & D. 450; *Miller v. James*, L. R., 3 P. & D. 4; *In bonis Cosnahan*, L. R., 1 P. & D. 183; *In b. Hill*, L. R., 2 P. & D. 89; *In b. Rule*, 4 P. D. 76; *In b. Smith*, 16 W. R. 1130; *In bonis Briesemann*, [1894] P. 260; *In b. Lemme*, [1892] P. 89; *In b. Von Linden*, [1896] P. 148; *Re Price*, [1900] 1 Ch. 442; *In b. Meatyard*, [1903] P. 125; *In b. Von Faber*, 20 T. L. R. 640; *In b. Reuss-Köstritz*, 49 L. J. P. 67; *In b. Miller*, 8 P. D. 167; *In b. Crawford*, 15 P. D. 212. See also the Colonial Probates Act, 1892; *In b. Smith*, [1904] P. 114.

(*y*) *Tristram and Coote*, Probate Pr. (13th edition) 214. *In Robinson v. Palmer*, [1901] 2 Ir. R. 489, probate was

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But some foreign states disregard domicile altogether, and treat the devolution of the property of a deceased person as governed by the law of his nationality. It has been decided that if a British subject makes his permanent home in such a country, the devolution of his property, in the event of his dying intestate, is governed by the law of his domicile of origin (z).

Effect where probate is granted in error.

Where probate has been granted of an instrument eventually ascertained not to be testamentary according to the law of the domicile, this proceeding (though it vests the whole personalty which is within the jurisdiction of the Court in the executor, as to whose legal title the grant of probate is conclusive) does not regulate or affect the ultimate destination of the property, which therefore the executor will be bound to distribute according to the law of the domicile (a).

Foreign law, how ascertained.

Where the construction of the will is to be regulated by foreign law, the opinion of an advocate versed in such law is obtained, for the information and guidance of the English Court on which devolves the task of construing it (b); or the English Court may remit a case for the opinion of a Court in any other part of the British dominions (c), or of a Court in any foreign country with

granted in Ireland of the will of a domiciled Englishman, his assets being in Ireland.

(z) *Re Johnson*, [1903] 1 Ch. 821, post, p. 25. Suppose an Englishman died possessed of personal property situate in England, but domiciled in Italy, and possessed of personal property in that country, and having made a will admitted to probate there: it seems that in the Italian Courts his testamentary capacity would be governed by the law of England, and it is submitted that our Courts should follow the same rule, otherwise the singular result might be that the Italian Courts would give full effect to his testamentary dispositions in respect of his moveables in Italy, while the English Courts would give his wife and family the same rights in respect of his moveables in England which they would have had under the law of Italy if he had been an Italian subject. The question is discussed in Mr. Pawley Bate's Essay on the Doctrine of Renvoi, and in Mr. Dicey's Conflict of Laws; post, p. 25. As to restrictions imposed on testamentary capacity by the laws of foreign countries, see a Return presented to the House of Commons in 1908 (Miscellaneous, No. 7).

(a) *Thornton v. Curling*, 8 Sim. 310.

In this case, an Englishman went to reside in France, where he was domiciled at his death, and left a will providing for an illegitimate child and its mother, to the exclusion of his wife and legitimate child, which the French law does not permit. Donations by a Frenchman (whether testamentary, or by act inter vivos) must not exceed a moiety if he leave at his decease one legitimate child, a third if he leave two, and a fourth if he leave three or more; the descendants of a deceased child being considered as one. Moreover, a Frenchman cannot dispose of the whole of his property, if he leaves only ascendants.

(b) *Harrison v. Harrison*, L. R., 8 Ch. 346; i.e., of an advocate practising in the particular foreign country; study elsewhere of its laws is insufficient: *Bristow v. Sequeville*, 5 Ex. 275; *In bonis Bonelli*, 1 P. D. 69. In *In bonis Dost Aly Khan*, L. R., 6 P. D. 6, concerning the will of a Persian subject, the Court allowed the law applicable to the case to be proved by the Persian ambassador, there being no professional lawyers in Persia.

(c) 22 & 23 Vict. c. 63: acted on in *Login v. Princess of Coorg*, 30 Beav. 632; and in *Bradford v. Young*, L. R., 26 Ch. D. 656, 671, but see s. c. on appeal, 29 Ch. D. 617, 622.

which there is a convention for that purpose (*d*). But if the point in dispute depend upon principles of construction common to both countries, the Court will adjudicate upon the question, according to its own view of the case, without having recourse to the assistance of a foreign jurist (*e*). And if the witnesses refer to passages from the code of their country as containing the law applicable to the case, the Court will itself examine those passages, and consider what is their proper meaning (*f*).

By sect. 3 of Lord Kingsdown's Act (Wills Act, 1861), it is provided that no will or other testamentary instrument shall be held to be revoked or have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same (*g*). This section applies to foreigners as well as to British subjects (*h*).

Validity and construction not affected by change of domicile.

The general rule that the law of the domicile applies to the moveable property of a deceased person, must be understood as meaning that it governs the devolution of the property. "For the purpose of succession and enjoyment, the law of the domicile governs the foreign personal assets. For the purpose of legal representation, of collection, and of administration, as distinguished from distribution among the successors, they [the assets] are governed not by the law of the owner's domicile, but by the law of their own locality" (*i*). This question is referred to in a later chapter (*j*).

Administration.

The general rule that a will, in order to be valid and operative with regard to the moveable property comprised in it, must comply with the law of the testator's domicile, is subject to an exception

Will exercising power.

(*d*) 24 Vict. c. 11.

(*e*) *Bernal v. Bernal*, 3 My. & C. 559; *Collier v. Rivaz*, 2 Curt. 855; *Earl Nelson v. Earl Bridport*, 8 Beav. 527, 547; *Yates v. Thompson*, 3 Cl. & Fin. 586; *Martin v. Lee*, 9 W. R. 522. But the Court here is bound by a previous judgment in rem of the Court of the domicile: *Doghioni v. Crispin*, L. R., 1 H. L. 301; *Re Trufort*, 36 Ch. D. 600, post, p. 24.

(*f*) *Concha v. Murrieta*, 40 Ch. D. 543. See *De Nicols v. Curlier*, [1900] A. C. 21.

(*g*) *In bonis Rippon*, 32 L. J. Prob. 141; *In b. Reid*, L. R., 1 P. & D. 74. As to the question whether an invalid (or inoperative) will can be made valid (or operative) by a change in the testator's domicile, see Dicey, 682 seq.

(*h*) *Estate of Groos*, [1904] P. 269.

(*i*) Judgment of the Privy Council in *Blackwood v. Reg.*, 8 A. C. p. 93: followed in *Henty v. Reg.*, [1896] A. C. 567. Other cases are, *Preston v. Melville*, 8 Cl. & F. 1; *Cook v. Gregson*, 2 Dr. 286; *Enohin v. Wylie*, 10 H. L. C. 1; *Doghioni v. Crispin*, L. R., 1 H. L. 301; *Re Hernando*, 27 Ch. D. 284; *Ewing v. Orr-Ewing*, 9 A. C. 34, 10 A. C. 453; *Re Trufort*, 36 Ch. D. 600; *Re Hewit*, [1891] 3 Ch. 568 (land situate abroad).

(*j*) Chap. LIV., where the case of *Re Klæbe*, 28 Ch. D. 175, is cited. As to administration proceedings, see *Hamilton v. Dallas*, 38 L. T. 215; *Stirling-Maxwell v. Cartwright*, 11 Ch. D. 522; *Ewing v. Orr-Ewing*, 9 A. C. 34, 10 A. C. 453.

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in the case of a will exercising a power of appointment. The question of the testator's capacity to exercise a power of appointment seems to depend on the intention of the parties creating the power; if it was intended that the property or trust fund should be governed by English law, the *lex domicilii* is immaterial (*k*). So with regard to the formalities of execution, if the will is executed in the particular form required by the power, it will, as a general rule, be good without reference to the law of the testator's domicil, because the appointee takes, not under the instrument exercising, but under the instrument creating, the power (*l*).

Effect of
treaty with
foreign
country.

Another exception to the general rule exists where, by treaty between this country and the country of domicil, it is agreed that the English law shall prevail. Thus subjects of the Ottoman Empire cannot dispose of their property by will, but by treaty English subjects domiciled there are allowed to do so, and their wills must be executed according to the English law (*m*).

Construction.

The rule that a will is to be construed according to the law of the domicil, will yield to the expression of a contrary intention by the testator (*n*); but it seems that the use of the technical terms of the law of a foreign country, in the will of a testator having an English domicil, will not of itself be regarded as an indication of intention that the will is to be construed according to the foreign law (*o*).

This exception to the general rule is often of importance in the case of a will which exercises a power of appointment (*p*).

Incon-
venience of
old law.

The doctrine that the will of an Englishman is governed by the law of his domicil at the time of his death has always led to

(*k*) See Chap. XXIII. (Powers), where *Re Hernando*, 27 Ch. D. 284; *Re Mégret*, [1901] 1 Ch. 547, and other cases, are referred to. With reference to the question by what law a settlement is intended to be governed, see *Re Fitzgerald*, [1904] 1 Ch. 573, where the principal authorities are cited.

(*l*) This subject is more fully dealt with in the chapter on Powers. See *Tatnall v. Hankey*, 2 Moo. P. C. C. 342; *In bonis Alexander*, 29 L. J. Pr. 93; *In b. Hallyburton*, L. E., 1 P. & D. 90. In the fourth and fifth editions of this work it is stated, on the authority of Story, Conf. c. viii.; 3 Burge, pt. 2, c. 20, that "the latter instrument [i.e. the instrument creating the power] is to be con-

strued according to the law of the place where it is executed, if it deals with moveables, and according to the *lex loci rei sitæ* if with immoveables." As I have some doubt as to the correctness of this statement, I have removed it from the text [C. S.].

(*m*) *Maltass v. Maltass*, 7 Jur. 135, 8 Jur. 860. No such rule applies to British subjects resident in China: *Re Tootal's Trusts*, 23 Ch. D. 532; or in Egypt: *Abd-ul-Messih v. Farra*, 13 App. Cas. 431.

(*n*) *Bradford v. Young*, 29 Ch. D. 617. (*o*) *Bradford v. Young*, *supra*.

(*p*) *Re Harman*, [1894] 3 Ch. 607; *Re Price*, [1900] 1 Ch. 442; *Re Bald*, 66 L. J. Ch. 524. See Chap. XXIII.

inconvenience. Mr. Jarman pointed out (*g*) that "a will may have been made in England, be written in the English language, the testator may have described himself as an Englishman (*r*), and it may have been proved in an English Court; and yet, after all, it may turn out, from the extrinsic fact of the maker being domiciled abroad at his death, that the will is wholly withdrawn from the influence of English jurisprudence."

In *Bremer v. Freeman* (*s*), the testatrix was an English subject resident in Paris, and executed a will conformably to English law; but probate of it was refused on the ground that she was domiciled in France, and that the will was not valid according to French law.

II.—Lord Kingsdown's Act.—To obviate such questions with regard to testators dying after August 6, 1861, it is enacted by the Wills Act, 1861 (24 & 25 Vict. c. 114), that (s. 1) every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his death) shall as regards personal estate be held to be well executed for the purpose of being admitted to probate, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin (*t*); and (s. 2) that every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his death) shall as regards personal estate be held to be well executed, and shall be admitted to probate, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where

Wills Act,
1861.

(*g*) First edition, p. 5.

(*r*) "This of course is not conclusive (as to which see *Nevinson v. Stables*, 4 Russ. 210), though the fact of a testator being described as resident abroad would produce suspicion and inquiry as to the foreign domicile" (note by Mr. Jarman).

(*s*) 10 Moo. P. C. C. 306. The case was a curious one; for the law of France does not permit a foreigner to acquire a domicile there, so as to affect the mode of making a will, without licence from the Government; in other

words, without such licence the foreigner may make a will according to the law of his nationality. In France, therefore, the English will would have been held good (see Sug. R. P. S. p. 404; *Collier v. Rivaz*, 2 Curt. 855; *Re Trufort*, L. R., 36 Ch. D. 600), and it had in fact been pronounced valid on that ground by the Prerogative Court (1 Deane, 192).

(*t*) See *In bonis De la Saussaye*, L. R., 3 P. & D. 42; *In bonis Donaldson*, L. R., 3 P. & D. 45; *In bonis Gatti*, 27 W. R. 323.

CHAPTER I.

Its effect on
the legal
operation of
wills.

the same is made. By sect. 4 the act is not to invalidate any will or other testamentary instrument as regards personal estate which would have been valid if the act had not been passed, except as such will or instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by the act.

Thus, for the purpose of British probate, a choice is given among several forms of execution, all in addition (s. 4) to that which alone was formerly sufficient: and, in terms, the act is directed only to modes of execution; but it has been held that a testamentary instrument, depending on the act for the validity of its execution, must also depend, for its acceptance as a valid testamentary disposition, on the local law on which its execution is rested. Thus, in *Pechell v. Hilderley* (*u*), a British subject with an English domicile died in 1867, leaving a will and codicil, neither of which was executed according to the law of England, but the codicil (though not the will) was well executed according to the law of Italy, where it was made. By that law, as proved in the case, it could not stand alone without the will, and did not set up the will, although indorsed upon it. It was argued that the codicil being well executed according to the act, its legal effect must be determined by the *lex domicilii*, and that according to that law the codicil established and made good the will (*v*). But Lord Penzance was of opinion that in determining the question whether any paper was testamentary, regard could be had to the law of one country only at a time, and that the mixing up of the legal precepts of two different countries could only result in conclusions conformable to neither. The Court therefore pronounced against both documents. But in *In bonis Lacroix* (*w*) a naturalised British subject executed at Paris a will and codicil in English form relating to his English property only, and a holograph will in French form disposing of his property in France, but referring directly to the English will; Sir J. Hannen seemed to think, assuming the testator's domicile to be French, that all three instruments might be admitted to probate under Lord Kingsdown's Act; eventually, however, probate was granted of the English will and codicil only.

Notwithstanding the words "according to the forms required by the law of the place" where the will is made, sect. 1 of the act applies to a country the law of which does not provide any forms for testamentary dispositions; if a British subject desires to make

(*u*) L. R., 1 P. & D. 673.

(*v*) Vide post, Chap. VI., s. xiv.

(*w*) 2 P. D. 94.

his will in such a place, any writing which can be identified as a will is apparently sufficient; at all events a holograph will signed by the testator is sufficient (x).

The expression "personal estate" in sect. 1 of the act, includes leaseholds situate in England (y).

"Personal estate" includes leaseholds.
Scope of act.

Sections 1, 2 and 4 of Lord Kingsdown's Act affect British subjects only, and therefore do not apply to any subject of a foreign country (z), even in the case of a woman born a British subject who has become a foreign subject by marriage (a). On the other hand, they apply to naturalised British subjects (b), although sect. 1 assumes that the testator had his domicile of origin in some part of the British dominions. It seems clear that the act only refers to the validity of the will in point of form, and that it does not affect any question as to its material validity, such as the question of testamentary capacity (c).

III.—Conflict of Laws.—Even if Lord Kingsdown's Act does affect the question of testamentary capacity (as appears to be assumed by some writers (d)), it is clear that foreign Courts are not bound to recognise the act in determining whether a given instrument is a valid will of personal property within their own jurisdiction: and thus the personal property, British and foreign, of a British subject may be distributable according to two distinct laws. Therefore, the necessity of conforming in the testamentary act to the law of the domicile, is still an important doctrine to the numerous British residents in foreign countries; and it appears that the circumstance of the contents of the will indicating that the testator contemplated returning to England (but which intention he never executed (e)), or even an express declaration that he intends to retain his domicile of origin (f), is insufficient to exclude the law of his domicile ascertained by the facts of the case (g).

Some foreign countries do not recognise domicile as governing the succession to the moveable property of a deceased person, but

(x) *Stokes v. Stokes*, 78 L. T. 50.

(y) *Re Grassi*, [1905] 1 Ch. 584; *Re Watson*, 35 W. R. 711.

(z) *In bonis Keller*, 61 L. J. Pr. 39.

(a) *In bonis Von Buseck*, 6 P. D. 211; *Blozam v. Favre*, 9 P. D. 130.

(b) *In bonis Gally*, 1 P. D. 438; *In bonis Lacroix*, 2 P. D. 94.

(c) See Dicey, *Conflict of Laws*, p. 687. The point did not arise in *Estate of Groos*, [1904] P. 269 (ante, p. 9), as the will was expressly made in accordance with the law governing

the testatrix's testamentary capacity. Some remarks on the act will be found in Sugden's R. P. Stat. 405-6.

(d) Mr. Vincent, in the fourth edition of this work, p. 8, n. (n); and apparently Lord St. Leonards (*Sugden, R. P. S.* 405-6).

(e) *Stanley v. Bernes*, 3 Hagg. 375.

(f) *Re Steer*, 3 H. & N. 594. See *McMullen v. Wadsworth*, 14 App. Cas. at p. 636.

(g) As to the *animus revertendi*, see also *Bruce v. Bruce*, 2 B. & P. 229, n.

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treat it as governed by the law of the country of which he was a subject. The right principle to be applied in cases of this kind cannot be said to be satisfactorily settled, but at present the result appears to be that a British subject who makes his permanent home in such a country retains his domicile of birth so far as regards the distribution of his property in England (*h*).

Suggestions
as to wills of
Englishmen
domiciled
abroad.

If an Englishman, domiciled abroad, has real estate (including in this definition property held by him for terms of years) in his native country, and also personal property there or elsewhere, he ought to make two wills, one devising his English lands, duly framed and executed for that purpose according to the forms of the English law, and the other bequeathing, if permitted, his personal (or rather his moveable) estate conformably to the foreign law. Wills made under such circumstances require more than ordinary care, in order to avoid some perplexing questions arising out of the conflict in the laws governing the real and personal property respectively (*i*), and also in order to avoid any question of incorporation by reference (*j*).

As to Scot-
land.

Such questions may arise, and indeed have most frequently arisen, in regard to the property of Englishmen domiciled in Scotland, or of Scotchmen domiciled in England; the law of succession and testamentary disposition being, in some respects, different in these two sections of the United Kingdom (*k*). Thus, in *Balfour v. Scott* (*l*), where a person domiciled in England died intestate, leaving real estate in Scotland, the heir was one of the next of kin, and claimed a share of the personal estate. By the law of

(*h*) *Re Johnson*, [1903] 1 Ch. 821, post, p. 25.

(*i*) See *Brodie v. Barry*, 2 V. & B. 130; *In bonis Smart*, 9 P. D. 64; and *Re Clark*, [1904] 1 Ch. 294.

(*j*) See *In bonis Murray*, [1896] P. 65, post, Chap. VI., s. xv.

(*k*) In Scotland there was formerly no direct power of disposing of real estate by will, but if there was a conveyance previously executed according to the proper feudal forms, the party might by will declare the use and trust to which it should enure. Per Sir W. Grant in *Brodie v. Barry*, 2 V. & B. 132. But by 31 & 32 Vict. c. 101, s. 20, land in Scotland may now be disposed of directly by will. Where a domiciled Scotchman dies intestate, leaving infant children, and possessed of property in Scotland and England, the Court of Session, it seems, appoints a factor to the children, to whom the English

Court grants administration: *In bonis Johnston*, 4 Hagg. 182; see *Studd v. Cook*, 8 App. Ca. 577.

In previous editions of this work it was suggested that if a Scotchman, i.e. a British subject, were to make a will, which by the law of Scotland is not revoked by marriage, and were subsequently to marry in England after having acquired an English domicile, a question of some nicety might probably arise as to whether the will was revoked by the marriage. See per Wilde, J., in *In bonis Reid*, L. R., 1 P. & D. at p. 76. In a similar case (*Re Martin*, [1900] P. 211) it was decided that the will was revoked by the marriage, but in that case the domicile of the husband at the time of the marriage was English.

(*l*) 6 Br. P. C. 550, stated in *Somerville v. Lord Somerville*, 5 Ves. 750, and cited 2 V. & B. 131; and see *Allen v. Anderson*, 5 Hare, 163.

Scotland, the heir cannot share in the personal property with the other next of kin, except on condition of collating the real estate ; that is, bringing it into a mass with the personal estate, to form one common subject of division (*m*). It was determined, however, that he was entitled to take his share without complying with that obligation, the case being regulated as to the moveable property by the English law.

In *Drummond v. Drummond* (*n*), a person domiciled in England had real estate in Scotland, upon which he granted a heritable bond to secure a debt contracted in England. He died intestate ; and the question was, by which of the estates this debt was to be borne ? By the English law then in force (*o*), the personal estate was the primary fund for the payment of debts ; but, by the law of Scotland, the real estate was the primary fund for the payment of the heritable bond. It was determined that the law of Scotland should prevail, and that the real estate must bear the burden (*p*).

Speaking of these two cases, Sir Wm. Grant has observed (*q*) : “ In the first case, the disability of the heir did not follow him to England ; and the personal estate was distributed as if both the domicile and the real estate had been in England. In the second, the disability to claim exoneration out of the personalty did follow him into England ; and the personal estate was distributed as if both the domicile and the real estate had been in Scotland.”

But by the law of Scotland, as of England, real estate is only a subsidiary fund for the payment of moveable debts ; and if the Scotch heir of a domiciled Englishman has paid them, the law of the domicile allows him to recover against the personal estate (*r*). Conversely, English rules of marshalling in favour of legatees will not be applied so as to throw on Scotch real estate debts of a domiciled Englishman, to which it could not be made liable by the *lex loci* (*s*).

(*m*) Ersk. Inst. Law of Scotland, 701, 5th edition.

(*n*) 6 Br. P. C. 601, cit. 2 V. & B. 132.

(*o*) An heir or devisee cannot now claim payment of a mortgage debt out of the testator's personal assets ; see s. 1 of Locke King's Act, 17 & 18 Vict. c. 113.

(*p*) But an express direction by a testator domiciled in England for payment of all his debts out of a specified fund will include the heritable bond : *Maxwell v. Maxwell*, L. R., 4 H. L. 506. Locke King's Acts (post, Chap. LIV.) do not extend to Scotland. A heritable bond will not pass by an

English will : *Jerningham v. Herbert*, 4 Russ. 388 ; but where there is an English security, and the debt is further secured by a Scotch heritable bond, the debt will pass by an English will : *Buccleuch v. Hoare*, 4 Mad. 467 ; *Cust v. Goring*, 18 Beav. 383. See further as to the nature of heritable bonds, Bell's Commentaries on the Laws of Scotland, 206 ; Ersk. Inst. 194.

(*q*) *Brodie v. Barry*, 2 V. & B. at p. 132.

(*r*) *Earl of Winchelsea v. Garetty*, 2 Keen, 293.

(*s*) *Harrison v. Harrison*, L. R., 8 Ch. 342.

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In all these cases the claim on the Scotch heir to exoneration, or his liability to be charged, was enforced by English Courts in distributing the personal estate only where the laws of both countries agreed in conceding the claim or imposing the charge.

Domicil—
how ascer-
tained.

How
determined.

Domicil of
birth or
origin.

IV.—Domicil.—A statement of some of the more important rules for ascertaining the domicil of a testator, and a reference to the cases of most frequent occurrence, may here be made (*t*).

The question of domicil is determined by English Courts according to the doctrines of English law, except (it seems) in those cases in which a person is resident in a country which does not recognise domicil as regulating questions of succession (*tt*).

The law attributes to everyone as soon as he is born the domicil of his father, if he be legitimate, and the domicil of his mother, if illegitimate (*u*). This is the domicil of birth, or, as it is more frequently called, the domicil of origin (*v*), and is involuntary. Another instance of involuntary domicil is where the domicil of an infant is changed by a change in the domicil of its father, or, in the case of a fatherless infant, by a change in the domicil and other acts on the part of its mother (*w*). So the domicil of a lunatic adult may be changed by a change in the domicil of his parent (*x*). In all these cases the altered domicil cannot be regarded as the domicil of origin; it is an acquired domicil (*y*). Probably the domicil

(*t*) As to domicil generally, see Dicey, *Conflict of Laws*; Westlake, *Private Int. Law*; and a valuable note in Hayes and Jarman's *Concise Forms of Wills*. Most of the definitions of domicil have been copied from the Roman law, in ignorance of the fact that in Roman law *domicilium* meant something quite different from what we understand by "domicil"; hence these definitions are inaccurate when applied to English law: see the judgment of Kindersley, V.-C., in *Lord v. Colvin*, 28 L. J. Ch. 361, where a useful definition of "acquired domicil" (that is, a domicil of choice) is given. There was formerly some confusion between the two ideas of nationality and domicil, but the distinction is now too clearly recognised to require discussion. See *Udny v. Udny*, L. R., 1 H. L. Sc. 441; *Haldane v. Eckford*, L. R., 8 Eq. 631 (where *Re Capdevielle*, 2 H. & C. 985; *Att.-Gen. v. Countess Blucher de Wahlstatt*, 3 H. & C. 374, and *Moorhouse v. Lord*, 10 H. L. C. 272, are referred to); *Brunel v. Brunel*, L. R., 12 Eq. 298; *Douglas v. Douglas*, L. R., 12 Eq. 617.

(*tt*) Per Lindley, M. R., in *Re Martin*, [1900] P. at p. 227; *Re Johnson*, [1903] 1 Ch. 801, post.

(*u*) *Dalhousie v. M'Douall*, 7 Cl. & F. 817; *Munro v. Munro*, 7 Cl. & F. 842; *Re Patten*, 6 Jur. N. S. 151; *Udny v. Udny*, L. R., 1 H. L. Sc. 441, where the earlier cases, including *The Indian Chief*, 3 C. Rob. Adm. 12, and *Munroe v. Douglas*, 5 Madd. 405 (in which Sir John Leach laid down much bad law), are referred to.

(*v*) The expression is not strictly accurate, for in Roman law *domicilium* and *origo* were two distinct things: see Sweet's *Law Dictionary*, s. v., "Domicile." In *Winans v. Att.-Gen.*, [1904] A. C. p. 290, Lord Macnaghten expressed a preference for the term "domicil of origin."

(*w*) As to this, see *infra*, p. 23.

(*x*) *Sharpe v. Criespin*, L. R., 1 P. & D. 611.

(*y*) *Re Macreight*, 30 Ch. D. 165; *Re Craignish*, [1892] 3 Ch. 180; *Re Beaumont*, [1893] 3 Ch. 490.

which a woman acquires by marrying a man with a different domicile to her own may be looked upon as an involuntary domicile (z), but the point is not material, as the important distinction is between the domicile of origin and an acquired domicile, whether voluntary or involuntary.

The chief points which require to be borne in mind in connection with the domicile of origin are: that everyone is assumed to preserve his domicile of origin until it is shewn that he has acquired another domicile; that there is a presumption against a man's intention to abandon his domicile of origin; that the domicile of origin revives if a man loses his acquired domicile; and that it is more difficult to lose the domicile of origin than an acquired domicile¹(a).

Characteristics of domicile of origin.

A man cannot have more than one testamentary domicile (b).

A man cannot have two domicils.

As soon as an individual is *sui juris*, it is competent to him to abandon his domicile of origin, and to elect and assume another domicile, which is called his domicile of choice (c). When another domicile is put on, the domicile of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicile of choice, but it revives and exists whenever there is no other domicile (as when the domicile of choice is in fact abandoned (d) with the intention of never returning), and it does not require to be regained or reconstituted *animo et facto* in the manner which is necessary for the acquisition of a domicile of choice (e). Domicile of choice is constituted by residence freely chosen and intended to continue for a non-limited period (f); and length of residence

Domicil of choice.

Recurrence of domicile of origin.

(z) In *Udny v. Udny*, Lord Westbury said that domicile by operation of law, as on marriage, is a domicile of choice; but this, of course, was a mere expression of opinion. His statement that all domicils, other than the domicile of origin, are domicils of choice, is clearly inaccurate.

(a) *Lord v. Colvin*, 28 L. J. Ch. 361; *Bell v. Kennedy*, L. R., 1 H. L. Sc. 307; *Udny v. Udny*, *ib.* 441; *Huntly v. Gaskell*, [1906] A. C. 56.

(b) *Forbes v. Forbes*, Kay, 353. See Dicey, p. 98. The notion that a man can have two domicils is probably derived partly from a misapprehension as to the meaning of *domicilium* in Roman law (see Sweet's Law Dictionary, s. v.) and partly from the use of the French word *domicile* in the sense of "residence"; see *McMullen v. Wadsworth*,

14 A. C. 631, where the phrase "international domicile" appears to be used as meaning "domicil" in the proper sense of the term.

(c) See *Bempde v. Johnstone*, 3 Ves. 198; *Drevon v. Drevon*, 12 W. R. 946; *King v. Foxwell*, 3 Ch. D. 518.

(d) The intention without the act of abandonment is insufficient: *In b. Raffell*, 32 L. J. Prob. 203; *Re Marrett*, 36 Ch. D. 400. And the mere fact that a person sails for his native country from the country where he has acquired a domicile of choice, does not prove that he intended to abandon it: *Lyall v. Paton*, 25 L. J. Ch. 746 (where the testator died *in itinere*).

(e) *King v. Foxwell*, 3 Ch. D. 518.

(f) As to what constitutes a non-limited period, see *Anderson v. Laneville*, 9 Moo. P. C. 325.

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is a most important ingredient from which to infer the animus manendi (g), but it is not conclusive (h).

The burden of proof is on those who allege that the domicile of origin has been lost (i).

How far
residence is
a test of
domicil.

“The question of domicile,” said Lord Loughborough, in the case of *Bempde v. Johnstone* (j), “primâ facie is much more a question of fact than of law. The actual place where [a person] is, is primâ facie to a great many given purposes his domicile. You encounter that, if you shew, it is either constrained, or from the necessity of his affairs, or transitory; that he is a sojourner; and you take from it all character of permanency. If on the contrary you shew, that the place of his residence is the seat of his fortune; if the place of his birth, upon which I lay the least stress; but if the place of his education, where he acquired all his early habits, friends and connections, and all the links that attach him to society, are found there; if you add to that, that he had no other fixed residence upon an establishment of his own, you answer the question; which would be, where does he reside? In London. Is that his domicile? It is: unless you shew, that is not the place where he would be, if there were no particular circumstance to determine his position in some other place at that period.”

Lord Loughborough's remark that a transitory residence in a country is not sufficient to shew that the person in question has acquired a domicile of choice there, is borne out by the decision in *Re Patience* (k). In that case P.'s domicile of origin was Scotch; he was in the Army and served abroad until 1860, when he retired; from that time until his death in 1882 he resided in lodgings, hotels, and boarding houses in various places in England; from the year 1810 till his death he never revisited Scotland, and he left no property whatever in that country: it was held that his domicile was Scotch (l). On the other hand, in *Re Craignish* (m), where

(g) *Cockrell v. Cockrell*, 25 L. J. Ch. 732; *Doucet v. Geoghegan*, 9 Ch. D. 441; *Re Craignish*, [1892] 3 Ch. 180. By the Domicile Act, 1861, power is given to the Crown to make conventions with foreign countries for the purpose of establishing rules as to the formalities required for a change of domicile by subjects of the two countries between which the convention is made. As to the operation of this act, see Sugd. R. P. S. p. 405. It is believed that no such convention has been entered into.

(h) *Re Patience*, and other cases cited infra.

(i) *Winans v. Att.-Gen.*, [1904] A. C. 287; *Huntly v. Gaskell*, [1906] A. C. 56.

(j) 3 Ves. 201. See also *Udny v. Udny*, supra; *Stevenson v. Masson*, L. R., 17 Eq. 78.

(k) 29 Ch. D. 976.

(l) *Lord v. Colvin*, 28 L. J. Ch. 361, and *Huntly v. Gaskell*, [1906] A. C. 56, are other examples of the strictness with which an intention to acquire a new domicile must be proved.

(m) [1892] 3 Ch. 180. This was a peculiar case, inasmuch as the question arose during the lifetime of the person whose domicile was in dispute.

the plaintiff's domicile of origin was Scotch, it was held on the evidence that he had acquired a domicile in England; he had led a roving life in all parts of the world until he married, when he came to London, and lived there in hotels and lodgings for a few years, when he took a furnished house; he never seems to have had a permanent "home" in England, but his intention to settle in that country appeared from his mode of life. *Att.-Gen. v. Dunn* (n), *Goulder v. Goulder* (o), and *Winans v. Att.-Gen.* (p), are also cases in each of which the unsettled life of the testator made it difficult to say with confidence where his "home" was.

Where an Englishman or Scotchman divides his time about equally between the two countries, the actual domicile is sometimes difficult to be ascertained, from the absence of preponderating evidence in favour of either. Such was the case of Lord Somerville (q), a Scotchman, originally domiciled in Scotland, who was elected a representative peer of Scotland, took a house in London, and lived there half the year, the remainder of which he spent in Scotland, where he still had an establishment; he died at his house in London. Sir R. P. Arden, M. R., after an elaborate argument, held that the original domicile remained unchanged, and, consequently, the succession to the personal property of the deceased nobleman (who had died intestate) was to be governed by the law of Scotland. In cases of residence equally divided between two places, the constant residence of his wife and family in one of them is strong evidence of animus in favour of domicile in that place (r).

Divided
residence.

The fact that a man, living in a foreign country, marries a woman who is a native of that country, tends to shew an intention on his part to make it his permanent home (s).

Marriage.

Lord Loughborough's remark that a residence which is "constrained" does not produce a change of domicile, is also borne out by the authorities.

Residence
necessity,

If the residence is "constrained" by external necessity, as by

—in public
service, &c.

(n) 6 M. & W. 511.

(o) [1892] P. 240.

(p) [1904] A. C. 287.

(q) *Somerville v. Lord Somerville*, 5 Ves. 750.

(r) *Forbes v. Forbes*, Kay, 364; *Aitchison v. Dixon*, L. R., 10 Eq. 589; *Platt v. Att.-Gen. of New South Wales*,

3 App. Cas. 336. But see per Wickens, V.-C., *Douglas v. Douglas*, L. R., 12 Eq. 647.

(s) See *Re Grove*, 40 Ch. D. 216. The presumption appears to have been rebutted by other circumstances in *D'Etchegoyen v. D'Etchegoyen*, 13 P. D. 132.

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the duties of military or naval service (*t*); or of a temporary political (*u*) or judicial (*v*) office; by imprisonment (*w*), or by flight from civil commotion or revolution (*x*) or to avoid creditors (*y*); it will not confer a domicile (*z*). But if a person comes to England to escape a sentence of imprisonment passed upon him in his native country, this will not prevent his acquiring an English domicile. if he shews an intention of settling permanently in this country (*a*). Again, neither an ambassador (*b*), nor a consul (*c*), loses his original domicile merely by residence in the foreign country where he is accredited. But a person holding a permanent office in an English colony which requires his residence there, may shew an intention of making it his home (*d*). So an ambassador (*e*), or a consul (*f*), may by his conduct and declarations shew an intention to acquire a domicile in the country where he lives. And if a consul engage in trade, his character of consul is, for some purposes at least, merged in that of merchant (*g*). On the other hand, if, being already domiciled in a foreign country, a man be appointed by his own sovereign ambassador (*h*) or consul (*i*) in that country, his original domicile is not thereby revived. The status of an English peer does not prevent his acquiring a foreign domicile (*j*).

It is said that if a foreigner enters the military service of the

Effect of
entering
Army.

(*t*) *Att.-Gen. v. Napier*, 6 Ex. 217; Phillim. Domicile, p. 79. Persons entering the military service of a foreign state acquire the domicile of that state, *ib.*; and service under the East India Company formerly gave an Indian or Anglo-Indian domicile; *Bruce v. Bruce*, 2 B. & P. 229; *Munroe v. Douglas*, 5 Madd. 379; *Craigie v. Lewin*, 7 Jur. 519; *Moorhouse v. Lord*, 10 H. L. C. 272; *Allardice v. Onslow*, 33 L. J. Ch. 434; *Forbes v. Forbes*, Kay, 356. As to these cases, see *infra*, p. 21. With a few immaterial differences, the stat. 1 Vict. c. 26 was made law in India by an act of council, No. 25, A.D. 1838, and applies to all wills made on or after February 1, 1839. And by the Indian Succession Act (Act X.), 1865, succession to immoveable property in India is regulated by the law of India; that to moveables by the law of the domicile. See *Macdonald v. Macdonald*, L. R., 14 Eq. 60.

(*u*) *Att.-Gen. v. Pottinger*, 6 H. & N. 733, 747 (Governor of the Cape and of Madras).

(*v*) *Att.-Gen. v. Rowe*, 1 H. & C. 31 (Chief Justice of Ceylon).

(*w*) Phillim. on Domicile, p. 87.

(*x*) *De Bonneval v. De Bonneval*, 1 Curt. 856.

(*y*) *Pitt v. Pitt*, 12 W. R. 1089.

(*z*) This rule applies as well to the loss of an acquired as to that of an original domicile: *Re Macreight*, 30 Ch. D. 165.

(*a*) *Re Martin*, [1900] P. 211.

(*b*) Story, Conf. s. 48; Phillim. on Dom. p. 79.

(*c*) *Sharpe v. Crispin*, L. R., 1 P. & D. 611.

(*d*) Dicey, 146; *Commissioners of Inland Revenue v. Gordon's Executors*, 12 Cas. Court Sess. 657.

(*e*) *Heath v. Sampson*, 14 Bea. 441.

(*f*) Dicey, 153.

(*g*) *The Indian Chief*, 3 C. Rob. Ad. 22; Phillim. on Domicile, pp. 124, 125. By the rules of their service British Consuls are forbidden to take part in mercantile affairs. *Sharpe v. Crispin*, L. R., 1 P. & D. 617.

(*h*) *Att.-Gen. v. Kent*, 1 H. & C. 12: the appointment in that case was as attaché, but the principle seems to apply to ambassadors.

(*i*) *Sharpe v. Crispin*, L. R., 1 P. & D. 611.

(*j*) *Hamilton v. Dallas*, 1 Ch. D. 257.

United Kingdom, he thereby acquires an English domicile (*k*). If so, sufficient importance was not given to the fact in the case of *Re Duleep Singh* (*l*).

Where, as in the United Kingdom, different laws prevail in different parts, a domicile in one, as in Jersey or Scotland, is not altered by entering the military or naval service of the kingdom, whether the domicile is original (*m*) or acquired (*n*). And apparently the same rule applies to the civil service (*o*).

The old decisions on the so-called Anglo-Indian domicile acquired by the servants of the East India Company (*p*) are anomalous, and the effect of a residence in India is a matter of doubt (*q*).

Attempts have been made to establish the doctrine that a kind of extra-territorial domicile may be acquired in such countries as China and Turkey, where British subjects have established settlements under the protection of treaties entered into between the British Government and the Government of the country, but it is settled that "the idea of a domicile, independent of locality, and arising simply from membership of a privileged society, is not reconcilable with any of the numerous definitions of domicile to be found in the books" (*r*). There is, therefore, no such thing as an Anglo-Chinese or Anglo-Egyptian domicile.

The effect of residence in conferring a new domicile may also be counteracted by the nature of the community in which the testator lived. If there is a fundamental difference between the religion, laws, habits and customs of that community and those of the testator's native country—as where he, being an Englishman, has resided in a country like China or Turkey—a strong presumption is raised against his having acquired a domicile in that country (*s*).

On the other hand, it seems clear that if a person has made up his mind to leave the place of his original domicile and permanently settle in another country, a residence in pursuance of that intention, however short, will establish a domicile there (*t*).

Local domicile not affected by service under Crown.

Anglo-Indian domicile.

Extra-territorial domicile.

Residence in half-civilised countries.

Residence may be short.

(*k*) *President of the United States v. Drummond*, 33 Bea. 449. See ante, p. 20, n. (*i*).

(*l*) 7 Morrell, 228.

(*m*) *In b. Patten*, 6 Jur. N. S. 151; *Brown v. Smith*, 15 Bea. 444; *Ex parte Cunningham*, 13 Q. B. D. 419.

(*n*) *Re Macreight*, 30 Ch. D. 165.

(*o*) *Urquhart v. Butterfield*, 37 Ch. D. 357.

(*p*) Ante, p. 20, n. (*i*).

(*q*) *Jopp v. Wood*, 4 D. J. & S. 616;

Re Tootal's Trusts, 23 Ch. D. 532; Dicey, 156, 738.

(*r*) Judgment of P. C. in *Abd-ul-Messih v. Farra*, 13 A. C. p. 439, approving *Re Tootal's Trusts*, 23 Ch. D. 532.

(*s*) *Re Tootal's Trusts*, 23 Ch. D. 532, following *The Indian Chief*, 3 C. Rob. Ad. 22; *Maltass v. Maltass*, 1 Rob. 67.

(*t*) Per Lord Cranworth in *Bell v. Kennedy*, L. R., 1 H. L. Sc. p. 319.

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Residence for business : intention to return.

Residence as trader.

Officer on half-pay.

Residence for health's sake.

Declarations of intention to return.

If it appears that a man resides in a foreign country for the purposes of his private business, always retaining the wish and intention of returning to his native country, he does not lose his domicile of origin (*u*). But vague expressions of an intention to return at some indefinite future time—such as “when I have made my fortune”—are not of themselves sufficient to shew that a man's residence is temporary (*v*). And as a general rule, a man who settles as a trader in a foreign country will thereby commonly acquire a domicile in that country (*w*) ; nor is the contrary to be inferred merely because, being a British subject, he invariably acts and regards himself as an Englishman (*x*). Nor will his being an officer in the British service on half-pay, and (in order to retain his pay) requiring and obtaining leave of absence (*y*), nor being an officer on unlimited furlough, subject to a positive obligation to return to duty when ordered (*z*), prevent his acquiring a domicile other than British ; though such an obligation would be strong to rebut any presumption that a domicile was contemplated in a foreign country where the obligation could not be enforced, for an intention contrary to duty is not to be presumed (*a*).

Residence in any place for health's sake is of dubious import ; and further manifestation of intention is requisite before such residence can be assumed to be permanent (*b*).

In a case where no special circumstances of the kind above referred to present themselves, it may be laid down, as a general rule, that if a person has in fact taken up a permanent residence in a country he will be deemed to have acquired a domicile of choice there, and mere declarations of an intention to return to the country of his birth will not be sufficient to rebut that presumption, so as to revive the original domicile (*c*).

(*u*) *Jopp v. Wood*, 4 D. J. & S. 616.

(*v*) *Doucet v. Geoghegan*, 9 Ch. D. 441. The statement of Kindersley, V.-C., in *Allardice v. Onslow*, 33 L. J. Ch. p. 436, goes too far.

(*w*) *Cockrell v. Cockrell*, 25 L. J. Ch. 730 ; *Allardice v. Onslow*, 33 L. J. Ch. 434 ; *Doucet v. Geoghegan*, 9 Ch. D. 441 ; *Re Grove*, 40 Ch. D. 216.

(*x*) *Moore v. Budd*, 4 Hagg. 346. As to whether treaties between two countries have any bearing on the question of domicile, see *Maltass v. Maltass*, 1 Rob. 67.

(*y*) *Cockrell v. Cockrell*, 25 L. J. Ch. 730. See also *Comm. I. R. v. Gordon's Executors*, 12 Cas. Court Sess. 657.

(*z*) *Att.-Gen. v. Pottinger*, 6 H. & N. 733, 747 ; *Forbes v. Forbes*, Kay, 359 ; *The Lauderdale Peerage*, 10 A. C. 692. Secus, if the furlough be for a limited period ; *Craigie v. Lewin*, 3 Curt. 435.

(*a*) *Hodgson v. De Beauchesne*, 12 Moo. P. C. C. 285.

(*b*) See *Hoskins v. Matthews*, 8 D. M. & G. 13 ; *Johnston v. Beattie*, 10 Cl. & F. 138 ; *Winans v. Att.-Gen.*, [1904] A. C. 287 ; *Re James*, 98 L. T. 438 ; *Forbes v. Forbes*, Kay, 341. See also per Lord Selborne in *The Lauderdale Peerage*, 10 App. Cas. at p. 740.

(*c*) *Att.-Gen. v. Kent*, 1 H. & C. 12 ; *Att.-Gen. v. Fitzgerald*, 3 Dr. 610 ; *Re Steer*, 3 H. & N. 594 ; *Haldane v.*

The general rule is that the domicil of a married woman is that of her husband, and that married women cannot change their domicil of their own acts (*d*). But a wife after a decree of divorce can acquire a domicil of choice (*e*). Whether the same rule applies to a wife who has been judicially separated from her husband (*f*), or whose husband has deserted her, or committed some other offence entitling her to a divorce or a judicial separation (*g*), has not been decided. But it is clear that a woman who is living apart from her husband, under an agreement for separation, cannot choose her own domicil (*h*).

The domicil of a legitimate child is that of the father, and the domicil of an illegitimate child is that of the mother (*i*). The domicil of the child changes with the domicil of the father or mother.

It has been made a question, whether infant children, who, after the death of the father, remain under the care of their mother, follow the domicil which she may from time to time acquire, or retain that which their father had at his death, until they are capable of gaining one by acts of their own. As a general rule, the domicil of the children in such a case follows that of the mother. Thus, where an Englishman domiciled in Guernsey, died there, and the widow came to England and took up her residence there, bringing her children with her; it was held, that the succession to the personal property of two of her children, who died there at an early age, was to be governed by the law of England, there being no ground to impute the removal to fraudulent intention (*j*). It has been suggested that a widow on re-marriage loses the power to change the domicil of the infant children of her former marriage, and that they consequently retain the domicil which their mother

Eckford, L. R., 8 Eq. 631; *Drevon v. Drevon*, 12 W. R. 946; *Brunel v. Brunel*, L. R., 12 Eq. 298; *Doucet v. Geoghegan*, L. R., 9 Ch. D. 441. See *Stevenson v. Masson*, L. R., 17 Eq. 78.

(*d*) *Robins v. Dolphin*, 1 Sw. & Tr. 37, s. c. *Dolphin v. Robins*, 7 H. L. C. 390; *Whitcomb v. Whitcomb*, 2 Curt. 351; *Yelverton v. Yelverton*, 1 Sw. & Tr. 574; *Re Daly's Settlement*, 25 Beav. 466; *Dalhousie v. M'Douall*, 7 Cl. & F. 817; *Bell v. Kennedy*, L. R., 1 H. L. Sc. 307; *Harvey v. Farnie*, 8 A. C. 43. As to the effect of the Naturalisation Act, 1870, see *In bonis Brown-Séguard*, 70 L. T. 811. It is possible that mere cohabitation might be sufficient to

change a woman's domicil: see *Turner v. Thompson*, 13 P. D. 37, where the marriage was voidable.

(*e*) *Williams v. Dormer*, 2 Rob. 505.

(*f*) *Dolphin v. Robins*, 7 H. L. C. 390.

(*g*) *Williams v. Dormer*, supra; *Le Sueur v. Le Sueur*, 1 P. D. at p. 140 et seq.

(*h*) *Warrender v. Warrender*, 2 Cl. & F. 488; *Re Daly's Settlement*, supra. See *Re Martin*, [1900] P. 211.

(*i*) *Dalhousie v. M'Douall*, supra; *Munro v. Munro*, 7 Cl. & F. 842; *In b. Patten*, 6 Jur. N. S. 151.

(*j*) *Pottinger v. Wightman*, 3 Mer. 67; *Johnstone v. Beattie*, 10 Cl. & F. at p. 66.

CHAPTER I.

had immediately before her re-marriage. But the true rule has been laid down by Stirling, J. (*k*), namely, that the change in the domicile of a fatherless infant, which may follow from a change of domicile on the part of the mother, is not a necessary consequence of the change in the mother's domicile, but is the result of the exercise by her of a power vested in her for the welfare of the infant, which, in their interest, she may abstain from exercising, even when she changes her own domicile, and the better view seems to be that this power is not lost by her re-marriage.

It is doubtful whether a guardian can change an infant's domicile (*l*).

Lunatic.

If a man at the time he attains his majority is of unsound mind, and remains in that state continuously up to the time of his death, the incapacity of minority is in effect continued, so as to confer upon the father the right of choice in the matter of domicile for his son, and a change of domicile by the father will usually produce a similar change of domicile as regards the son. In order that such a change of domicile may be produced, it is necessary that the son should be under the control of his father (*m*).

Conflict of
laws as to
domicil.
Doctrine of
Renvoi.

When a British subject takes up his permanent residence in a country, the laws of which do not recognise domicile as governing the devolution of property after death, or which do not permit a domicile to be acquired by mere residence, the question arises whether English law will treat him as having acquired a domicile in that country. It is difficult, if not impossible, to reconcile the decisions on this question. The authority of *Collier v. Rivaz* (*n*) has been shaken by *Bremer v. Freeman* (*o*), the case which led to the passing of Lord Kingsdown's Act. In *Re Trufort* (*p*) a British subject became a Swiss subject, and afterwards went to reside in France, where, according to English law (*q*), he was domiciled at his death; according to French law, the succession to his personal property was governed by the law of Switzerland: the English Court accepted this view, and distributed the property in accordance with

(*k*) *Re Beaumont*, [1893] 3 Ch. 490.

(*l*) Per Wickens, V.-C., in *Douglas v. Douglas*, L. R., 12 Eq. at p. 625. It seems that, by the law of Scotland, an infant aged fourteen years may choose his own domicile: *Urquhart v Butterfield*, 37 Ch. D. 357.

(*m*) *Sharpe v. Crispin*, L. R., 1 P. &

D. 611.

(*n*) 2 Curt. 855.

(*o*) 10 Moo. P. C. 306, ante, p. 11.

(*p*) 36 Ch. D. 600.

(*q*) It does not appear that the deceased had a domicile in France according to French law.

a decision of the Swiss Courts, which was accepted as binding on the English Court. There was, therefore, no conflict of laws (r). In *Hamilton v. Dallas* (s), it was held that the deceased had acquired a "de facto domicile" in France, although he had not complied with the requirements of the Code Napoleon. In *Re Johnson* (t), on the other hand, it was held that the moveable property of a British subject is not distributable in accordance with the law of his domicile, if he has resided in a country the law of which does not recognise domicile for purposes of succession. In that case the law of Baden (where the testatrix had lived for many years) treated nationality as governing the question of succession, and her moveable property was distributed by our Courts in accordance with the law of Malta, which was her domicile of origin. It is submitted that the question requires further consideration (u).

It sometimes happens that a person has a French domicile according to English law, and an English domicile according to French law. In such a case a will executed by him according to the requirements of English law may be proved in England in order to enable the French Courts to give effect to it (v).

(r) As to the bearing of this case on the doctrine of *Renvoi*, see Dicey, 718 seq., where attention is drawn to the distinction between *renvoi* as meaning "remittal," and *renvoi* as meaning "transmission."

(s) 1 Ch. D. 257.

(t) [1903] 1 Ch. 821. Followed in *Re Bowes*, 22 T. L. R. 711.

(u) See a note on the case by Mr. Dicey in the *Law Quarterly Review* (xix. 244), and in his *Conflict of Laws* (pp. 715 seq.). It is submitted that the true solution of the difficulty is

that suggested by him, namely, that the moveables of the deceased should have been distributed in the manner in which the Courts in Baden would have distributed them if they had been within their jurisdiction. A different view is taken by Mr. Bate, *Doctrine of Renvoi*, pp. 115 seq. See also Mr. Westlake's *International Law*; his theory of a "modified *renvoi*" is criticised by Mr. E. H. Abbot, jun., in *Law Q. Review*, xxiv. 133.*

(v) *In bonis Brown-Séguard*, 70 L. T. 811.

* Since the foregoing remarks on *Re Johnson* were put in type, an article on the case, by Mr. W. Jethro Brown, has appeared in the *Law Quarterly Review* for April 1909. His conclusions appear to agree in the main with those above expressed.

CHAPTER II.

FORM AND CHARACTERISTICS OF THE INSTRUMENT.

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“ Will.”

“ Codicil.”

I.—Preliminary.—Mr. Jarman points out (*a*) that “ in a general and comprehensive sense, a will consists of the aggregate of all the papers through which it is dispersed ” ; or, as it has also been put, a will is the aggregate of a man’s testamentary intentions so far as they are manifested in writing, duly executed according to the statute (*b*). In this sense, therefore, it includes a codicil. But sometimes the term “ will ” is used as opposed to “ codicil,” the distinction between the two being that the will is the principal, and the codicil the accessory ; a codicil is a supplement by which the testator alters or adds to his will. But these distinctions are to some extent questions of terminology, for a man may execute two or more instruments, each purporting to be a will (*c*), and together constituting one will (*d*). And on the other hand, if he leaves nothing but an instrument described as a codicil, it may take effect as a will (*e*). The distinction is of importance where a man

(*a*) First edition, p. 172 ; cited again post, Chap. VII.

(*b*) Per Lord Penzance in *Lemage v. Goodban*, L. R., 1 P. & D. 57 ; cited by Fry, J., in *Green v. Tribe*, 9 Ch. D. 231.

(*c*) As in *In bonis Claus*, 31 W. R. 924, where a man made two wills, one limited to property vested in him as trustee, and the other disposing of his

own property. As to wills disposing of property in different countries, see ante, p. 14 and post, p. 37.

(*d*) See the quotation from *Douglas-Menzies v. Umphelby*, infra, p. 38 ; and see post, Chap. VII. (revocation by subsequent inconsistent will, &c.).

(*e*) Post, Chap. VII. (whether a codicil is revoked by destruction of will).

revokes or revives his "will," for the question arises whether he thereby intends to revoke or revive a codicil to it (*f*). And where a will consists of two or more documents, a person who attests one of them does not forfeit a benefit given him by another, if the latter is separately executed and attested (*ff*).

II.—What Instruments are Testamentary.—"A will," says Mr. Jarman (*g*), "is an instrument by which a person makes a disposition (*h*) of his property to take effect after his decease (*i*), and which is *in its own nature* ambulatory and revocable during his life (*j*). It is this ambulatory quality which forms the characteristic of wills; for, though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposing party, yet the postponement is in such case produced by the express terms, and does not result from the nature, of the instrument. Thus, if a man, by deed, limit lands to the use of himself for life, with remainder to the use of A. in fee, the effect upon the usufructuary enjoyment is precisely the same as if he should, by his will, make an immediate devise of such lands to A. in fee; and yet the case fully illustrates the distinction in question; for, in the former instance, A., *immediately* on the execution of the deed, becomes entitled to a remainder in fee, though it is not to take effect in possession until the decease of the settlor, while, in the latter, he would take no interest whatever until the decease of the testator should have called the instrument into operation."

Ambulatory
nature of
wills.

It will be noticed that Mr. Jarman's definition includes only wills which dispose of property, and his treatment of the subject, therefore, does not extend to testamentary dispositions of a personal

Appointment
by will
of executors
or guardians.

(*f*) Post, Chap. VII.

(*ff*) Post, Chap. V.

(*g*) First edition, p. 11. It will be remembered that a man's will may be contained in several testamentary writings: *supra*, p. 26.

(*h*) Where one by will said, "I propose to give the residue by codicil, or otherwise to allow the same to go to my next of kin according to the statutes for the distribution of the estates of intestates," and he left no codicil, he was held not to have disposed of the residue: *Ash v. Ash*, 33 Bea. 187. And if a will altogether fails to take effect by reason of the death of the sole executor and legatee in the lifetime of the tes-

tator, there is an intestacy: *Re Ford*, [1902] 2 Ch. 605.

(*i*) It need not take effect immediately after his decease: *In bonis Novus*, 7 Jur. N. S. 688.

(*j*) As to deeds and other dispositions which are not testamentary, although they only take effect after the donor's death, see *Fletcher v. Fletcher*, 4 Ha. 67; *Hughes v. Stubbs*, 1 Ha. 476. As to donations mortis causâ, see Roper on Legacies, 1; Watson's Comp. Eq. 136; *Powell v. Hellicar*, 26 Bea. 261; *Farquharson v. Cave*, 2 Coll. 356; *Solicitor to Treasury v. Lewis*, [1900] 2 Ch. 812.

CHAPTER II.

Religious
education.

character, such as the question in what manner and by what words a testator may appoint executors (*k*) or guardians (*l*).

A testator may give directions as to the religion in which he wishes his children to be brought up (*m*).

These matters are dealt with in special text-books, and are therefore not discussed in detail here.

Appointment
of solicitor,
agent, &c.

Where a testator appoints a person to be solicitor or agent to his estate, or authorises an executor or trustee to make professional charges, this amounts to the bequest of a right to remuneration for services properly performed (*n*).

Attempts to
make will
irrevocable.

As a will is of its own nature revocable, a declaration by a testator that his will is irrevocable is inoperative (*o*). A covenant not to revoke a will cannot be specifically enforced, but an action for damages will lie for the breach of it, unless the will was revoked by the marriage of the covenantor (*p*).

Contract
to leave
property by
will.

As a general rule, a contract to bequeath a legacy or to leave property by will cannot be specifically enforced, and only gives rise to an action for damages (*q*), but in certain cases contracts of this kind have been given effect to specifically. Thus a covenant (or apparently any contract for valuable consideration) to devise land in a particular way can be specifically enforced against the

(*k*) As to the words which will constitute a person "executor according to the tenor," see *In bonis Montgomery*, 5 N. of C. 99; *In bonis Lowry*, L. R., 3 P. & D. 157; *In bonis Allam*, 66 L. T. 382; *In bonis Wilkinson*, [1892] P. 227; *In bonis Cook*, [1902] P. 114; *In bonis Pryse*, [1904] P. 301; and other cases cited in Robbins & Maw, p. 3. As to the will of a foreigner, see *In bonis Von Linden*, [1896] P. 148. As to the appointment of a corporation as executor, see *In bonis Hunt*, [1896] P. 288; *In bonis Martin*, 90 L. T. 264. As to the appointment of different executors for different parts of the testator's estate, or for different countries, or in different contingencies, see *Velho v. Leite*, 33 L. J. P. 107; Robbins & Maw, 5; *In bonis Langford*, L. R., 1 P. & D. 458. As to the revocation of an appointment of executors, see post, Chap. VII.

(*l*) As to what words will amount to an appointment of guardian, see *Bridges v. Hales*, Mos. 109; *Miller v. Harris*, 14 Sim. 540; *Morgan v. Hatchell*, 24 L. J. Ch. 135; *In bonis Morton*, 33 L. J. P. 87; *Re G.*, [1892] 1 Ch. 292.

(*m*) *Re Scanlan*, 40 Ch. D. 200. It is hardly necessary to say that such a direction is not binding on the Court: *Andrews v. Salt*, L. R., 8 Ch. 622. Nor is a direction by a testator that his estate shall be administered by the Court: *Re Stocken*, 38 Ch. D. 319.

(*n*) Post, Chap. IV.

(*o*) *Vynior's Case*, 8 Co. 82a.

(*p*) *Robinson v. Ommaney*, 23 Ch. D. 285.

(*q*) *Hammersley v. De Biel*, 12 Cl. & F. 45. The contract must be definite: *Cochran v. Graham*, 19 Ves. 63; *Re Fickus*, [1900] 1 Ch. 331, where the earlier cases are referred to. The liability is not necessarily discharged by a devise or bequest: *Eyre v. Monro*, 3 K. & J. 305; *Graham v. Wickham*, 1 D. J. & S. 474. As to the effect of the covenantee dying in the testator's lifetime, see *Jones v. How*, 7 Ha. 267. As to such a covenant being satisfied by a bequest of a different nature, or by a distributive share under an intestacy, see *Goldsmid v. Goldsmid*, 1 Sw. 214, and Mr. Swanston's note; *Salisbury v. Salisbury*, 6 Ha. 526; and Chap. XXXII.

testator's heir at law, or persons claiming under him as volunteers (*r*). And if during his lifetime the testator conveys the land to a third person, an immediate right of action to recover damages accrues to the promisee (*s*).

As a general rule, a covenant by a man to leave by will all his property, or a share of all his property, in a certain way, only applies to such property as he dies possessed of, and does not prevent him from disposing during his lifetime of any part of his property (*t*). The Courts have, however, in certain cases defeated attempts to evade such a covenant. Thus in *Lewis v. Madocks* (*u*), an agreement to settle personal property was not allowed to be evaded by investing it in the purchase of land. Again, in *Fortescue v. Hennah* (*v*), a father covenanted on the marriage of one of his two daughters that on his death all his property which he should die possessed of should be held in trust for his two daughters in equal shares. He afterwards disposed of part of his property in favour of various persons, reserving a life interest for himself. Grant, M. R., said that although a covenant of this kind did not prevent the testator from making bonâ fide dispositions of his property during his life, he could not defeat it by dispositions which were in effect testamentary, though not such in point of form; and he held that the property of which the testator reserved the life interest was, for the purposes of the covenant, to be considered as part of the property which he possessed at the time of his death. The case of *Logan v. Wienholt* (*w*) seems to have been decided on the same principle.

A covenant to bequeath a certain sum is not satisfied by a testamentary appointment of that sum under a special power, although expressed to be made in satisfaction of the covenant (*x*).

A legacy bequeathed in pursuance of a covenant is on the same footing as ordinary legacies with regard to lapse, debts, &c. (*y*).

As to the revocation of mutual wills, see below, p. 41.

Covenant to leave whole of testator's property—how enforced.

Appointment under special power.

Gift may fail by lapse, &c.

Mutual wills.

(*r*) *Goylmer v. Paddiston*, 2 Ventr. 353; s.c. as *Goilmer v. Battison*, 1 Vern. 48; *Coverdale v. Eastwood*, L. R., 15 Eq. 121.

(*s*) *Synge v. Synge*, [1894] 1 Q. B. 467. See *Humphreys v. Green*, 10 Q. B. D. 148; *Maddison v. Alderson*, 8 A. C. 467.

(*t*) *Needham v. Kirkman*, 3 B. & Al. 531; *Needham v. Smith*, 4 Russ. 318; *Re Brookman's Trust*, L. R., 5 Ch. 182; *Coverdale v. Eastwood*, L. R., 15 Eq. 121. If the testator bequeaths a legacy to the persons entitled to the benefit of the covenant, a case of election arises: see *Bennett v. Houldsworth*, 6 Ch. D.

671, and other cases cited in Chap. XXXII. As to the inexpediency of relying on a covenant of this kind, see *Davidson*, Conv. III. 805, n. As to probate duty, see *Att.-Gen. v. Murray*, 20 L. R. Ir. 124.

(*u*) 8 Ves. 150.

(*v*) 19 Ves. 67, following *Jones v. Martin*, 5 Ves. 266, n.

(*w*) 1 Cl. & F. 611.

(*x*) *Graham v. Wickham*, 1 D. J. & S. 474.

(*y*) *Re Brookman's Trust*, L. R., 5 Ch. 182; *Jervis v. Wolferstan*, L. R., 18 Eq. 18.

CHAPTER II.

Covenant to
exercise
power.
Evidence of
animus
testandi,
when
requisite.

As to the validity of covenants to exercise testamentary powers, see Chapter XXIII.

It is essential to the validity of a will that at the time of its execution the testator should know and approve of its contents (z). And whenever any ground for suspicion exists, the burden of proving that the will was the voluntary and conscious act of the testator lies on him who propounds the will (a). The degree of proof required may vary with the circumstances of the case. If a person writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court, and it ought not to pronounce the will valid unless the suspicion is removed and it is judicially satisfied that the paper propounded expresses the true will of the deceased (b).

Effect of
mistake.

A document which is in form a testamentary disposition by a person competent to make a will, and executed with all due formalities, may nevertheless be proved not to be the will of the person who signed it, on the ground that the requisite animus testandi was wanting. Accordingly, if the execution of a will has been induced by mistake, probate of it will be refused. Thus, where two sisters made mutual wills in favour of each other, the words *mutatis mutandis* being precisely the same, and by mistake each signed the will of the other, both wills were held invalid (c). So if words have been inserted in a will by mistake of the person who prepared it, and the attention of the testator is not called to them, they will be omitted from the probate (d), although the right words cannot be inserted (e). The Court of Construction,

(z) *Hastilow v. Stobie*, L. R., 1 P. & D. 64.

(a) *Sutton v. Sadler*, 3 C. B. N. S. 87; *Cleare v. Cleare*, L. R., 1 P. & D. 655; *Fulton v. Andrew*, L. R., 7 H. L. 448; *Tyrrell v. Painton*, [1894] P. 151; post, p. 48.

(b) *Barry v. Butlin*, 2 Moo. P. C. 480; *Brown v. Fisher*, 63 L. T. 465; *Tyrrell v. Painton*, [1894] P. 151; and see below, pp. 49 seq. Where the onus of proof is thus cast on the party propounding the will, a person opposing it is *prima facie* justified in pleading undue influence and fraud, and in a proper case will be entitled to costs: *Wilson v. Bassil*, [1903] P. 239.

(c) *In bonis* —, 14 Jur. 402; *In bonis Nosworthy*, 11 Jur. N. S. 570; *In bonis Hunt*, L. R., 3 P. & D. 250; *Estate of Meyer*, [1908] P. 353.

(d) *Hippesley v. Homer*, T. & R. 48, n.; *Trimlestown v. D'Alton*, 1 D. & Cl. 85; *In bonis Fairburn*, 4 N. of Cas. 478; *In bonis Wray*, Ir. R., 10 Eq. 267; *In bonis Duane*, 2 Sw. & Tr. 590; *In b. Oswald*, L. R., 3 P. & D. 162; *Morrell v. Morrell*, 7 P. D. 68; *In bonis Boehm*, [1891] P. 247; *In b. Gordon*, [1892] P. 228; *In b. Moore*, ib. 378; *In b. Reade*, [1902] P. 75; *Brisco v. Baillie Hamilton*, ib. 234; *In b. Snowden*, 75 L. T. 279; *Vaughan v. Clerk*, 87 L. T. 144; *In b. Wrenn*, [1908] 2 Ir. R. 370. See also the cases cited *infra*, p. 32.

(e) *In bonis Schott*, [1901] P. 190 (see also *In bonis Walkeley*, 69 L. T. 419), overruling *In bonis Bushell*, 13 P. D. 7; *In bonis Huddleston*, 63 L. T. 255. As to the effect of the omission on what remains, see *Rhodes v. Rhodes*, 7 A. C. at p. 198.

however, although it cannot (in the exercise of its ordinary jurisdiction) change the words of a will (*f*), may construe the will on the assumption that words have been inserted or omitted by mistake (*g*).

In *In bonis Douce* (*h*), a man named Thomas Douce, who could neither read nor write, requested A. to prepare a will for him; A. did so, but erroneously described the testator throughout as "John Douce." Thomas Douce executed it by making his mark, and it was duly attested. It was clear from the terms of the will and the surrounding circumstances that the will was that of Thomas Douce, and it was admitted to probate as his will. Here, of course, the *animus testandi* was present.

But where a testator makes two wills, the second of which revokes the first, and then makes a codicil referring to the first will, parol evidence is not admissible to shew that this was a mistake, and that he meant to refer to the second will (*i*). By consent, however, the Court of Probate can allow the mistaken reference to be omitted from the probate (*j*).

Mistaken
reference to
revoked will.

Nor is evidence admissible to shew that a legacy was inserted in the will by mistake, if there is a person in existence answering the description of the legatee (*k*). And as a general rule, a bequest which is induced by a mistake on the part of the testator is nevertheless valid (*l*).

Gift inserted
by mistake.

From the general principle that *animus testandi* is essential to the validity of a will, it follows that where a document purporting to be a will is deliberately executed with all due formalities, yet if it is intended by the person executing it not to have any testamentary operation, but is executed for some collateral object (e.g., to be shewn to another person to induce him to comply with the pretended testator's wish), it is a nullity, and probate will be refused (*m*).

Sham will.

A will may also be invalid on the ground that its execution was induced by fraud (*n*), coercion, or undue influence (*o*). In many

Fraud, undue
influence, &c.

(*f*) See *Re Bywater*, 18 Ch. D. 17.

(*g*) See Chap. XVIII.

(*h*) 8 Jur. N. S. 723; better reported 31 L. J. P. 172, s.n. *In bonis Douce*.

(*i*) *In bonis Chapman*, 8 Jur. 902, post, Chap. XV.

(*j*) *In bonis Gordon*, [1892] P. 228; *In bonis Reade*, [1902] P. 75.

(*k*) *Stringer v. Gardiner*, 4 De G. & J. 468; *Re Nunn's Trusts*, L. R., 19 Eq. 331. Where there is a latent ambiguity, evidence is, of course, admissible: see Chap. XV.

(*l*) See *Re Dyke*, 44 L. T. 568, cited post, Chap. XXX. s. iv.

(*m*) *Lister v. Smith*, 33 L. J. Pr. 29.

(*n*) *Goss v. Tracy*, 1 P. W. 287; *Doe v. Allen*, 8 T. R. 147; *Browning v. Budd*, 6 Moo. P. C. 435; *Rhodes v. Rhodes*, 7 A. C. at p. 198.

(*o*) *Stulz v. Schaeffe*, 16 Jur. 909; *Hall v. Hall*, L. R., 1 P. & D. 481; *Parfitt v. Lawless*, L. R., 2 P. & D. 462; *Betts v. Doughty*, 5 P. D. 26; *Wingrove v. Wingrove*, 11 P. D. 81; *Boyse v. Rossborough*, 6 H. L. C. 2; *Jones v.*

CHAPTER II.

of these cases there is also present the element of physical or mental weakness (*p*). So if a portion of a will was inserted by fraud or undue influence, it may be omitted from the probate (*q*).

Improper
omission of
legacies.

In *Mitchell v. Gard* (*r*), the residuary legatee, who prepared the will, intentionally omitted some legacies which he had been directed to insert, and the omission was not noticed by the testatrix: it was held that the will was nevertheless valid. Probably in such a case the residuary legatee would be held to be a trustee for the disappointed legatees.

Will prepared
by another.

If a man requests another to draw up a will for him without saying what he desires it to contain, and executes it without knowing its contents, the will is bad (*s*); but a will prepared in good faith in pursuance of the testator's definite instructions is valid, if at the time of execution he believes it to have been so prepared, although he may then be mentally incapable of understanding it (*t*). And if in drawing up a will by the instructions of the testator, the draughtsman, without reason or special directions, but in good faith, introduces words the effect of which the testator does not intelligently appreciate when the will is read over to him, they must stand as part of the will (*u*); the rule is the same even if the testator asks to have them explained, and their effect is, in good faith, misrepresented to him (*v*). But if they were inserted by mistake, and there is no clear evidence that they were really brought to the mind of the testator, they will be omitted from the probate (*w*).

Presumption
from reading
over will
before
execution.

As a general rule, in the absence of suspicious circumstances, the fact that a will has been read by, or read over to, the testator affords a strong presumption that he understood and approved of its contents (*x*); but there is no inflexible rule on the subject (*y*).

Godrich, 5 Moore P. C. 16; *Baudains v. Richardson*, [1906] A. C. 169.

(*p*) See *Hampson v. Guy*, 64 L. T. 778, and the cases cited below, p. 49.

(*q*) *Morrell v. Morrell*, 7 P. D. at p. 70; *Farrelly v. Corrigan*, [1899] A. C. 563; and the other cases cited below, p. 50. The decision in *Fulton v. Andrew* (L. R., 7 H. L. 448) seems to have rested on fraud. There appears to be some doubt whether part of a will can be omitted if the omission would alter the sense of what remains: see *Rhodes v. Rhodes*, 7 A. C. at p. 198.

(*r*) 33 L. J. P. 7.

(*s*) *Hastilow v. Stobie*, L. R., 1 P. & D. 64.

(*t*) *Parker v. Felgate*, 8 P. D. 171. Where the testator is deaf and dumb,

strict evidence that his wishes were correctly interpreted is required: *In bonis Owston*, *In bonis Geale*, post, p. 48, note (*n*).

(*u*) *Rhodes v. Rhodes*, 7 A. C. 192; *Guardhouse v. Blackburn*, L. R., 1 P. & D. 109; *In bonis Davy*, 29 L. J. P. 161; *Harter v. Harter*, L. R., 3 P. & D. 11; *Beamish v. Beamish*, [1894] 1 Ir. R. 7.

(*v*) *Collins v. Elstone*, [1893] P. 1.

(*w*) *Brisco v. Baillie Hamilton*, [1902] P. 234.

(*x*) *Guardhouse v. Blackburn*, supra; *Cleare v. Cleare*, L. R., 1 P. & D. 655; *Beamish v. Beamish*, [1894] 1 Ir. R. 7.

(*y*) *Fulton v. Andrew*, L. R., 7 H. L. 448; *Tyrrell v. Painton*, [1894] P. 151; *Garnett-Botfield v. Garnett-Botfield*, [1901] P. 335.

As Mr. Jarman points out (z) : “ The law has not made requisite, to the validity of a will, that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property ; and, if this appear to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded (a).

“ Thus (b), a deed-poll, and even an agreement or other instrument between parties, has repeatedly been held to have a testamentary operation. As, in *Hixon v. Wytham* (c), where A. by indenture made between him on the one part, and B. and C. of the other part, in consideration of 5*l.*, bargained and sold to them certain lands in trust to sell after his decease, and directed the money to arise by the sale to be employed in the payment of certain sums therein mentioned, and the rest thereof, and all his personal estate, he gave and bequeathed (for the language was here changed to the first person) in favour of certain persons. A. made B. and C. executors of *his will* ; and signed, sealed, published and declared the instrument as his will in the presence of several witnesses. The Court declared this to be a good will.

Instruments in the form of deeds, agreements, &c., held to be testamentary.

Instrument commencing as an indenture, but ending as a will.

“ So, in *Green v. Proude* (d), where, by instrument entitled ‘ Articles of Agreement,’ made between A. of the one part, and B. of the other part : it was agreed between them that A., being sick in body, gives, &c. ; in consideration whereof B. promised to pay several sums of money. The instrument concluded in the ordinary manner of deeds, *i.e.* ‘ in witness whereof the parties have hereunto interchangeably set their hands and seals.’ This instrument was delivered as a deed ; but it was held to be testamentary, and as such revocable, and the Court seems to have been influenced by the circumstance, that the person who prepared it was instructed to make a will.”

Instrument entitled “ Articles of Agreement.”

(z) First edition, p. 11.

(a) This passage was cited with approval, as correctly stating the law on this subject, by Lord Selborne, C., in *Whyte v. Pollok*, 7 App. Cas. at p. 409.

(b) *West's Case*, Mo. 177, pl. 314 ; *Manly v. Lakin*, 1 Hagg. 130 ; *In bonis Dunn*, ib. 488 ; *Thorold v. Thorold*, 1 Phillim. 1 ; *In bonis Montgomery*, 5 N. of Cas. 99 ; *Henderson v. Farbridge*, 1 Russ.

479 ; *Rigden v. Vallier*, 2 Ves. sen. 253 ; *In bonis Morgan*, L. R., 1 P. & D. 214 ; *Milnes v. Foden*, 15 P. D. 105. In *Consett v. Bell*, 1 Y. & C. C. C. 569, the deed was apparently not testamentary. See also *Dillon v. Coppin*, 4 My. & Cr. 647 ; *Hope v. Harman*, 11 Jur. 1097 ; *In bonis Halpin*, Ir. R., 8 Eq. 567.

(c) 1 Ch. Cas. 248 ; s.c. Finch, 195.

(d) 3 Keb. 310 ; s.c. 1 Mod. 117.

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Mr. Jarman also cites *Peacock v. Monk* (e), *Tomkyns v. Ladbroke* (f), *Hog v. Lashley* (g), and *Habergham v. Vincent* (h), as illustrating the same principle. In *Fielding v. Walshaw* (i), a deed of gift referring to "sick and funeral moneys" was held to be testamentary, although it gave to the donor's wife certain benefits during his life, and although he orally declared that it was not intended to be a will.

Att.-Gen. v. Jones.
Whether property professedly settled by deed was liable to legacy duty.

The question, whether an instrument in the form of a deed operated as a will, was much discussed in *Att.-Gen. v. Jones* (j), where A., by indenture dated March 25, 1813, assigned, for a nominal pecuniary consideration, certain leasehold property to C. and D.; also certain stock, and all other his personal estate, upon trust for himself for life, and after his decease, for B. (an illegitimate daughter). The instrument reserved to A. a power of revocation by deed or will. By will, dated April 16, 1813, A. confirmed the deed except as to certain particulars, which he specified, and appointed the same persons as were trustees in the deed executors. A. did not transfer the stock, or part with the possession of the assigned property, or even communicate to the trustees the existence of the deed, which he retained in his own custody. The question was, whether the property assigned by it was liable to the legacy duty; and three of the Barons of the Exchequer (dissentiente Wood, B.) decided in the affirmative.

Tompson v. Browne.
Settlement reserving life interest to settlor, with power of revocation, held that the property was not liable to legacy duty.

This decision has been generally condemned, and may be regarded as overruled. In *Tompson v. Browne* (k), the question raised was whether an assignment by deed of personal property, reserving a life interest to the assignor, and giving him a power of revocation, was not testamentary, and the fund accordingly subject to legacy duty. The affirmative was attempted to be maintained on the authority of *Att.-Gen. v. Jones*; but Sir C. C. Pepys, M. R., decided that the legacy duty did not attach. "The decision in *Att.-Gen. v.*

(e) 1 Ves. sen. 127; Belt's Suppl. 82. The deed in this case contained a clause shewing that the instrument was designed to operate in the donor's lifetime. In a much earlier case (*Audley's Case*, 4 Leon. 166), it appears to have been considered as conclusive against the construing of an instrument as a will, that by it an estate was to be taken by the maker, "who could not take by his own will." From Lord Hardwicke's observations in *Peacock v. Monk* it would seem that he thought that an instrument might be testamentary for some purposes but not for others; as to

which, see *Doe v. Cross*, 8 Q. B. 714, stated post, p. 39.

(f) 2 Ves. sen. 591.

(g) 6 Br., P. C. 577, stated 3 Hagg. 415, n. So an instrument headed "Notes of intended settlement by W. W.," and containing sufficient words of bequest, was held to be testamentary by D. P. in *Whyte v. Pollok*, L. R., 7 App. Ca. 400.

(h) 2 Ves. jun. 204, 4 Br. C. C. 355.

(i) 27 W. R. 492.

(j) 3 Price, 368.

(k) 3 My. & K. 32.

Jones," he said, "seems to have proceeded upon the ground that, under the circumstances of that case, nothing passed from the maker of the instrument, so as to entitle any other person to interfere with his property in his lifetime. If there be anything in that decision to support the notion, that where a person by deed settles property to his own use during his life, and after his decease for the benefit of other persons, a power of revocation reserved in such a deed alters the character of the instrument, and renders it testamentary, and consequently subject to legacy duty, I can only say that if this were law, a great number of transactions, of which the validity has never been doubted, would be liable to be impeached."

Although the remarks of the *M. R.* are expressed with great caution, they leave no doubt of his opinion of *Att.-Gen. v. Jones*, and when that case was cited to Lord St. Leonards in *D. P. (l)*, he said, "That case is quite wrong."

In *Marjoribanks v. Hovenden (m)*, an instrument commencing with a recital, and having an attestation clause, like a deed-poll, and sealed, stamped, and registered, was held by the same learned Lord not to be invested with a testamentary character by the mere nature of the power (a power to appoint by will, misrecited as a power to appoint by deed or will) under which it purported to be made. The fact of registration as a deed appears to have been deemed almost conclusive against its testamentary character.

Instrument sealed, stamped, an registered, not testamentary.

The Ecclesiastical Judges (before whom, of course, questions of this kind were formerly most frequently agitated) acted fully up to the principle which regards as testamentary any instrument that is designed not to take effect until the maker's decease, though assuming the form of a disposition *inter vivos*; and more especially if it be incapable of operation in the intended form (*n*); and accordingly, in repeated instances, probate was, under the old practice, granted of such irregular documents as the assignment of a bond by

Rule in Ecclesiastical Courts as to instruments testamentary in substance but not in form.

(l) *Brown v. Adv.-Gen.*, 1 Macq. Sc. Ap. p. 85. See also *Alexander v. Brame*, 7 D. M. & G. 530; s.c. nom. *Jeffries v. Alexander*, 8 H. L. Ca. 594. At the present time, however, the property would be liable to succession duty: see stats. 16 & 17 Vict. c. 51; 51 Vict. c. 8, s. 21. As to estate duty, see the Finance Act, 1894.

(m) 1 Dru. t. Sug. 11.

(n) But now that all wills must be

attested by two witnesses, the validity of an instrument as an actual disposition of property would, if not so attested, depend on the maintenance of its non-testamentary character: *Mitchell v. Smith*, 33 L. J. Ch. 596. If an instrument is clearly testamentary, but not duly attested, it will not be supported as a *donatio mortis causâ*: *Re Hughes*, 36 W. R. 821; *Solicitor to Treasury v. Lewis*, [1900] 2 Ch. 812.

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indorsement (*o*), receipts for stock and bills indorsed (*p*), a letter (*q*), marriage articles (*r*), and promissory notes, and notes payable by executors, in order to avoid the legacy duty (*s*), and cheques on a banker (*t*), though the testator made a subsequent will containing a clause revoking any former will or codicil (*u*). Even a list of articles, signed and attested, but without any words of bequest, has been held to be testamentary (*v*). On the same principle, Sir J. Nicholl admitted to probate, as testamentary, the drafts of three bonds, prepared in the lifetime of the deceased, and intended to be executed by him, to the trustees of the marriage settlement of his three daughters, in substitution for legacies which he had, by a revoked will, bequeathed for the benefit of the daughters, and the execution of which bonds was prevented by his death (*w*).

Instruments
in the form of
present or
past gifts
held testa-
mentary.

Since the Wills Act, papers, duly signed and attested in accordance with the provisions of the act, in these words, "I wish A. to have my bank book for her own use" (*x*); "I hereby make a free gift to A. of the sum deposited," &c. (*y*); "I have given all to A. and her sons: they are to pay" certain weekly sums to "X. and Y., and to divide the residue among themselves" (*z*); have been held testamentary, chiefly upon collateral evidence, which is always admissible (*a*), that they were executed with that intent. And a paper purporting to be a nomination paper under the Industrial and Provident Societies Act, 1893, may be admitted to probate if duly executed (*b*).

Likewise
deeds inter
partes.

Instruments in the form of deeds inter partes, and purporting to convey property to trustees, but providing that the trusts should not take effect until after the death of the donor, have been held testamentary in the Probate Court (*d*).

(*o*) *Musgrave v. Down*, T. T. 1784; cit. 2 Hagg. 247.

(*p*) *Sabine v. Goate and Church*, 1782; cit. 2 Hagg. 247.

(*q*) *Drybutter v. Hodges*, E. T. 1793; cit. 2 Hagg. 247; *Passmore v. Passmore*, 1 Phillim. 218; *Denny v. Barton*, 2 Phillim. 575; *In bonis Mundy*, 30 L. J. P. 85.

(*r*) *Marnell v. Walton*, T. T. 1796; cit. 2 Hagg. 247.

(*s*) *Maxee v. Shute*, H. T. 1799; cit. 2 Hagg. 247; and see 4 Ves. 565; *Jones v. Nicolay*, 14 Jur. 675; *In bonis Marsden*, 1 Sw. & Tr. 542.

(*t*) *Bartholomew v. Henley*, 3 Phillim. 317.

(*u*) *Gladstone v. Tempest*, 2 Curt. 650. But the Court of Chancery declared the cheques to be in effect revoked: *Walsh v. Gladstone*, 1 Phil. 294.

(*v*) *In bonis Lowrey*, 5 N. of C. 619.

(*w*) *Masterman v. Maberly*, 2 Hagg. 235.

(*x*) *Cock v. Cooke*, L. R., 1 P. & D. 241.

(*y*) *Robertson v. Smith*, L. R., 2 P. & D. 43; *In bonis Slinn*, 15 P. D. 156.

(*z*) *In bonis Coles*, L. R., 2 P. & D. 362. Compare *In bonis Webb*, 10 Jur. N. S. 709.

(*a*) *In bonis English*, 34 L. J. P. 5. And, conversely, evidence may be submitted to shew that an instrument apparently testamentary was not executed with that intent. See *Trevelyan v. Trevelyan*, 1 Phillim. 149; *Nichols v. Nichols*, 2 Phillim. 183; *Lister v. Smith*, 3 Sw. & Tr. 282; *In bonis Nosworthy*, 11 Jur. N. S. 570.

(*b*) *In bonis Baxter*, [1903] P. 12.

(*d*) *In bonis Morgan*, L. R., 1 P. & D.

A paper merely expressing an intention to instruct a solicitor to prepare a will making a particular disposition of property, will not be admitted to probate in the absence of evidence of intention that such paper should have a testamentary operation (e). But instruments headed "Plan of a will" (f), or "Heads of a will" (g), or "Sketch of my will" (h), or "Memorandum of my intended will" (i), or "Notes of an intended settlement" (j), have been held to operate as valid testamentary dispositions, if duly executed (k). But probate was (l) refused of an instrument duly executed and attested as a will, but headed "This is not meant as a legal will, but as guide."

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Instructions
for a will.

It seems that a document commencing "I declare this to be a codicil to my will" may include words written above it on the same sheet of paper (m).

It seems that probate may be granted of part only of a document, if the remaining part is not testamentary (n).

It will of course be remembered that a document not executed as a will may be incorporated in a duly executed will, so as to form part of it (o).

Incorporated
documents.

A testator sometimes makes two wills, one relating to his property in England, and the other relating to his property in some foreign country. In such a case, if the wills are wholly independent, probate may be granted of the English will alone (p); or in some cases both wills may be proved (q). But if the English will refers to and incorporates the foreign will, or conversely, both wills must be included in the probate (r).

Concurrent
wills.

In *Re Tamplin* (s), a testator made a will disposing of his personal estate and immoveable property situate elsewhere than in Russia,

214; *Milnes v. Foden*, 15 P. D. 105; and see cases ante, p. 33. See also *In bonis Knight*, 2 Hagg. 554; *Shingler v. Pemberton*, 4 Hagg. 356; both of which cases were before *Tompson v. Browne*, stated above.

(e) *Coventry v. Williams*, 3 Curt. 787.

(f) *Matthews v. Warner*, 4 Ves. 186, 5 Ves. 23.

(g) *Bone and Newsam v. Spear*, 1 Phillim. 345.

(h) *Hattatt v. Hattatt*, 4 Hagg. 211.

(i) *Barwick v. Mullings*, 2 Hagg. 225, and other cases cited post, Chap. VI.

(j) *Whyte v. Pollok*, 7 A. C. 400.

(k) *Re Hyslop*, [1894] 3 Ch. 523.

(l) *Ferguson - Davie v. Ferguson - Davie*, 15 P. D. 109.

(m) *Oldroyd v. Harvey*, [1907] P. 326.

This case is also referred to in Chaps. VI. and VII.

(n) *Doe d. Cross v. Cross*, 8 Q. B. 714, stated infra, p. 39; *Wolfe v. Wolfe*, [1902] 2 Ir. R. 246.

(o) See post, Chap. VI.

(p) *In bonis Astor*, 1 P. D. 150, and other cases cited post, Chap. VI.

(q) *In bonis Bolton*, 12 P. D. 202. See also *In bonis Bridges*, 65 L. T. 764.

(r) *In bonis Howden*, 43 L. J. P. 26; *In bonis Harris*, L. R., 2 P. & D. 83;

In bonis Lockhart, 69 L. T. 21. For the case of an English testamentary paper (not a will) being incorporated in a foreign will, see *In bonis Crawford*, 15 P. D. 212.

(s) [1894] P. 39.

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and made a separate will disposing only of his immoveable property in Russia: it was held that the latter will could not be included in the probate.

Testator can only leave one will.

However many testamentary documents a testator may leave, "it is the aggregate or the net result that constitutes his will, or in other words, the expression of his testamentary wishes. The law, on a man's death, finds out what are the instruments which express his last will. If some extant writing be revoked, or is inconsistent with a later testamentary writing, it is discarded. But all that survive this scrutiny form part of the ultimate will or effective expression of his wishes about his estate. In this sense it is inaccurate to speak of a man leaving two wills; he does leave, and can leave, but one will" (*t*).

Paper testamentary in form.

Paper not testamentary in form or substance.

III.—What Instruments are not Testamentary.—As mentioned above, evidence is admissible to shew that an instrument apparently testamentary was not executed with that intent (*u*).

If an instrument is not testamentary either in form or in substance (none of the gifts in it being expressed in testamentary language, or being in terms postponed to the death of the maker), and if no collateral evidence is adduced to shew that it was intended as a will, probate will not be granted of it as a testamentary document. In one case (*v*), a minor aged nineteen (at a period when minors of such an age were capable of making wills of personal estate) wrote a paper in these words: "I, A. B., of &c., in the presence of the two under-mentioned witnesses, C. D. of &c., and E. F. of &c., do give all my goods and chattels to M. D. of —, spinster;" this paper was dated, and witnessed by the two persons referred to in the body of it; the Court was of opinion that, as the paper bore upon the face of it no evidence of its being intended to be testamentary, but it rather appeared, both from its contents and the evidence dehors (though the latter was rather conflicting), to have been intended as a present gift, probate ought not to be granted.

So probate was refused of a letter addressed by the deceased to a friend, directing the sale of stock in the public funds, and the distribution of the proceeds, on the ground that it referred to an immediate and not to a posthumous sale (*w*). And in

(*t*) Per Jud. Comm., *Douglas-Menzies v. Umphelby*, [1908] A. C. at p. 233. The facts and decision in the case are shortly referred to in Chap. XVI.

(*u*) Supra, p. 30.

(*v*) *King's Proctor v. Daines*, 3 Hagg. 218; and see *Langley v. Thomas*, 26 L. J. Ch. 609.

(*w*) *Glynn v. Oglander*, 2 Hagg. 428.

another case, a paper addressed by a testator to his executors was held not to be testamentary, the same not being dispositive in terms, nor shewn by extrinsic evidence to have been so intended (x). In this case Sir Herbert Jenner observed that there was this distinction in the consideration of papers which are in their terms dispositive, and those which are of an equivocal character, that the first will be entitled to probate, unless, as in *Nicholls v. Nicholls* (y), they proved not to have been written animo testandi; whilst, in the latter, the animus must be proved by the party claiming under it.

But, as already observed, an instrument is not testamentary merely because actual enjoyment under it is postponed until after the donor's death. If it has present effect in fixing the terms of that future enjoyment, and therefore does not require the death of the alleged testator for its consummation, it is not a will. Therefore, where there was an agreement for a lease, which contained a provision for the distribution of the rent after the lessor's death among his grandchildren, of whom the lessee was one, it was held that this provision, being part of the consideration for which the lessee was to pay his rent, was irrevocable; it was therefore not testamentary (z). The Court was asked to grant probate only of a part of the document, namely, that which contained the provision in question: and as to this, Sir J. P. Wilde said he had met with no case where it had been done, although he by no means said it could not be done. And in fact, in the case (there cited) of *Doe d. Cross v. Cross* (a), where an instrument in the form of a power of attorney was given by a person abroad, whereby he appointed his mother to receive the rent of his lands for her own use, until he might return to England; or in the event of his death, he "thereby assigned and delivered to her the sole claim to his lands," but her occupancy was to cease on his return: this instrument was properly executed as a will, and was held to be a good will of the lands in question. The Court was clear that there was no objection to one part of an instrument operating in præsentia as a deed, and another in futuro as a will.

But the fact that the document is executed as a will, and that, either wholly or partially, it is to take effect after the donor's death, does not necessarily make it testamentary (b).

(x) *Griffin v. Ferard*, 1 Curt. 97.

(y) 2 Phillim. 180.

(z) *In bonis Robinson*, L. R., 1 P. & D. 384; and see *Patch v. Shore*, 2 Dr. & Sm. 589.

(a) 8 Q. B. 714. See also *Peacock v. Monk*, 1 Ves. sen. 127. *Wolfe v. Wolfe*, [1902] 2 Ir. 246.

(b) *Thorncroft v. Lashmar*, 31 L. J. P. 150.

Instrument not made testamentary by postponing enjoyment.

Probate of part of an instrument.

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Where property is given by will, and a trust affecting it is created de hors the will, the title of the cestui que trust is not testamentary (c).

Contingent wills.

IV.—Contingent, Joint, and Mutual Wills.—A will may be made so as to take effect only on a contingency (d), and if the contingency does not happen the will ought not to be admitted to probate (e). The contingency will generally attach to every part of the will, e.g., to a clause revoking former wills (f). But a codicil in other respects contingent will be admitted to probate, because it may operate as a republication of the will (g). A reference to some impending danger is common to most of these cases, and the question is whether the possible occurrence of the event is the reason for the particular disposition which the testator makes of his property, as where he says, "Should anything happen to me on my passage to W., I leave," &c. (h); or only the reason for making a will, as where he says, "In case of accident, being about to travel by railway, I bequeath," &c. (i). A will may also be made contingent on the assent of another person (j).

A will, intended to take effect as an exercise of a power, is not necessarily conditional on the existence of the power, if the testator has an interest independent of the power (k), or a power not expressly referred to (l), sufficient to support the disposition; for if an intention appears to dispose of the property, it matters not that the testator mistook the origin or nature of his dispositive

(c) *Cullen v. Att.-Gen. for Ireland*, L. R., 1 H. L. 190; *Re Maddock*, [1901] 2 Ch. 372. On the question whether an instrument which is testamentary in its character, but inadmissible to probate, can be enforced as creating a trust, see *Smith v. Attersoll*, 1 Russ. 266; *Johnson v. Ball*, 5 De G. & S. 89; *Consett v. Bell*, 1 Y. & C. C. C. at p. 577.

(d) See *In bonis News*, 7 Jur. N. S. 688.

(e) *Parsons v. Lanoe*, 1 Ves. sen. 190; *Sinclair v. Hone*, 6 Ves. 607.

(f) *In bonis Hugo*, 2 P. D. 73.

(g) *In bonis Da Silva*, 30 L. J. P. 171; *In bonis Colley*, 3 L. R. Ir. 243.

(h) *Roberts v. Roberts*, 31 L. J. P. 46; *In bonis Porter*, L. R., 2 P. & D. 22; *In bonis Robinson*, ib. 171; *Lindsay v. Lindsay*, ib. 459; *In bonis Hugo*, 2 P. D. 73.

(i) *In bonis Thorne*, 34 L. J. P. 131; *In bonis Dobson*, L. R., 1 P. & D. 88; *In bonis Martin*, ib. 380; *In bonis Stuart*, 21 L. R. Ir. 105. But the ex-

pressions used by the testator must be such as clearly to indicate his intention that the will is only to take effect upon his death during a particular journey or period; if the expressions are equivocal, the will will not be regarded as conditional, but will be admitted to probate, though the journey or period has been completed: *In bonis Mayd*, 6 P. D. 17; *In bonis Spratt*, [1897] P. 28; *Halford v. Halford*, [1897] P. 36; *Townsend v. Moore*, [1905] P. 66.

(j) *In bonis Smith*, L. R., 1 P. & D. 717.

(k) *Southall v. Jones*, 28 L. J. P. 112; *Jones v. Southall*, 30 Beav. 187; *Sing v. Leslie*, 2 H. & M. 68, post, Chap. XXIII. This interest must be a bequeathable interest. The will of a married woman would be inoperative to dispose of such an interest: *Price v. Parker*, 16 Sim. 198; unless the case comes within the Married Women's Property Act, 1882.

(l) *Re Wilmot*, 29 Beav. 644; *Bruce v. Bruce*, L. R., 11 Eq. 371.

power. And if the testator has no interest, still the will may raise a case of election (*m*). CHAPTER II.

Where the will is in terms clearly contingent, and the contingency has failed, the will cannot either as to real estate (*n*), or, since the Wills Act, as to personal estate (*o*), be set up but by some act amounting to a re-execution of it (*p*). Without some such act it is a nullity, and a previous will stands unrevoked (*q*). When on the death of the testator the event is still in suspense, general probate will be granted at once (*r*). Of course the question still remains open what effect the will is to have.

Two or more persons may make a joint will, which, if properly executed by each, is, so far as his own property is concerned, as much his will, and is as well entitled to probate upon his death, as if he had made a separate will (*s*). But a joint will made by two persons, to take effect after the death of both, will not be admitted to probate during the life of either (*t*). Joint wills are revocable at any time by either of the testators during their joint lives, or, after the death of one of them, by the survivor (*u*). Joint will.

Mutual wills are recognised by the Roman Dutch law which is in force at the Cape of Good Hope, Ceylon, &c. A mutual will is regarded as being in effect two separate wills, in which the disposition of each testator is treated as applicable to his share of the joint property (*v*). Instruments of this nature are unknown to the testamentary law of this country (*w*), and with us the term "mutual will" is generally applied to the case of two persons making a will by which each leaves all his property to the other (*x*). A mutual compact by two persons to make testamentary dispositions in each other's favour is apparently enforceable in equity in some cases, as where the survivor accepts the benefits under Mutual wills.

(*m*) *Re Brooksbank*, 34 Ch. D. 160.

(*n*) *Parsons v. Lanoe*, 1 Ves. sen. 190.

(*o*) *Roberts v. Roberts*, *supra*; *In bonis Winn*, 2 Sw. & Tr. 147. Secus, before 1 Vict. c. 26, *Burton v. Collingwood*, 4 Hagg. 176; *Strauss v. Schmidt*, 3 Phillim. 209.

(*p*) *In bonis Cawthron*, 33 L. J. P. 23.

(*q*) *In bonis Robinson*, L. R., 2 P. & D. 171.

(*r*) *In bonis Cooper*, 1 Deane, Eccl. R. 9. It is presumed, though it is not so stated in the report, that the children were minors. See also *In bonis Bangham*, 1 P. D. 429.

(*s*) *In bonis Stracey*, 1 Jur. N. S.

1177; *Re Miskelly, Ir. R.*, 4 Eq. 62; *In bonis Piazzzi-Smyth*, [1898] P. 7.

(*t*) *In bonis Raine*, 1 Sw. & Tr. 144; *In bonis Piazzzi-Smyth*, *supra*.

(*u*) *Hobson v. Blackburn*, 1 Add. 274; *In bonis Lovegrove*, 2 Sw. & Tr. 453; *In bonis Fletcher*, 11 L. R. Ir. 359.

(*v*) *Denysen v. Mostert*, L. R., 4 P. C. 236; *Dias v. De Livera*, 5 App. Cas. (P. C.) 123, 136.

(*w*) See Will. Exors., p. 7 (10th ed.). See also 1 Cowp. 268; 1 Add. 277.

(*x*) *In bonis Lovegrove*, 2 Sw. & Tr. 453. In *In bonis Piazzzi-Smyth* (*supra*) the will was partly joint and partly mutual.

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the dispositions of the deceased testator (*y*). But such a compact must be clear and fair in its terms to make it binding (*z*).

Probate how
far conclusive
as to
personalty.

V.—Effect of Probate.—“The granting of probate,” says Mr. Jarman (*a*), “is conclusive as to the testamentary character of the instrument in reference to personalty” (*b*). Everything included in the probate copy (*c*), but no word besides (*d*), must be taken by the Court of Construction to be part of the will, and the original will cannot be appealed to for the purpose of shewing that such copy is erroneous (*e*). Thus where probate was granted, with cross lines drawn over the bequests of certain legacies, Lord Cranworth held that it was to be taken as conclusively settled by the probate, that the will was at its execution in the state in which it was then found; i.e., that the testator had executed the instrument with the cross lines drawn over it (*f*). That being so, the only question for him to determine was, what did the instrument mean? and he thought the meaning was, that the testator’s original intention to give the legacies had ceased, and that he had placed the lines there to shew this. The result was that the legacies were struck out (*g*). Neither was it competent for the Court of Chancery, on the ground that legacies given by a

(*y*) *Dufour v. Pereira*, 1 Dick. 419; *Stone v. Hoskins*, [1905] P. 194, where a fuller report of the judgment in *Dufour v. Pereira* is referred to.

(*z*) *Lord Walpole v. Lord Orford*, 3 Ves. 402. As to promises to make testamentary dispositions in favour of particular persons, see above, p. 28.

(*a*) First edition, p. 22.

(*b*) “See *Douglas v. Cooper*, 3 My. & K. 378. The executors are considered as representing the legatees, in regard to the litigation respecting the validity of the will; and unless a case of fraud and collusion can be made out against them, the legatees are bound by the adjudication in the suit to which the executors are parties: *Colvin v. Fraser*, 2 Hagg. 292; *Wood v. Medley*, 1 Hagg. 645; *Newell v. Weeks*, 2 Phillim. 224; and that, too, though the same persons are executors under two conflicting testamentary instruments: *Hayle v. Hasted*, 1 Curt. 236. The Court, however, sometimes directs the parties interested to be brought before it: *Reynolds v. Thrupp*, 1 Curt. 570.”

[Note by Mr. Jarman.] But if the administration of the property is affected by a question as to the testator’s domicile, the executors are not deemed to represent the persons interested for

the purpose of raising the question of domicile, and the decision of the Probate Court on that question will not bind the parties in a suit for the administration of the estate: *Concha v. Concha*, 11 App. Cas. 541.

(*c*) *Gann v. Gregory*, 3 D. M. & G. 777. Probate in facsimile was also granted in *In bonis Raine*, 34 L. J. P. 125, post, Chap. V.

(*d*) *Barnaby v. Tassell*, L. R., 11 Eq. 368. As to omission from the probate of scurrilous imputations on character, see *In bonis Honeywood*, L. R., 2 P. & D. 251. As to the omission from the probate of words inserted by mistake, see ante, p. 30.

(*e*) But the Court sometimes looks at the original will to see whether the punctuation or the mode in which it is written throws any light on its construction: post, p. 44. If the probate copy is erroneous, it ought to be sent back to the Court of Probate for rectification.

(*f*) The general presumption is that alterations in a will were made after its execution: see post, Chap. VII.; but that is for the consideration of the Court of Probate.

(*g*) *Gann v. Gregory*, 3 D. M. & G. 777.

codicil were fraudulently obtained, to declare the legatee a trustee for the person who would otherwise have taken. The objection on the ground of fraud should be taken in the Probate Court, which, on being satisfied of the fraud, would direct probate to issue, omitting that part containing the bequest complained of (*h*), or declaring that the legatees are trustees for the claimant (*i*). So if it is alleged that words have been inserted in the will by mistake, this can only be corrected by the Court of Probate (*j*). And practically this division of jurisdiction is continued as between the Chancery and Probate Divisions of the High Court of Justice (*k*), the judges of the former Division declining (in their discretion) to exercise the jurisdiction of the latter in matters of probate (*l*).

The Court of Probate Act, 1857 (*m*), gives to probate, after citation of the heir and other persons interested, and proof in solemn form, the same effect with regard to realty as it had before with regard to personalty (*n*). But the granting of probate in common form had no effect as regards real estate, either freehold or copyhold (*o*), except (under the Act of 1857) to furnish *prima facie* evidence of the validity and contents of the will (*p*).

Under the old law, a will disposing of real estate only was not entitled to probate (*q*) unless it appointed an executor, in which case it was entitled to probate (*r*); and if the executor renounced,

As to realty.

Will of real estate, whether entitled to probate.

(*h*) *Allen v. M'Pherson*, 1 H. L. Ca. 191, 11 Jur. 785, affirming 1 Phil. 133, and reversing 5 Beav. 469; *Hindson v. Weatherill*, 5 D. M. & G. 301. So the Court of Chancery had no jurisdiction to set aside a will of lands for fraud. The remedy was by ejectment: *Jones v. Gregory*, 2 D. J. & S. 83.

(*i*) *Betts v. Doughty*, 5 P. D. 26. Probate may also be revoked on the ground of fraud: *Birch v. Birch*, [1902] P. 130.

(*j*) *Re Pywater*, 18 Ch. D. 17.

(*k*) *Meluish v. Milton*, 3 Ch. D. 27, 35.

(*l*) *Pinney v. Hunt*, 6 Ch. D. 98; *Bradford v. Young*, L. R., 26 Ch. D. 656; *Smart v. Tranter*, L. R., 40 Ch. D. 165, 43 Ch. D. 587. In *Re Birchall*, 29 W. R. 461, the person who had committed the fraud was dead; Malins, V.-C., presumed that he had acted properly on the ground that he was a person "of the greatest apparent respectability and holding the highest offices."

(*m*) 20 & 21 Vict. c. 77, ss. 61, 62.

(*n*) To bring a will within the purview of this enactment, it must be one which both as to realty and personalty

is to be tested by the same considerations. For if there were any difference between them, it would be absurd to enact that probate of one should be conclusive evidence of the validity of the other. Consequently it must be a will executed since and according to the stat. 1 Vict. c. 26: *Campbell v. Lucy*, L. R., 2 P. & D. 209. It is not necessary to cite the assignee of the heir; if the heir is a party, his assignee will be bound: *Jones v. Jones*, L. R., 7 P. D. 66.

(*o*) *Hume v. Rundell*, 6 Madd. 331. See also *Bonser v. Bradshaw*, 5 Jur. N. S. 86; *Loffus v. Maw*, 3 Giff. 592.

(*p*) *Barracrough v. Greenhough*, L. R., 2 Q. B. 612.

(*q*) *In bonis Bootle*, L. R., 3 P. & D. 177; *In bonis Lloyd*, 9 P. D. 65; *In bonis Gunn*, ib. 242 (conversion of money into realty, &c.).

(*r*) *O'Dwyer v. Geare*, 1 Sw. & Tr. 465; *In bonis Hornbuckle*, 15 P. D. 149. In *Brownrigg v. Pike*, 7 P. D. 61, and in *In bonis Cubbon*, 11 P. D. 169, the testatrix also had separate personal estate.

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a grant of administration with the will annexed would be made (s). But in the case of a testator who makes a will disposing of real estate (t) and dies since December 31, 1897, the real estate vests on his death in his personal representatives, and their assent is necessary to any devise contained in the will. In such a case, therefore, the will must be proved, and the Land Transfer Act, 1897, accordingly enacts that probate and administration may be granted in respect of real estate only, although there is no personal estate.

As to probate of appointments under testamentary powers, see Chapter XXIII.

Limited
effect of
probate.

Even with respect to personal estate, the granting of probate of any paper has no other effect than to establish generally its claim to be received as testamentary (tt); and it remains for the Court of Construction to determine the meaning and effect of the instrument thus stamped with a testamentary character (u). The adjudication of this Court may, and often does, render the paper wholly nugatory. It may be found not to contain any intelligible disposition of the deceased's property (v), or to be in substance the same as or in substitution for another paper of which probate has been granted (w); or that its provisions are invalid according to the law of a foreign country, which constituted the domicile of the maker at the time of his decease (x); in all which cases the instrument so proved operates merely as an appointment of an executor, who distributes the property as under an intestacy.

Original will
may be
examined by
Court of
Construction.

And to determine the construction, the original will, both of real and personal property, may be looked at (y). It was said, indeed, by Sir W. Grant (z), that his decision on the construction of the will before him could not depend on the grammatical skill of the writer, in the position of the characters expressive of a parenthesis: that it was from the words and from the context, not from the punctuation, that the sense must be collected. And

(s) *In bonis Jordan*, L. R., 1 P. & D. 555.

(t) "Real estate" does not include copyholds or customary freeholds where admission is necessary: Land Transfer Act, 1897, s. 1, subs. 4.

(tt) As to what papers are testamentary, see *In bonis Durance*, L. R., 2 P. & D. 406; *Toomer v. Sobinska*, [1907] P. 106. Compare *In b. Da Silva*, 30 L. J. P. cited ante, p. 40.

(u) *In bonis Mundy*, 30 L. J. P. 85.

(v) See *Gawler v. Standerwick*, 2 Cox, 16; *Mayor, &c., of Gloucester v. Wood*, 3 Hare, 131, 1 H. L. Ca. 72.

(w) See *Heming v. Clutterbuck*, 1 Bli. N. S. 479; s.c. nom. *Hemming v. Gurrey*, 1 D. & Cl. 35; *Walsh v. Gladstone*, 1 Phil. 290, 13 Sim. 261; *Campbell v. Radnor*, 1 Br. C. C. 271.

(x) *Thernton v. Curling*, 8 Sim. 310; see ante, p. 7, n. (s). Probate is not conclusive of domicile: *Bradford v. Young*, 26 Ch. D. 656; *De Mora v. Concha*, 29 Ch. D. 268.

(y) See Mr. Hare's note to *Walker v. Tipping*, 9 Ha. 802, n., where *Philipps v. Chamberlaine*, 4 Ves. 57, and *Compton v. Bloxham*, 2 Coll. 204, are referred to.

(z) *Sanford v. Raikes*, 1 Mer. 651.

there are, probably, few imaginable cases in which punctuation could exercise a very important influence upon the construction (a). But in recent times, the Courts have without hesitation adopted the practice of examining original wills "with a view to see whether anything there appearing,—as, for instance, the mode in which it was written, how 'dashed and stopped,'—could guide them in the true construction to be put upon it" (b). And where a will is in a foreign language, and the probate copy is a translation, the Court may look at the original will, or a copy of it, in order to ascertain its meaning (c).

Probate of the will of a married woman is now granted to her executor in the ordinary form without any exception or limitation (d). Formerly it was limited to property which she had power to dispose of and had disposed of, with administration *cæterorum* to the husband; and under the Judicature Act, 1873 (e), it was the duty of the Probate Division (so far as could properly and conveniently be done) to decide whether any particular fund was separate property or not (f). Formerly also if a married woman made a will by which she merely exercised a power of appointment, and appointed an executor, probate could not be granted (g). The present practice is based on the Married Women's Property Act, 1882 (h); but is not confined to cases where the testatrix has the powers conferred by that Act. Whether

Probate of
wills of
married
women.

(a) See per Sir E. Sugden, *Heron v. Stokes*, 2 Dr. & War. 98; and per Lord Westbury, *Gordon v. Gordon*, L. R., 5 H. L. 276.

(b) Per K. Bruce, L. J., in *Manning v. Purcell*, 24 L. J. Ch. 523, n.; also reported 7 D. M. & G. 55. See also *Compton v. Bloxham*, 2 Coll. 201; *Child v. Elsworth*, 2 D. M. & G. 683; *Oppenheim v. Henry*, 9 Hare, 802, n.; *Gauntlett v. Carter*, 17 Beav. 590; *Milsome v. Long*, 3 Jur. N. S. 1073; *Re Harrison*, 30 Ch. D. 390. In *Gann v. Gregory*, 3 D. M. & G. 780 (already referred to), Lord Cranworth expressed his opinion that the will could not be looked at for the purpose of virtually reversing the decision of the Probate Court with respect to the form of the probate copy in question. In *Re Wyatt*, 4 T. L. R. 245, the Court referred to the original will for the purpose of supplying the name of an annuitant: it had been erased and was left blank in the probate copy.

(c) *L'Fit v. L'Batt*, 1 P. W. 526; *Re Cliff's Trusts*, [1892] 2 Ch. 229. The

proper course, however, seems to be to apply to the Court of Probate to correct the translation. In *Steignes v. Steignes*, Mos. 296, the word *meubles* in the original will was translated "moveables" in the probate copy, "by which," said the Solicitor-General, *arguendo*, "we must go": and the Court construed the will as if "moveables" had been the word used by the testator.

(d) *In bonis Price*, 12 P. D. 137. See also *Re Lambert's Estate*, 39 Ch. D. 626; *Smart v. Tranter*, 43 Ch. D. 587; *Re Atkinson*, [1899] 2 Ch. 1. It is not necessary that the will should dispose of her separate estate: *In bonis Ievers*, 13 L. R. Ir. 1.

(e) 36 & 37 Vict. c. 66.

(f) *In bonis Tharp*, 3 P. D. 76.

(g) *Tugman v. Hopkins*, 4 M. & Gr. 389; *O'Dwyer v. Geare*, 1 Sw. & Tr. 465; *In bonis Barden*, L. R., 1 P. & D. 325; *In bonis Tharp*, 3 P. D. 76; *In bonis Tomlinson*, 6 P. D. 209.

(h) 45 & 46 Vict. c. 75.

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she has or not any such powers the probate is conclusive, as regards the right of the executors to get in the assets, in the Chancery Division, but it does not alter the beneficial title of the husband to any property which the wife had no power to dispose of; the executors will hold such property in trust for the husband (*i*). If no executor is appointed and there is a partial intestacy, the husband is entitled to administration with the will annexed in preference to the next of kin of the testatrix (*j*).

Will of
married
woman
domiciled
abroad.

If a married woman domiciled abroad makes a will, appointing executors, which is invalid by the law of her domicile, but is operative under English law (e.g., as an appointment under a power), administration with the will annexed may be granted to the executors (*k*).

Revocation
of probate.

If probate of an invalid will is granted in common form, the executor can sue for and give a good discharge for any debt due to the deceased (*l*). If probate is revoked, it is for some purposes treated as a nullity ab initio (*m*), but how far this doctrine extends does not seem to have been decided.

(*i*) *Smart v. Tranter* (in C. A.), 43 Ch. D. 587, reversing on the latter point the decision of Kay, J., s.c. 40 Ch. D. 165.

(*j*) Rules of 1887, cited 39 Ch. D. 627, n. And if there is an executor, but separate estate is undisposed of, the husband surviving is entitled bene-

ficially: *Re Lambert's Estate*, 39 Ch. D. 626.

(*k*) *In bonis Tréfond*, [1899] P. 247; *In bonis Vannini*, [1901] P. 330.

(*l*) Court of Probate Act, 1857, ss. 77-8.

(*m*) Per Lord Davey in *Chan Kit San v. Ho Fung Hang*, [1902] A. C. at p. 260.

CHAPTER III.

PERSONAL DISABILITIES OF TESTATORS.

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A WILL made during any personal disability is not rendered valid by the fact of the disability having been removed during the life of the testator, unless its removal has been followed by some act of confirmation or adoption amounting in law to re-execution of the will (*a*). Removal of disability after execution of will.

I.—Infancy.—At common law, infants of a certain age, namely, Old law. males of fourteen and females of twelve, were competent to dispose by will of personalty (*b*), and such a will was valid, although the testator or testatrix afterwards lived to attain majority without confirming it (*c*). In some places a custom existed enabling infants of a definite and reasonable age to devise real estate (*d*), but in the absence of such a custom infants were incompetent to dispose of real estate by will (*e*). Under the statute 12 Car. 2, c. 24, a father, even though an infant, could appoint guardians of his children by will.

The Wills Act, 1837, enacts (sect. 7) that no will made by any Present law. person under the age of twenty-one years shall be valid. And by the definition clause in the act this provision is extended to appointments of testamentary guardians under the Act of Charles II. Sect. 11 of the Wills Act exempts from the operation of the act wills of personal estate made by soldiers on actual service

(*a*) *Bunter v. Coke*, 1 Salk. 238, 1 Eq. Ca. Abr. 172, pl. 3. See also *Noble v. Willock* (or *Willock v. Noble*), and the other cases cited post, p. 54.

(*b*) *Bishop v. Sharp*, 2 Vern. 469 ;

Whitmore v. Wild, 2 Ch. Rep. 383 ;
Hyde v. Hyde, 1 Eq. Ca. Abr. 408.

(*c*) *Hinckley v. Simmons*, 4 Ves. 160.

(*d*) 2 Anders. 12.

(*e*) Stat. 34 & 35 Hen. 8, c. 5, s. 14.

CHAPTER III.

Mode of computing age.

or by mariners at sea, but with this exception (as to which see Chapter VI.) every will made by an infant is invalid.

"It may not be quite superfluous to remark," says Mr. Jarman (*e*), "that, in computing the age of a person for testamentary or other purposes, the day of his birth is included; thus, if he were born on the 16th of January, 1800, he would have attained his majority on the 15th of January, 1821 (*f*); and as the law does not recognise fractions of a day (*g*), the age would be attained at the first instant of the latter day."

Onus probandi.

II.—Insanity, Weakness of Mind, &c.—The general rule is "that the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator" (*h*). But if a will is rational on the face of it, and appears to be duly executed, it is presumed, in the absence of evidence to the contrary, to be valid (*i*).

Wills of idiots.

The will of an idiot is of course void (*j*). Mental imbecility arising from advanced age, or produced permanently or temporarily by excessive drinking, or any other cause, may destroy testamentary power (*k*).

Of persons deaf and blind.

"A person who has been from his nativity blind, deaf and dumb, is intellectually incapable of making a will, as he wants those senses through which ideas are received into the mind" (*l*). Blindness or deafness alone, however, produces no such incapacity. And it seems that a person born deaf and dumb, but not blind, though *primâ facie* incapable (*m*), may be shewn to have capacity, and to understand what is written down (*n*); and

(*e*) First ed. p. 37.

(*f*) *Herbert v. Torball*, 1 Sid. 162, s. o. nom. *Herbert v. Tuckal*, T. Raym. 84, 8 Vin. Dev. G. pl. 20; *Anon.*, 1 Salk. 44; *Howard's Case*, 2 ib. 625. But a person attains "his 25th year" when he becomes 24 years old: *Grant v. Grant*, 4 Y. & C. 256.

(*g*) See *Lester v. Garland*, 15 Ves. 257.

(*h*) *Barry v. Builin*, 2 Moo. P. C. 480; *Browning v. Budd*, 6 Moo. P. C. 435; *Sutton v. Sadler*, 3 C. B. N. S. 87; *Cleare v. Cleare*, L. R., 1 P. & D. 655; *Fulton v. Andrew*, L. R., 7 H. L. 448. This subject has been already referred to in connection with questions of undue influence, fraud, &c., ante, p. 31.

(*i*) See *Foot v. Stanton*, 1 Dea. 19; *Symes v. Green*, 1 Sw. & Tr. 401.

(*j*) *Dyer*, 143b.

(*k*) See Swinb. P. II. ss. 5, 6. And as to the difference in proof of lucid intervals in case of imbecility from drinking and ordinary imbecility, see *Ayrey v. Hill*, 2 Add. 206. In *Foot v. Stanton*, 1 Deane, 19, the will of a person subject to epileptic fits was admitted to probate, although there was no evidence that the testatrix knew its contents, the memory of the attesting witnesses failed, and a third person declared she was unfit to make a will.

(*l*) First edition of this work, p. 29. See Co. Litt. 42b.

(*m*) Swinb. P. II. s. 10.

(*n*) *Dickenson v. Blissett*, 1 Dick. 268; *In re Harper*, 6 M. & Gr. 732. As to the evidence required, see *In bonis Owston*, 31 L. J. P. 177; *In bonis Geale*, 33 L. J. P. 125.

this of course applies more strongly to a person deaf and dumb from accident (*o*). Indeed, it has even been held that a will need not be read over to a blind testator previously to its execution, provided there be proof aliunde of a clear knowledge of the contents of the instrument (*p*); but it is almost superfluous to observe, that, in proportion as the infirmities of a testator expose him to deception, it becomes imperatively the duty, and should be anxiously the care, of all persons assisting in the testamentary transaction, to be prepared with the clearest proof that no imposition has been practised (*q*). This remark especially applies to wills executed by the inmates of lunatic asylums (*r*), or any other persons habitually or occasionally afflicted with insanity.

In cases of weakness of mind arising from the near approach of death, strong proof is required that the contents of the will were known to the testator (*s*), and that it was his spontaneous act (*t*). It is not, however, essential that the testator should at the time he signs the will be mentally competent to understand it: if while he is mentally competent he gives instructions for his will, and it is prepared in accordance with them, and at the time of signing it he understands that he is executing the will for which he had given instructions, the will is valid, although at the time of signing it he may not be able to understand its provisions in detail (*u*). On the other hand, a suspicion is justly entertained of a will conferring large benefits on the person by whom or by whose agent it was prepared (*v*), or of a will in favour of a medical attendant in

In case of weakness of mind, strong proof required as to knowledge of contents of will.

(*o*) Swinb. P. II. s. 10.

(*p*) *Longchamp d. Goodfellow v. Fish*, 2 B. & P. N. R. 415; *Fincham v. Edwards*, 3 Curt. 63; and see *Mitchell v. Thomas*, 6 Moo. P. C. C. 137.

(*q*) As to what amounts to undue influence in the case of persons of weak intellect, see *Baudains v. Richardson*, [1906] A. C. 169, and other cases cited ante, p. 31.

(*r*) "Lord Eldon once mentioned his having been concerned in a cause, in which a gentleman who had been some time insane, and was confined at Richmond, had made a will. It was, his Lordship observed, of large contents, proportioning the different divisions with the most prudent care, with a due regard to what he had previously done for the objects of his bounty, and in every respect pursuant to what he declared before his malady he intended to have done; and it was held that he was of sound mind at the time. See 1 Dow, 179" [Note by Mr. Jarman]. *Martin v. Johnston*, 1 Fost. & Finl. 122;

Nichols v. Binns, 1 Sw. & Tr. 239. In the case of a person found lunatic by inquisition, the reports of the Board of Visitors are not available as evidence to prove the state of his mind at any particular time by reason of s. 186 of the Lunacy Act, 1890: *Roe v. Nia*, [1893] P. 55.

(*s*) *Mitchell v. Thomas*, 6 Moo. P. C. C. 137, 12 Jur. 967; *Durnell v. Corfield*, 1 Rob. 51, 8 Jur. 915. But see *Reece v. Pressey*, 2 Jur. N. S. 380, and compare the cases cited above, p. 30, where the necessity of an animus testandi is explained.

(*t*) *Tribe v. Tribe*, 1 Rob. 775, 13 Jur. 793; and see *Dufaur v. Croft*, 3 Moo. P. C. C. 136; *Harwood v. Baker*, ib. 282; *In bonis Field*, 3 Curt. 752; *Longford v. Purdon*, 1 L. R. Ir. 75; *Archambault v. Archambault*, [1902] A. C. 575.

(*u*) *Parker v. Felgate*, 8 P. D. 171; *Perera v. Perera*, [1901] A. C. 354.

(*v*) *Paske v. Ollatt*, 2 Phillim. 323; *Durling v. Loveland*, 2 Curt. 225; *Baker v. Batt*, 2 Moo. P. C. C. 317; *Parker v.*

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Part of a will
may be void
and the rest
valid.

Lunatics.

Fraud, or
undue influ-
ence over a
weak mind.

Inquisition
primâ facie
evidence of
testamentary
incapacity.

whose house the testator resided (*w*); and the rule requiring strict proof is not confined to these cases, but extends to all cases in which circumstances exist which excite the suspicion of the Court (*x*).

Where undue influence has been exercised in obtaining gifts by will, the whole will is not necessarily void, but it will be left to the jury to determine what gifts were obtained by undue influence, and such gifts only will be declared void (*y*).

Mr. Jarman continues (*yy*), "A mad or lunatic person cannot, during the insanity of his mind, make a testament of land or goods; but if, during a lucid interval, he make a testament, it will be good (*z*). Lord Hardwicke has observed that fraud and imposition upon weakness may be a sufficient ground to set aside a will of real, much more a will of personal estate (*sed quære* as to this distinction?), although such weakness is not a sufficient ground for a commission of lunacy (*a*). And in *Mountain v. Bennet* (*b*), Lord C. B. Eyre laid it down, that although a man may have a mind of sufficient soundness and discretion to manage his affairs in general, yet if such a dominion or influence be obtained over him as to prevent his exercising that discretion in the making his will, he cannot be considered as having such a disposing mind as will give it effect. In this case the will was attempted to be invalidated on the ground that it was obtained by the undue influence of the testator's wife, whom he had married from an inferior station, but the will was finally supported, amidst much conflicting testimony as to the state of the testator's mind, principally on the evidence of the attesting witnesses, who were persons of high character and respectability, and were unanimous as to the testator's sanity and freedom from control.

"It appears, that though an inquisition finding a man a lunatic is primâ facie evidence of lunacy during the whole period covered by such inquisition, yet it does not preclude proof that the execution of a will, or any other act, occurred during a lucid interval (*c*).

Duncan, 62 L. T. 642; *Brown v. Fisher*, 63 L. T. 465.

(*w*) *Jones v. Godrich*, 5 Moo. P. C. C. 16; and see *Major v. Knight*, 4 No. of Cas. 661; *Cockcraft v. Rawles*, ib. 237.

(*x*) *Tyrrill v. Painton*, [1894] P. 151, supra, p. 30.

(*y*) *Trimleston v. D'Alton*, 1 D. & Cl. 85; *Hippesley v. Homer*, T. & R. 48, n.; *Lord Guillamore v. O'Grady*, 2 J. & Lat. 210; *Haddock v. Trotman*, 1 Post. & Finl. 31; *Allen v. M'Pherson*, 1 H. L. Ca. 191, 11 Jur. 785; *Farrelly v. Corri-*

gan, [1899] A. C. 563; *Karunaratne v. Ferdinandus*, [1902] A. C. 405.

(*yy*) First ed. p. 30.

(*z*) *Swinb. P. II. s. 3, pl. 1, 4*; *Beverley's Case*, 4 Rep. 123b; *White v. Driver*, 1 Phillim. 84; *Brogden v. Brown*, 2 Add. 441; *Kemble v. Church*, 3 Hagg. 273.

(*a*) 2 Ves. sen. 408.

(*b*) 1 Cox, 355.

(*c*) *Hall v. Warren*, 9 Ves. 605; *In bonis Watts*, 1 Curt. 594; and see *Creagh v. Blood*, 2 J. & Lat. 509; *Snook v. Watts*, 11 Beav. 105; *Cooke v. Chol-*

"The principle is very ably stated by Sir W. Wynn in his judgment in *Cartwright v. Cartwright* (d): 'If you can establish that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved, is sufficient, and the general habitual insanity will not affect it; but the effect of it is this—it inverts the order of proof and of presumption; for, until proof of habitual insanity is made, the presumption is, that the party, like all human creatures, was rational; but where an habitual insanity in the mind of the person who does the act is established, then the party who would take advantage of the fact of an interval of reason must prove it'" (e).

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Lucid
intervals.

It has been laid down that the test of a person being of unsound mind in a legal sense is the existence of a delusion (f), or a belief in facts which an ordinary person would not credit, or a belief which one cannot understand how any person in his senses should hold; and that mere eccentricity of habits or perversion of feeling and conduct, forming what is termed moral insanity, do not constitute legal incapacity (g). General insanity must be distinguished from partial insanity or monomania. In case of the former, a lucid interval, a real absence at the time of making the will, of the disease itself, and not of its apparent delusions only, must be shewn (h). In case of the latter, opinions have differed. In *Waring v. Waring* (i), it was laid down by Lord Brougham, that it was incorrect to speak of partial insanity; that a mind unsound on one subject could not be called sound on any; and that unless a lucid interval (as explained above) could be shewn, testamentary incapacity was the necessary consequence, although the subject on which the unsoundness was manifested might be quite unconnected with the testamentary disposition in question. It is not perfect sanity, however, but only a mind that comprehends the testamentary act, that is required; and in *Banks v.*

In what un-
soundness of
mind consists.

A disposing
mind suffices.

mondely, 2 Mac. & G. 22; *Bannatyne v. Bannatyne*, 16 Jur. 864; *Roe v. Nix*, [1893] P. 55. As to deeds, see *Re Walker*, [1905] 1 Ch. 160.

(d) 1 Phillim. 100; and see 2 ib. 465, 2 Add. 209; *Steed v. Calley*, 1 Keen, 620; *Tatham v. Wright*, 2 R. & My. 1; *Borlase v. Borlase*, 4 No. Cas. 106.

(e) The evidence of sanity was held insufficient in *Groom v. Thomas*, 2 Hagg. 433.

(f) But see *Nichols v. Binns*, 1 Sw. & Tr. 239.

(g) *Pilkington v. Gray*, [1899] A. C.

401; *Frere v. Peacocke*, 1 Rob. 442, 11 Jur. 247. See s.c. in a previous stage, 3 Curt. 664, where a plea of hereditary insanity was disallowed. See also *Grimani v. Draper*, 12 Jur. 925; *Mudway v. Croft*, 3 Curt. 671; *Ditchburn v. Fearn*, 6 Jur. 201; *Goldie v. Murray*, ib. 608; *Austen v. Graham*, 8 Moo. P. C. C. 493.

(h) *Waring v. Waring*, 6 Moo. P. C. C. 341; *Smith v. Tebbitt*, L. R., 1 P. & D. 398.

(i) 6 Moo. P. C. C. 341.

CHAPTER III.

Goodfellow (j), Lord Brougham's doctrine, which it was observed was unnecessary to the decision of the cases in which it was stated, was rejected; and it was decided that monomania, which had not, and was not capable of having, any influence on the provisions of a will, did not destroy the capacity to make one; that the inquiry whether the monomania has or not had any such effect might be difficult, but was not impracticable; and that if, in the result, the Court was convinced that it had, the conclusion must be against the will. So, in *Dew v. Clark (k)*, where the Prerogative Court was called upon to decide as to the testamentary capacity of a gentleman named Stott, an eminent medical electrician, who had an only child, against whom he had conceived a strong and groundless aversion, exhibited in a series of absurd acts of harshness and severity, and which he followed up by making a will in favour of some collateral relations, to the almost total exclusion of such only child; Sir J. Nicholl and the Court of Delegates successively pronounced against the validity of the will, after the delivery of very able and elaborate judgments, which should be perused by all inquirers into this interesting subject (*l*). And a like decision was made in the somewhat similar case of *Boughton v. Knight (m)*.

Religious delusions.

Beliefs connected with religious subjects may amount to delusions which prove testamentary incapacity (*n*). But the fact that a person believes himself to be commanded by the Deity to carry out some particular work, does not of itself prove that he entertains delusions which incapacitate him from making a valid will (*o*).

Lord Thurlow is said to have intimated an opinion, that where lunacy is once established by clear evidence, the party ought to be restored to as perfect a state of mind as he had before; but Lord Eldon expressed his dissent from this notion (*p*).

Where there is a question as to the testamentary capacity of a

(j) L. R., 5 Q. B. 549. See also *Smee v. Smee*, 5 P. D. 84; *Murfett v. Smith*, 12 P. D. 116; *Jenkins v. Morris*, 14 Ch. D. 674. In the latter case it was said by Hall, V.-C., that it was immaterial that the monomania was capable of influencing the will, if in fact it had not done so.

(k) 3 Add. 79, 5 Russ. 163; and see *Fowles v. Davidson*, 6 No. Cas. 461. But see *Greenwood's Case*, cited by Lord Erskine in *White v. Wilson*, 13 Ves. 89.

(l) See the remarks on *Dew v. Clark*, in *Smith v. Tebbitt*, L. R., 1 P. & D. 398.

(m) L. R., 3 P. & D. 64.

(n) *Smith v. Tebbitt*, supra.

(o) Per Lord Davey in *Hope v. Campbell*, [1899] A. C. at p. 14.

(p) *Ex parte Holyland*, 11 Ves. 10. See further as to lunatics and their acts, *Lord Ely's Case* in D. P. in Ireland, 1784; 1 Ridg. P. C. 16; and the six appendices; Lord Thurlow's celebrated judgment in *Att.-Gen. v. Parnter*, 3 Br. C. C. 441; particularly *Greenwood v. Greenwood*, cited ib. p. 444; 1 Fonbl. Eq. 46. See also *Niell v. Morley*, 9 Ves. 478; *Hall v. Warren*, ib. 605; *Chambers and Yatman v. Queen's Proctor*, 2 Curt. 415; and see 2 De G. & S. 620.

testator, an executor propounding the will does so at his own risk, if he has means of knowing the true state of mind of the deceased (*q*).

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III.—Coverture under the Old Law.—Before the Married Women's Property Act, 1882, a married woman was generally, subject to the exceptions to be presently noticed, incapable of making a valid testamentary disposition of real or personal property. And, inasmuch as the former law in this respect holds good with regard to all property acquired before 1883 by a woman married before that date (*r*), the pre-existing law still requires consideration.

Disability of
coverture
under the
old law.

A married woman subject to the old law cannot dispose by will of the legal estate in freehold land except by the exercise of a power of appointment (*s*). And such a power, if given to her by a marriage settlement, and thereby made exercisable during coverture, may be exercised by her during any subsequent coverture (*t*). In the case of copyholds, a married woman can devise lands which she has surrendered (after separate examination and with the consent of her husband) to the use of her will, but a surrender made by an unmarried woman to the use of her will is suspended during her subsequent coverture (*u*). A married woman can dispose of an equitable fee simple or other interest in land, whether freehold or copyhold, if it belongs to her for her separate use (*v*), and it is immaterial that the legal estate is not vested in trustees, since the husband, and all persons on whom the legal estate may devolve, are deemed trustees for the persons to whom the wife has given the equitable interest (*w*).

Land.

In *Re Currey* (*x*), Chitty, J., expressed the opinion that a restraint on anticipation does not prevent a married woman from disposing by will of property given to her separate use.

Restraint on
anticipation.

(*q*) *Twist v. Tye*, [1902] P. 92; *Page v. Williamson*, 87 L. T. 146.

(*r*) *Re Harris's Settled Estates*, 28 Ch. D. 171; *Re Cuno*, 43 Ch. D. 12.

(*s*) Sugden on Powers, 153. See the case of *Lawrence v. Wallis* (2 Bro. C. C. 319), discussed *ib.* 463; *Re Anstis*, 31 Ch. D. 596.

(*t*) See *Burnet v. Mann*, 1 Ves. sen. 156; *Hawksley v. Barrow*, L. R., 1 P. & D. 147. But of course a contrary intention, if expressed, will be given effect to. See *post*, p. 54, n. (*d*).

(*u*) Elton on Copyholds, 85; *George v. Jew* (*George d. Thornbury v. Anon.*),

Amb. 627; *Driver v. Thompson*, 4 Taunt. 294.

(*v*) *Taylor v. Meads*, 4 D. J. & S. 597; *Pride v. Bubb*, L. R., 7 Ch. 64. And the will defeats the husband's equitable right to curtesy: *Cooper v. Macdonald*, 7 Ch. D. 288. In *Troutbeck v. Boughey*, L. R., 2 Eq. 534, the separate use was attached only to the annual rents. As to the words which will create a separate use, see Chap. XXXIX.

(*w*) *Hall v. Waterhouse*, 5 Giff. 64; *Bennet v. Davis*, 2 P. W. 316.

(*x*) 56 L. T. 80.

CHAPTER III.

Ante-nuptial contract.

It seems also that a contract before marriage as to specified lands is sufficient to give the wife an equitable power to devise them (y), but a mere renunciation by the husband of his marital rights in respect of his wife's real property is not sufficient to give her a testamentary power (z).

Personalty.

A married woman subject to the old law can make a valid will of personalty in pursuance of an agreement before marriage, or of an agreement made after marriage for consideration (a), or if the husband assents to the particular will, either before or after her death, and survives her (b). Formerly, if the husband proved her will in general form, the probate operated as an assent, but since the alteration in the practice with regard to the probate of married women's wills, this is no longer so (c).

Power of appointment.

A married woman subject to the old law can dispose of personal property over which she has an absolute power of appointment by will, notwithstanding coverture (d), but if she has a power of appointment exercisable only in the event of her dying during the lifetime of her husband, a will made in exercise of the power is inoperative if she survives him (e), unless of course it is republished (f).

Separate use.

A married woman subject to the old law can also dispose by will of personal property belonging to her for her separate use (g). And

(y) *Wright v. Lord Cadogan*, 2 Ed. 239. See *Churchill v. Dibben*, 9 Sim. 447, n.; *Dillon v. Grace*, 2 Sch. & Lef. 463.

(z) *Dye v. Dye*, 13 Q. B. D. 147.

(a) 1 Roper, *Husb. and Wife*, 170.

(b) *Willock v. Noble*, L. R., 7 H. L. 580; and cases there cited: *Elliot v. North*, [1901] 1 Ch. 424. He must know the contents of the will: *Ex parte Fane*, 16 Sim. 406; *In bonis Reay*, 4 Sw. & Tr. 215, 31 L. J. P. 154; *In bonis Isaacs*, 31 L. J. P. 158. The assent may be retracted at any time before probate, unless it has been given or confirmed after the wife's death: *Maas v. Sheffield*, 1 Rob. 364, 10 Jur. 417. For other examples of wills ex assensu viri, see *In bonis Cooper*, 6 P. D. 34; *Chappell v. Charlton*, 56 L. J. P. 73. As to circumstances which will raise a presumption of the husband's consent, see *Brook v. Turner*, 2 Mod. 172.

(c) *Re Atkinson*, [1899] 2 Ch. 1.

(d) See Farwell on Powers, 116; *Bernard v. Minshull*, Jo. 276. As to the effect of s. 24 of the Wills Act, see post, Chap. XII. A power to appoint

during coverture may be restricted to a particular coverture: *Horseman v. Abbey*, 1 J. & W. 381.

(e) *Price v. Parker*, 16 Sim. 198; *Trimmell v. Fell*, 16 Bea. 537; *Willock v. Noble*, L. R., 7 H. L. 580; *Re Cuno*, 43 Ch. D. 12.

(f) As to republication generally, see Chap. VIII.; and as to republication with reference to powers, see Chap. XXIII.

(g) *Willock v. Noble*, supra; *Taylor v. Meads*, supra, p. 53; *Rich v. Cockell*, 9 Ves. 369; *Parker v. Brooke*, ib. 583; *Fettiplace v. Gorges*, 1 Ves. jun. 46, 3 Br. C. C. 8; *Caton v. Rideout*, 1 Mac. & G. 599, 2 H. & Tw. 33; *Rowe v. Rowe*, 2 De G. & S. 294; *Charlemont v. Spencer*, 11 L. R. Ir. 490 (property acquired after will). In *Bishop v. Wall* (3 Ch. D. 194), property was held upon trust for a married woman for her separate use for life, with a power of appointment by deed or will if she died during her husband's lifetime, and if she survived him, upon trust for her, her executors, administrators, and as-

it is immaterial that the property is not expressly vested in trustees for her (*h*). If the separate use applies to the corpus or principal, it attaches on all the produce or accumulations of such principal (*i*). Savings out of an allowance made by a husband for the separate maintenance of his wife are in equity treated as her separate estate (*j*); of which, therefore, she may dispose by will. But savings out of pin-money are said to belong to the husband (*k*); on the principle that pin-money is an allowance made for a particular purpose, and, if not applied for that purpose, reverts to the donor.

CHAPTER III.

Savings out of main-tenance.

Pin-money.

The separate use may, however, be limited to the income of the property, whether real or personal, so as not to apply to the corpus (*l*), and then of course she cannot, under the old law, dispose of the corpus by will.

Separate use attaching to income and not to corpus.

And under the old law a woman might, while discover, deal with the corpus of property settled to her separate use in such a way as to put an end to the separate use (*m*).

Extinguish-ment of separate use.

The opinion of Chitty, J. (*n*), that a restraint on anticipation does not prevent a married woman from disposing by will of property belonging to her for her separate use, has been already referred to.

Restraint on anticipation.

signs for her separate use; she made a will during coverture in exercise of the power, and survived her husband: it was held by Malins, V.-C., on the authority of *Taylor v. Meads* (4 D. J. & S. 597), that the will was a good disposition of the property: *sed quære*.

(*h*) *Rich v. Cockell*, 9 Ves. 369; *Parker v. Brooke*, 9 Ves. 583; and cases cited above, p. 53, n. (*w*); *Newlands v. Paynter*, 4 My. & Cr. 408; *Wright v. Wright*, 2 J. & H. 647; *Gardner v. Gardner*, 1 Giff. 126. A declaration in the husband's will is sufficient to shew that the property is the wife's separate estate, and does not merely operate as an assent, which, as we have seen, would be insufficient if the husband died first: *In bonis Smith*, 1 Sw. & Tr. 125, 27 L. J. P. 39. A declaration of trust by the husband in favour of his wife for her separate use may be either express (*Baddeley v. Baddeley*, 9 Ch. D. 113) or implied by his acts, as, where with his assent she carries on a separate business, and the profits and stock in trade are treated as her separate property: *Haddon v. Fladgate*, 1 Sw. & Tr. 48, 27 L. J. P. 21; *Ashworth v. Outram*, 5 Ch. D. 923. As to what is separate trading by a feme

covert, see *Lovell v. Newton*, 4 C. P. D. 7, a case under the Married Women's Property Act, 1870.

(*i*) *Fettiplace v. Gorges*, *supra*; *Gore v. Knight*, Pre. Ch. 255, 2 Vern. 535; *Ashton v. M'Dougall*, 5 Beav. 56; *Dar-kin v. Darkin*, 17 Beav. 578; *Humphery v. Richards*, 25 L. J. Ch. 442; *Scales v. Baker*, 28 Beav. 91; *In bonis Tharp*, 3 P. D. 76. But under the old law, if any income was received after the death of the husband, it would not pass by a will made during coverture: *Mayd v. Field*, 3 Ch. D. 587; *Re Wilson*, 26 W. R. 848. See *Willock v. Noble*, *post*.

(*j*) *Brooke v. Brooke*, 25 Beav. 342; *In b. Tharp*, 3 P. D. 76 (separate allowance to wife of lunatic). Secus at law, *Messenger v. Clark*, 5 Exch. 388.

(*k*) *Jodrell v. Jodrell*, 9 Beav. 45; *Howard v. Digby*, 2 Cl. & Fin. 634; and per Wood, V.-C., *Barrack v. M'Culloch*, 3 K. & J. 114. See, however, Sugden's Law of Property, p. 163, *contra*.

(*l*) *Crosby v. Church*, 3 Bea. 485; *Hanchett v. Briscoe*, 22 Bea. 496; *Troutbeck v. Broughy*, L. R., 2 Eq. 534; *Re Davenport*, [1895] 1 Ch. 361.

(*m*) *Wright v. Wright*, 2 J. & H. 655; *Buttanshaw v. Martin*, John. 89.

(*n*) *Re Currey*, 56 L. T. 80.

CHAPTER III.

Judicial
separation
and protec-
tion orders.

A woman who has been deserted by her husband, and has obtained a protection order, can effectually by her will dispose of property acquired by her during the desertion, and the order has a retrospective operation, relating back to the commencement of the desertion (o). But the husband may claim to set aside the will if he can shew that the order was obtained by fraud (p). Under the same act (Matrimonial Causes Act, 1857) a woman who has obtained a judicial separation is thenceforward in the position of a feme sole, and so is a woman who has obtained a separation order under the Summary Jurisdiction (Married Women) Act, 1895.

Wife of an
exile may
make a will,

—or wife of a
felon-convict
transported
for life.

Wife of
alien enemy.

A woman, whose husband had been banished for life by Act of Parliament (q), may dispose by will of her real and personal estate; for, as he was civilly defunct, she is restored to the rights and privileges of discoveriture. This doctrine was held to be applicable to the case of a felon-convict transported for life, so as to enable his wife to dispose by will of personalty acquired by her after the conviction (r), although the felon had received a conditional free pardon (s); and when a felon was transported for a definite term of years, his marital rights (and therefore it would seem his wife's conjugal disabilities) were suspended for that period (t).

It was suggested in *Deerly v. Duchess of Mazarine* (u), that the wife of an alien enemy was in the same position as the wife

(o) *In bonis Ellicott*, L.R., 2 P. & D. 274.

(p) *Mudge v. Adams*, 6 P. D. 54; *Mahoney v. McCarthy*, [1892] P. 21.

(q) *Countess of Portland v. Prodders*, 2 Vern. 104.

(r) *In bonis Martin*, 15 Jur. 686; *In bonis Coward*, 34 L. J. P. 120. In the latter case sentence of death had been recorded, so that the felon was attainted, and being thus dead in the eye of the law, was incapable of claiming jure mariti: per Wood, V.-C., in *Gough v. Davies*, 2 K. & J. 627, where *Newsome v. Bowyer*, 3 P. W. 37, is referred to. However, the Court did not take this ground, but relied expressly on *Ex parte Franks*, 1 M. & Sc. 11, 7 Bing. 762, where the felon was transported for a term of years. See also *Atlee v. Hook*, 23 L. J. Ch. 776 (where a legacy bequeathed, after the conviction, to the wife of a felon transported for life, but so far as appears not attainted, was ordered to be paid to her); and per Romilly, M. R., *Re Harrington's Trust*, 29 Beav. 24. Attainder for felony is now abolished, and

the status of a felon-convict regulated by 33 & 34 Vict. c. 23, as to which see post.

(s) Under 5 Geo. 4, c. 84, s. 26, a convict was entitled to retain against the Crown and to recover in the Courts of the United Kingdom personalty acquired by him after receiving such a pardon: *Gough v. Davies*, 2 K. & J. 623. But see and consider *Re Church's Will*, 16 Jur. 517; *Coombs v. Queen's Proctor*, 2 Roberts. 547, 16 Jur. 820 (transportation for term of years), and see now the Act referred to in the last preceding note.

(t) *Ex parte Franks*, 1 M. & Sc. 11, 7 Bing. 762, where it was held that the wife could be made bankrupt. But where the wife of a felon transported for years had died intestate in the husband's lifetime, it was held that the Crown, and not her next of kin, was entitled to her personal property acquired after the conviction: *Coombs v. Queen's Proctor*, 2 Roberts. 547, 16 Jur. 820.

(u) 1 Salk. 116.

of a person banished ; but the point is now of no practical interest, as the disabilities of aliens have been abolished.

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Except in these cases, however, a married woman was under the old law unable to make a valid testamentary disposition of property. Consequently a will made by a married woman during coverture was inoperative to pass property to which she became entitled on or after her husband's death, unless she re-executed or republished it after the determination of the coverture (*v*). So that if property was given upon such trusts as a married woman should during coverture by will appoint, and if she survived her husband upon trust for her absolutely, and she made a will during coverture exercising the power, and survived her husband, the will was inoperative (*w*).

Will of feme covert surviving husband.

But a married woman who is an executrix could always by will appoint an executor to carry on the administration of the estate of the original testator (*x*).

Will of executrix.

Although a married woman under the old law may have no power to make a will, it seems that she may by "writing," under sect. 20 of the Wills Act, revoke one made while discover (*y*).

Feme covert may revoke a will.

IV.—Married Women's Property Act, 1882.—In this state of the law the Married Women's Property Act, 1882, was passed (*z*). Its material clauses are the following:—Sect. 1 (1). "A married woman shall, in accordance with the provisions of this act, be capable of acquiring, holding and disposing by will or otherwise of any real or personal estate as her separate property in the same manner as if she were a feme sole without the intervention of any trustee." Sect. 2. "Every woman who marries after the commencement of this act (*a*) shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid, all real and personal property which shall belong to her at the time of marriage or shall be acquired by or devolve upon her after marriage, including any wages, earnings," &c. Sect. 5. "Every woman married before the commencement of this act shall be entitled to have and to hold, and to dispose of in manner aforesaid as her separate property, all real and personal property, her

The Married Women's Property Act 1882.

(*v*) *Willock v. Noble*, L. R., 7 H. L. 580; *Re Young*, 23 Ch. D. 705; *Re Cuno*, 43 Ch. D. 12. Compare *Bishop v. Wall*, *supra*, p.

(*w*) *In bonis Wollaston*, 32 L. J. P. 171; *Willock v. Noble*, *supra*.

(*x*) *In bonis Martin*, 3 Sw. & Tr. 1; *Scammell v. Wilkinson*, 2 East, 552;

Birkett v. Vandercom, 3 Hagg. 750; *In bonis Richards*, L. R., 1 P. & D. 156; *Willock v. Noble*, L. R., 7 H. L. 580.

(*y*) *Hawksley v. Barrow*, L. R., 1 P. & D. 147.

(*z*) 45 & 46 Vict. c. 75.

(*a*) January 1, 1883.

CHAPTER III.

title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this act, including wages," &c.

Act does not give general testamentary capacity.

Sect. 1 is a general or introductory section, which gives the keynote to the subsequent detailed sections of the act; it does not confer on married women any general testamentary power. It therefore does not enable a woman married before the commencement of the act to dispose of property by will, unless it was acquired by her after the commencement of the act, and during the coverture (c). But where a married woman having powers of appointment and separate estate, and having, therefore, capacity to make a will, made a will before the commencement of the act, containing a residuary gift, this was held to pass separate property which she acquired under the provisions of the act (d).

Capacity outside the Act.

When title accrues.

If a woman married before January 1, 1883, was at that date entitled to property contingently or in reversion, her title to it has already "accrued," and it does not "accrue," so as to make the property her separate property under sect. 5, by falling into possession after the commencement of the act (e). And the same rule applies where reversionary property is converted from realty into personalty by being sold under a power of sale before the reversion falls into possession (f). On the other hand, where a testator who died in 1879 bequeathed property to the persons who should be his next of kin in 1886, the title of a married woman who formed one of the class thus ascertained was held to accrue at the latter date (g).

Property acquired after coverture.

On the principle already mentioned, it was held that the Married Women's Property Act, 1882, did not enable a married woman, by will made during coverture, to dispose of property which vested in her after her husband's death; to have this operation, her will had to be republished after the determination of the coverture (h).

The Married Women's Property Act, 1893.

And now by the Married Women's Property Act, 1893 (s. 3), it is enacted that sect. 24 of the Wills Act, 1837 (which makes a will speak from the death of the testator), shall apply to the will of a married woman made during coverture, whether she is or is not

(c) *Re Harris's Settled Estates*, 28 Ch. D. 171; *Re Price*, ib. 709.

(d) *Re Bowen*, [1892] 2 Ch. 291.

(e) *Reid v. Reid*, 31 Ch. D. 402, overruling *Baynton v. Collins*, 27 Ch. D. 604, and *Re Thompson and Curzon*, 29 Ch. D. 177, and affirming *Re Adames' Trusts*, 33 W. R. 834; *Re Tucker*, 33 W. R. 932; and *Re Hobson*, 34 W. R. 195.

(f) *Re Bacon*, [1907] 1 Ch. 475.

(g) *Re Parsons*, 45 Ch. D. 51.

(h) *Re Price*, supra; *Re Cuno*, 43 Ch. D. 12. It is hardly necessary to say that if the will was confined to property over which she had a power of appointment, republication would not enlarge its scope so as to make it include property acquired after the coverture: *Re Taylor*, 57 L. J. Ch. 430.

possessed of or entitled to any separate property at the time of making it, and that such will shall not require to be re-executed or republished after the death of her husband.

This enactment applies to the will of any married woman dying after December 5, 1893, although the will may have been made before that date (*i*).

It has been decided that the general disposing power given to married women by the act does not enable them to devise land for the erection of churches under stat. 43 Geo. 3, c. 108 (*j*).

Gifts for Churches Act, 1803.

Apparently a married woman has no power to devise land vested in her as sole trustee, even if it was conveyed to her since 1882. But by virtue of the Vendor and Purchaser Act, 1874, or the Conveyancing Act, 1881, land vested in a married woman as sole trustee devolves on her death to her personal representative (*k*).

Trust estates.

V.—Aliens.—At common law, a devise of lands by an alien was at least voidable (*l*); the crown being entitled, after office found, to seize them in the hands of the devisee, as it might have done in those of the alien during his life. Until office, the lands of an alien remained in him with all the incidental qualities belonging to such estates; on which ground it has been held, that an alien tenant in tail in possession might suffer a common recovery (*m*): and he might, of course, execute its substitute, an enrolled conveyance, and thereby bar the issue in tail and remainders; and, by parity of reasoning, the will of an alien vested his defeasible title in the devisee (*n*); though, if he died intestate, the land escheated to the Crown, or other lord, *pro defectu tenentis*, without any inquest of office, because an alien could have no heirs (*o*). But by the Naturalisation Act, 1870 (*p*), “real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural-born British subject.

Devises by aliens.

(*i*) *Re Wylie*, [1895] 2 Ch. 116.

(*j*) *Re Smith's Estate*, 35 Ch. D. 589. See *Re Douglas*, [1905] W. N. 7.

(*k*) See Chap. XXV. The difficulty caused by the decision in *Re Harkness and Allsopp*, [1896] 2 Ch. 358, has been partially removed by the Married Women's Property Act, 1907.

(*l*) See Shep. Touch. 404. As to what constitutes an alien, see *De Geer v. Stone*, L. R., 22 Ch. D. 243, 253.

(*m*) 4 Leon. 84.

(*n*) See Shep. Touch. 404.

(*o*) Co. Litt. 2b.

(*p*) 33 Vict. c. 14, s. 2; not confined to alien friends, as 7 & 8 Vict. c. 66, s. 3.

CHAPTER III.

Provided that . . . this section shall not affect (*q*) any estate or interest in real or personal property to which any person has or may become entitled either mediately or immediately in possession or expectancy in pursuance of any disposition made before the Act, or in pursuance of any devolution by law on the death of any person dying before the act."

Devises by
traitors and
felons;
—realty.

VI.—Traitors and Felons.—Persons attainted of high treason were formerly incompetent to devise their lands, since, by several old statutes (*r*), the real estates of a traitor were, by the attainder, ipso facto vested in the Crown.

The lands of all persons attainted for petit treason and felony, formerly escheated to the king or other feudal lord (*s*), by reason of the corruption of blood consequent on attainder, which of course prevented the descent to the heir; and the devises of such persons were absolutely void, or rather, by the better opinion, were voidable, as in the case of an alien (*t*); and such until 1870 was still the case as to persons not entitled to the benefit of the statute 54 Geo. 3, c. 145, which provided, that no attainder for felony, except in cases of high treason, or of the crimes of petit treason (afterwards abolished by statute (*u*)), or murder, or of abetting, procuring, or counselling the same, "shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders, during his, her, or their natural lives only; and that it shall be lawful to every person or persons to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders, should or might have appertained, if no such attainder had been, to enter into the same."

There was some ground to contend, that the concluding words of this provision enabled persons convicted of, or rather attainted for, any other than the excepted offences, to alien their real estate by will, and this ground was strengthened by the statutes (*v*), which in all cases where a title had accrued to the Crown by escheat for want of heirs, or by reason of any forfeiture, empowered the

(*q*) That is, shall not validate or invalidate: *Sharp v. St. Sauveur*, L. R., 7 Ch. 343.

(*r*) See 4 Jarm. Conv. (2nd ed.) 186.

(*s*) Subject to the right of the Crown to hold the lands vested in the person attainted at the period of the attainder

for a year and a day: 1 Steph. Com. 417.

(*t*) Shep. Touch. 404.

(*u*) 9 Geo. 4, c. 31, s. 2.

(*v*) 39 & 40 Geo. 3, c. 88, s. 12; 47 Geo. 3, sess. 2, c. 24; 59 Geo. 3, c. 94; 6 Geo. 4, c. 17.

sovereign (notwithstanding the statute (*w*) which had restrained the alienation of the royal demesnes in general to leases for thirty-one years) to make grants to any person for the purpose of restoring the land to the family of the former owner, or carrying into effect any grant, conveyance or devise of it which he might have intended to make.

But the point is now of less importance, since, by stat. 33 & 34 Vict. c. 23, attainder (which, and not the conviction, caused the disability) is thenceforth abolished, and express provisions (presently noticed) are made regarding the real estate both of traitors and felons.

Treason and felony incapacitated persons from making a will of personal estate, which, if vested (either in possession or remainder), became forfeited to the Crown on conviction (*x*); and this incapacity extended to a *felo de se*, who was, however, capable of devising his real estate, as there was in such case no attainder (*y*). In every case of felony in which sentence of death was not recorded, that is to say, in which there was no attainder, the prisoner's competency to devise or otherwise dispose of his real estate was not affected (*z*).

Wills of traitors and felons ;
—personalty.

But the law as to both real and personal property is now regulated by the Forfeiture Act, 1870, which enacts (sect. 1) that after the passing of it, “ no confession, verdict, inquest, conviction, or judgment of or for any treason, or felony, or *felo de se*, shall cause any attainder or corruption of blood, or any forfeiture or escheat ; provided that nothing in this act shall affect the law of forfeiture consequent on outlawry ” (*a*). The statute then, after defining (sect. 6) “ convict ” to mean any person against whom sentence of death, or of penal servitude, shall have been pronounced or recorded upon any charge of treason or felony ; and after providing (sect. 7) that when any convict shall die, or become bankrupt, or shall have suffered his punishment, original or commuted, or have been pardoned, he shall thenceforth, as to the provisions thereafter contained, cease to be subject to the act,

Attainder and forfeiture for treason or felony abolished.

(*w*) 1 Ann. st. 1, c. 7, s. 5.

(*x*) 2 Bl. Comm. 499 ; *Re Thompson's Trusts*, 22 Beav. 506 ; *Re Bateman's Trusts*, L. R., 15 Eq. 355. Contra as to goods which he has as executor of another, of which he may make a will : *In bonis Bailey*, 31 L. J. P. 178. Contra, also, as to contingent interests, where the felony was not capital : *Stokes v. Holden*, 1 Keen, 145 ; *Barnett v. Blake*, 2 Dr. & Sm. 117, 128 ; and as to

personalty acquired by him after a conditional free pardon, *Gough v. Davies*, 2 K. & J. 623.

(*y*) *Norris v. Chambres*, 29 Beav. 258. See *In bonis Bailey*, 31 L. J. P. 178.

(*z*) *Rex v. Willes*, 3 B. & Ald. 510, 2 Inst. 55 ; *Rex v. Bridger*, 1 H. & Wel. 147 ; *Re Harrop's Estate*, 3 Drew. 726.

(*a*) Outlawry in civil proceedings is now abolished by the stat. 42 & 43 Vict. c. 59, s. 3.

CHAPTER III. enacts (sect. 8) that no action or suit for the recovery of any property shall be brought by any convict during the time that he is subject to the act, and that every convict shall be incapable during that time of alienating or charging any property, or of making any contract, save as thereafter provided. Sect. 9 gives the Crown power to appoint an administrator, in whom, upon his appointment, (sect. 10) all the real and personal property (including choses in action) to which the convict was at the time of his conviction, or shall afterwards, while subject to the act, become or be entitled, and which, until such appointment, remains in the convict (*b*), vests for all the convict's estate and interest. And the administrator has full power (sect. 12) to let, sell, and mortgage the property, and thereout (sects. 13 to 17) to pay costs, debts, damages, &c., and to make allowances for the support of the convict and his family. Subject thereto, the administrator is (sect. 18) to hold the property in trust, and may accumulate the income, for the benefit of the convict and his heirs, or legal personal representatives, or such other persons as may be lawfully entitled thereto, according to the nature thereof; and the same is to revest in the convict on his ceasing to be subject to the act, or in his heirs or representatives, or such other persons as may be lawfully entitled thereto. The convict is to be entitled as against the administrator to all property acquired by him while at large under licence, and, during the same time, his disabilities under sect. 8 are suspended (sect. 30).

Effect of the
abolition.

Subject, therefore, to the temporary estate of the administrator, and to the charges imposed by the act, the real and personal property of a traitor or felon remains his own, and he may apparently dispose of it by his will; for the prohibition against alienation during the time that he is subject to the act, can have no application to his will, whensoever executed; a will being no alienation until the testator's death.

(*b*) *Ex parte Graves*, 19 Ch. D. 1, 5.

CHAPTER IV.

WHAT MAY BE DEVISED OR BEQUEATHED.

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I.—Preliminary.—Personal property (including chattels real) passes on the death of the owner to his personal representatives, who are bound to satisfy his debts and liabilities before distributing the estate. Every legatee takes subject to this obligation, and his title to the property bequeathed to him is not complete until the executors have assented to the bequest. In the case of estates of inheritance in land, the rule was formerly different, for a devise of land operated as a conveyance to the devisee (*a*). This rule was broken into by the Vendor and Purchaser Act, 1874, which (by sect. 4) gave the legal personal representatives of a deceased mortgagee of land power to reconvey it on redemption, and (by sect. 5) on the death of a person seised (*b*) of any hereditaments in fee simple as a bare trustee, made them pass to his personal representatives. This latter section was repealed by sect. 48 of the Land Transfer Act, 1875, and it was enacted that from January 1, 1876, on the death of a bare trustee intestate as to any hereditament of which he was seised in fee simple, it should vest like a chattel real in his legal personal representative from time to time. All these enactments have been repealed, and new provisions have been enacted by sect. 30 of the Conveyancing Act, 1881, and sect. 88 of the Copyhold Act, 1894; the result is that in the case of any person dying since December 31, 1881, all hereditaments

Executors' interest in testator's property.

(*a*) As to land being assets for payment of debts, see Chaps. LIII., LIV.
 (*b*) The use of this expression seems

to have excluded copyholds from the operation of the section.

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vested in him solely on any trust or by way of mortgage for an estate of inheritance (other than copyholds of which he is tenant on the Court rolls), devolve to his personal representatives like a chattel real, notwithstanding any testamentary disposition made by him (c). Another exception to the general rule was introduced by sect. 4 of the Conveyancing Act, 1881, which enacts that where at the death of a person there is subsisting a contract enforceable against his heir or devisee for the sale of land, his personal representatives can convey it so as to give effect to the contract.

Land Transfer Act, 1897.

As to freehold land which is held by a person as beneficial owner, it has now been placed on practically the same footing as personal estate, so far as its devolution to the personal representatives of the deceased owner is concerned, for sect. 1 of the Land Transfer Act, 1897, provides as follows : “ (i.) Where real estate is vested in any person without a right in any other person to take by survivorship, it shall on his death (d), notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him (e). (ii.) This section shall apply to any real estate over which a person executes by will a general power of appointment as if it were real estate vested in him. (iii.) Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate. (iv.) The expression ‘ real estate ’ in this part of this act shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant (f). (v.) This section applies only in cases of death after the commencement of this act,” namely, January 1, 1898 (g). Sect. 2 provides in effect that, subject to the payment of debts, &c., the personal representatives shall hold the real estate as trustees

(c) As to the operation of this section, see Chap. XXV.

(d) According to *John v. John*, [1898] 2 Ch. 573, before probate the land passes to the heir : sed quære : the act does not expressly abrogate the old rule, under which a devisee takes by virtue of the will.

(e) As to who are personal representatives within the meaning of this section, see *Re Cohen's Executors and London County Council*, [1902] 1 Ch. 187 ; and as to the manner in which a chattel real vests, see *Re Culverhouse*,

[1896] 2 Ch. 251.

(f) The act applies to equitable interests in copyholds : *Re Somerville and Turner's Contract*, [1903] 2 Ch. 583.

(g) Part I. of the Land Transfer Act, 1897, is one of the worst-drawn enactments of modern times. Some of the difficulties arising from its obscure wording are referred to in *Brickdale and Sheldon's Land Transfer Acts*, and *Robbins and Mawe on the Devolution of Real Estate*.

for the persons beneficially entitled thereto (*h*), and that those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate. Sect. 3 provides that at any time after the death of the owner of any land his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee or otherwise, and may make the assent or conveyance subject to a charge for the payment of any money which the personal representatives are liable to pay (*i*). The result seems to be that if they assent to a devise, the legal estate in the land vests in the devisee without a conveyance. The act does not require an assent to be in writing (*j*). A written assent does not require a stamp (*k*).

Effect of
assent.

The better opinion seems to be that the effect of the act is that the personal representatives of a deceased person are trustees of his real estate for the persons beneficially entitled thereto as from his death, and not, as in the case of personal estate, from the time when they have fully administered (*l*).

Effect of act
on real estate.

II.—What may be devised or bequeathed.—Sect. 3 of the Wills Act enacts that “it shall be lawful for every person to devise, bequeath or dispose of by his will, executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed or disposed of, would devolve upon the heir at law or customary heir of him (*m*), or if he became entitled by descent, of his ancestor, or upon his executor or administrator.” The section contains detailed provisions which will be referred to in the course of this chapter.

Power of
testamentary
disposition.

It will be remembered that under sect. 30 of the Conveyancing Act, 1881, a devise of trust or mortgage estates is in general wholly inoperative.

(*h*) These words (coupled with the reference to “testamentary dispositions” in s. 1) seem to shew that Part I. of the act was not meant to apply to trust and mortgage estates, and that these continue to be subject to s. 30 of the Conveyancing Act, 1881, post, Chap. XXV. As to the effect of s. 2 on devises to trustees, see post, Chap. XLVI.

(*i*) See *Re Cary and Lott's Contract*, [1901] 2 Ch. 463.

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(*j*) As to the rights of a devisee under the act, see *Re Pix*, [1901] W. N. 165.

(*k*) *Kemp v. Inl. Rev. Comm.*, [1905] 1 K. B. 581.

(*l*) See Brickdale and Sheldon, 244. As to the title of an administrator, see *In bonis Pryse*, [1904] P. 301.

(*m*) It is not necessary that the testator should in fact leave an heir; his will defeats the lord's right of escheat: *Wentworth v. Humphrey*, 11 A. C. 619; Williams, R. P. (20th ed.) 56, n.

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Joint estates
and interests.

Tried by the rule laid down by sect. 3 of the Wills Act, it is obvious that a devise or bequest by a joint tenant of real or personal estate is void, in the event of the testator dying in the lifetime of his co-proprietor, whose title by survivorship takes precedence of the claim of the devisee or legatee, as it would of that of the heir or administrator, of the predeceased joint tenant, in case he had died intestate (*n*). If, on the other hand, the testator survives his companion in the tenancy, it is now (*o*) unnecessary to inquire whether the devising joint tenant had become solely seised by survivorship at the period of the execution of his will; it is enough that he had acquired a devisable interest in the estate at the time of his decease. And the same rule applies now, as formerly, to bequests of leaseholds or other personal estate.

Tenants in
common and
coparceners.

"Where the several co-proprietors are tenants in common, or coparceners, each has an absolute power of testamentary disposition over his or her undivided share" (*oo*).

Dead body.

It is obvious that a person cannot dispose by will of anything that is not the subject of ownership or property, such as his own body after death (*p*).

After-
acquired free-
hold interests
formerly not
devisable.

III.—Freehold Land.—Mr. Jarman says (*pp*): "A will disposing of any interest in real estate of which the testator was seised, operated, under the old law, in the nature of a conveyance, and, consequently, extended only to hereditaments belonging to the testator when he made the devise (*q*). This rule was early established, in relation as well to devises by custom, as to devises under the statutes of Henry VIII. which shews that it did not (as commonly supposed) arise from the mode of penning those

(*n*) Co. Litt. 185a. Such a disposition would not work a severance. The power of devising is given by 1 Vict. c. 26, s. 3, only where the property, if not devised, would go to the heir. As to property transferred by a husband into the joint names of himself and his wife, see *Dummer v. Pitcher*, 2 M. & K. 262; *Coates v. Stevens*, 1 Y. & C. Ex. 66; *Grosvenor v. Durston*, 25 Bea. 97; *Turner v. Att.-Gen.*, Ir. R., 10 Eq. 386 (property held subject to secret trust).

(*o*) Formerly the efficacy of such a devise or bequest depended on the nature of the property: see the fourth edition of this work, Vol. I. p. 46. As to devise of a freehold interest acquired after execution of a will under the old law on partition or severance, see *Swift*

d. *Neale v. Roberts*, 1 W. Bl. 476, 3 Burr. 1488.

(*oo*) Mr. Jarman, in the first edition of this work, p. 40. As to co-parceners, see Blackstone, Comm. ii., 188.

(*p*) *Williams v. Williams*, 20 Ch. D. 659, where the rights of an executor with regard to the dead body of his testator are referred to. See also *Reg. v. Price*, 12 Q. B. D. 247; *Re Dixon*, [1892] P. 381.

(*pp*) First ed., p. 43.

(*q*) It seems, however, that if a man devised a remainder or reversion, and afterwards acquired the particular estate, the devise carried the estate thus acquired, the ulterior estate being accelerated by merger: *Buckenham v. Cook*, Holt, 248.

statutes, but resulted from principles common to both species of devises. As equity follows the law, the doctrine extended no less to equitable than to legal interests. If, therefore, a testator before the year 1838 devised all the real estate of which he should be seised at the time of his decease, and after the making of his will he purchased lands in fee simple, such after-acquired property, whether it was conveyed to the testator himself, or to a trustee for him, did not pass by the will, but descended, as to the legal inheritance in the former case, and as to the equitable inheritance in the latter, to the testator's heir at law (*r*).

“Where a testator had an equitable interest in the devised lands when he made his will, and afterwards acquired the legal ownership, the equitable interest passed by the will, and the subsequently acquired legal estate descended to the heir, who, of course, became a trustee for the devisee. If, on the other hand, the testator was seised only of the legal estate at the time of the execution of his will, and afterwards acquired the equitable interest (being the converse case), as where, being a mortgagee in fee at the date of the will, he subsequently purchased the equity of redemption, the devisee was a trustee of the legal estate which he derived through the will, for the heir at law to whom the equitable inheritance descended (*s*). Cases of the former description frequently occurred, where a man contracted to purchase a freehold estate, then devised it, and, subsequently to the execution of his will, took a conveyance of the property, and then died without republishing his will (*t*). The testator being equitable owner under the contract (*u*), his interest passed by the will to the devisee, whose equitable right the heir was bound to clothe with the legal title. In these and many other cases, great inconvenience occurred from the incompetency of a testator to dispose by will of his after-acquired real estate; and questions often arose as to the actual state

Equitable
interests.

Contract
of purchase

(*r*) *Bunter v. Coke*, 1 Salk. 237, nom. *Buckenham v. Cook*, Holt, 248, *Bunker v. Cook*, 3 Bro. P. C. 19; *Langford v. Pitt*, 2 P. W. 629; *Harwood v. Goodright*, Cowp. 90.

(*s*) *Strode v. Lady Falkland*, 3 Ch. Rep. 187. In *Yardley v. Holland*, L. R., 20 Eq. 428, a mortgagee in fee devised “all hereditaments whereof he was seised as mortgagee” (without any specific description of the mortgaged estate), and afterwards purchased the equity of redemption: this was ademption, and the devise failed both at law and in equity.

(*t*) *Greenhill v. Greenhill*, Pre. Ch. 320,

2 Vern. 679, Gilb. Eq. R. 77; *Green v. Smith*, 1 Atk. 572; *Gibson v. Lord Montfort*, 1 Ves. 494; *Capel v. Girdler*, 9 Ves. 509; *Holmes v. Barker*, 2 Madd. 462. Same law as to copyholds: *Seaman v. Woods*, 24 Beav. 372. A valid contract would not be presumed to have been entered into before the date of the will for the purchase of lands conveyed to the testator immediately after that date: *Cathrow v. Eade*, 4 De G. & S. 527.

(*u*) It was sufficient if the vendor alone was bound by the contract: *Morgan v. Holford*, 1 Sm. & Gif. 101, *semble*.

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of the rights and obligations of the parties under the contract, on which the validity of the devise depended (*w*), and also as to the effect of certain modes of conveyance, in producing a revocation of the devise of the equitable interest. The removal of this incapacity, therefore, is not the least of the advantages conferred by the recent statute [the Wills Act, 1837], which has expressly extended the testamentary power to such real and personal estate as the testator may be entitled to at the time of his death, notwithstanding he may become entitled to the same subsequently to the execution of his will. But it may, of course, be necessary, even under the present law, to go into the inquiry, whether the circumstances attending a contract for purchase or sale by a deceased person are such as to render the contract obligatory, for upon this fact would depend the question (which has lost none of its importance by the recent enactment) whether, as between the representatives of the deceased testator or intestate, it is to be regarded as real or personal estate." This question is discussed in the chapter on Conversion.

After-acquired real estate now devisable.

The Wills Act not only (by sect. 3) extends the power of testamentary disposition to all real estate which the testator is entitled to at the time of his death, but (by sect. 24) makes every will speak from the time of the testator's death, unless a contrary intention appears. The effect of these sections is discussed in chapters XII. and XXVI.

Devises of copyholds.

IV.—Copyholds.—(*a*) *Old Law.*—By the common law, copyholds could not be devised except by virtue of a special custom of the manor of which they were held, nor were they affected by the Statutes of Wills passed in the reign of Henry VIII. (*x*). When a copyholder wished to devise his copyhold, it was originally necessary that he should make a surrender to the use of his last will; the estate then passed by the surrender and not by the will, which was only a direction of the uses of the surrender (*y*). The surrender, and not the will, being the operative part, so to speak, of the devise, one joint tenant could, by surrendering to the use of his will, and then devising to a stranger, sever the jointure (*z*),

Will of a copyholder in joint tenancy a severance.

(*w*) *Duckle v. Baines*, 8 Sim. 525.

(*x*) 1 Watk. Cop. 122, 2 Rol. Rep. 383.

(*y*) *Att.-Gen. v. Vigor*, 8 Ves. 286. See 1 Watk. Cop. 122; and *Roe d. Jeffereys v. Hicks*, 2 Wils. 13. As to the necessity for a surrender by an equitable mortgagee of copyholds to the use of his

will, *Doe d. Shewen v. Wroot*, 5 East, 132.

(*z*) Co. Litt. 59b; *Porter v. Porter*, Cro. Jac. 100; *Gale v. Gale*, 2 Cox, 136; see per Willes, C. J., 2 Ves. sen. at p. 609. In *Edwards v. Champion* (1 De G. & S. 75), it was held by K. Bruce, V.-C., that a surrender by one joint tenant to the use of the will of a stranger whose will

and, in most manors, also bar his widow of freebench. By the statute 55 Geo. III., c. 192, all devises thereafter to be made of copyhold lands, though not surrendered to the use of the testator's will, were rendered as valid as if a surrender had been made (a).

An equitable interest in copyholds under a trust or right of redemption, or a contract for purchase, being incapable of surrender, was devisable without any such formality, and it was immaterial in the last case that a surrender had been made to the use of the purchaser, so long as he had not been admitted (b) : and the right of the equitable owner to devise his interest could not be controlled by the custom of the manor (c).

Customary freeholds, though not held at the will of the lord, yet if alienable by surrender and admittance, were devisable in the same manner as copyholds (d).

Mr. Jarman remarks (e) that : " Copyholds, equally with freeholds, were subject to the rule, which, under the old law, restricted a devise to lands of which the testator was seised when he made his will (f). A devise of copyholds, therefore, however comprehensive in its terms, did not generally pass an after-acquired copyhold estate (g), except so far as such estate might have been brought within its operation by a subsequent surrender to the use of the will (formerly a necessary accompaniment of a devise of copyholds), which surrender was construed to have the effect of extending a general devise of copyholds to lands acquired in the interval between the will and the surrender (g) ; and it was decided that a surrender to such uses as the testator ' shall ' by will appoint applied to a will

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Stat. 55 Geo. 3, dispensing with surrender to use of the will
Equitable interests in copyholds devisable without surrender.

Customary freeholds.

As to devises of after-acquired copyholds.

did not come into operation until after the death of the surrenderor produced a severance ; but on appeal (3 D. M. & G. 202) this was doubted by Lord Cranworth, Parke, B., and Cresswell, J.

(a) See *Doe d. Hickman v. Hickman*, 4 B. & Ad. 56 : *Doe v. Bartle*, 5 B. & Ald. 492, 1 D. & Ry. 81. It seems the better opinion, that a custom in a manor that the copyhold tenant shall not devise through the medium of a surrender to the use of his will, is bad : *Wardell v. Wardell*, 3 Br. C. C. 117 ; *Pike v. White*, ib. 287 ; but see 1 Evans' Stat. p. 450. At all events, such a custom will not be presumed from the fact that no entry is to be found on the Court rolls of any such surrender : *Doe d. Edmunds v. Llewellyn*, 2 C. M. & R. 503, 5 Tyr. 899 ; *Doe d. Dand v. Thompson*, 7 Q. B. 897.

(b) *Allen v. Poulton*, 1 Ves. sen. 121 ; *Davies v. Beversham*, 2 Freem. 157.

3 Ch. Rep. 76 ; *Car v. Ellison*, 3 Atk. 73 ; *King v. King*, 3 P. W. 358 ; *Gibson v. Lord Montfort*, 1 Ves. 489 ; *Greenhill v. Greenhill*, 2 Vern. 679 ; *Phillips v. Phillips*, 1 My. & K. 664 ; *Seaman v. Woods*, 24 Beav. 372, where the purchaser took under a power of sale in a will.

(c) *Lewis v. Lane*, 2 My. & K. 449.

(d) *Doe v. Huntingdon*, 4 East, 288 ; *Doe d. Cook v. Danvers*, 7 East, 299 ; *Doe d. Dand v. Thompson*, 7 Q. B. 897. These cases appear to overrule Lord Hardwicke's apparent opinion to the contrary in *Hussey v. Grills*, Amb. 299.

(e) First edition, p. 50.

(f) *Harris v. Cutler*, cit. 1 T. R. 438, n. ; *Spring v. Biles*, ib. 435, n.

(g) *Heylin v. Heylin*, Cowp. 130 ; *Atk.-Gen. v. Vigor*, 8 Ves. 287 ; *Phillips v. Phillips*, 1 My. & K. 664.

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antecedently executed, it being considered that the surrenderor referred to that will which should be in existence at his death (*h*).

"And here it may be observed, that as every copyhold is parcel of the manor to which it belongs, a devise of the manor was held to comprise such copyholds, though acquired by the lord after the making of his will" (*i*).

Devise by devisee or surrenderee of copyholds before admittance void.

Devise by an unadmitted heir held to be good.

Under the old law, too, a devisee or surrenderee of copyholds before admittance was wholly incapable of devising them (*j*). The same doctrine was at one period considered to apply to an heir, on the supposed authority of *Smith v. Triggs* (*k*); but, as such, the decision in that case was completely overruled by *Right d. Taylor v. Banks* (*l*). The point was again raised, and received a similar determination, in *King v. Turner* (*m*) and *Doe d. Perry v. Wilson* (*n*).

Devises of copyholds under Wills Act.

(*b*) *Present Law*.—The Act 1 Vict. c. 26, s. 3, has precluded any question of this nature in regard to wills which are subject to its operation. It repeals stat. 55 Geo. III, c. 192, which only supplied the omission of a formal surrender (*o*), and makes the will itself, without any surrender, confer a right to admittance (*p*), notwithstanding that the testator has not surrendered to the use of his will, or notwithstanding that the copyholds, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, or in consequence of there being a custom that a will or surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by the will previously to the passing of the act. It also expressly affirms the testamentary power of an unadmitted heir, and extends the devising power to an unadmitted devisee or surrenderee. Thus all questions arising under the former act respecting the validity of a devise, in consequence of the power to devise being still left

(*h*) *Spring v. Biles*, 1 T. R. 435, n.; overruling *Warde v. Warde*, Amb. 299, which is contra.

(*i*) *Roe d. Hale v. Wegg*, 6 T. R. 708. As to what will pass by the devise of a manor, see post, Chap. XXXV.

(*j*) *Wainwright v. Elwell*, 1 Mad. 627; *Phillips v. Phillips*, 1 My. & K. 664; *Matthew v. Osborne*, 17 Jur. 696.

(*k*) 1 Str. 487. See Sir T. Plumer's judgment in *Wainwright v. Elwell*, 1 Mad. 632; and Sir L. Shadwell's judgment in *King v. Turner*, 2 Sim. 548, reversed 1 My. & K. 456.

(*l*) 3 B. & Ad. 664.

(*m*) 1 My. & K. 456.

(*n*) 5 Ad. & Ell. 321; and see *Doe d. Winder v. Lawes*, 7 Ad. & Ell. 195.

(*o*) See *Doe d. Hickman v. Hickman*, 4 B. & Ad. 56. It did not dispense with a particular mode of surrender required by custom to give validity to a devise by a married woman: *Doe v. Bartle*, 5 B. & Ad. 492, 1 D. & Ry. 81.

(*p*) This view was adopted by the Court in *Garland v. Mead*, L. R., 6 Q. B. 441. See *Reg. v. Garland*, L. R., 5 Q. B. 269; *Allen v. Bewsey*, 7 Ch. Div. 453. Admittance is still necessary to vest the estate.

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dependent on the power to surrender to the use of the will (though the surrender itself was not required), are now set at rest. But in *Lacey v. Hill* (q), it was held that the Wills Act does not merely dispense with the surrender and the custom, but gives the devise the same effect as if there actually had been both; and that consequently a general devise of the testator's "real estate," without more, bars his widow of her freebench. Reading the act, Sir G. Jessel, M. R., said: "That means that a testator is to have the same power of devising copyhold estate, as if he had done all the things there mentioned; as if there had been a surrender, or as if there had been a custom, and so forth. It breaks in upon the customary law of copyholds for the purpose of giving an unlimited power of devise. I am of opinion that the same effect is to be given to a devise of copyholds under the new law, as under the law as it stood before the Wills Act, and consequently the widow is not entitled to freebench." It is to be presumed that in this case the custom gave freebench of lands of which the copyholder was seised at his death, and not, as is the custom in some manors (r), of those of which he was seised at any time during the coverture; since, in the latter case, notwithstanding a custom to surrender to the use of the will, neither a devise nor an actual surrender by the husband would under the previous law have barred the freebench (s).

Lacey v. Hill.
Devise of
copyholds
bars free-
bench.

Copyholders also participate in the benefit of the enactments which extend the devising power to after-acquired real estate, and other interests not before devisable; and are, on the other hand, bound by those which (as we shall see) regulate the ceremonial of execution. Copyholds are also, in common with freeholds, subject to the several clauses by which the legislature has propounded certain new canons or rules of construction, which in general appear to be of a nature to admit of application to copyhold estates.

After-
acquired
copyholds
now
devisable.

Copyholds cannot be entailed except under a custom to that effect (t).

Entail.

It will be remembered that "land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord

Copyholds
and custom-
ary free-
holds not
within Land
Transfer Act.

(q) L. R., 19 Eq. 346. The contrary must have been assumed in *Thompson v. Burra*, L. R., 16 Eq. 592. It was needless there to argue that the widow must elect between her freebench and the benefits given her by the will if the freebench was defeated by the devise. And see *Rowland v. Cuthbertson*, L. R.,

8 Eq. 466.

(r) *Riddell v. Jenner*, 10 Bing. 29 (Manor of Cheltenham).

(s) See *Berry v. Gaukroger*, Theobald on Wills, App. B.

(t) See *Hardcastle v. Dennison*, 10 C. B. N. S. 606.

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of the manor is necessary to perfect the title of a purchaser from the customary tenant" is excluded from sect. 1 of the Land Transfer Act, 1897, and consequently a devise of such land gives the devisee a title independent of the executors (*u*). Equitable interests in copyholds and customary freeholds are "real estate" within sect. 1 (*v*).

Chattels
real.

V.—Chattels Real.—Bequests of chattel interests in land (*w*) were always governed by principles wholly different from those which formerly regulated devises of freehold estates. Even under the old law they did not, as Mr. Jarman points out (*x*), "pass directly to the legatee, as the alienee of the testator, but, forming part of his personal estate, they devolve to the executor or other general personal representative, who is bound, in subordination to the paramount claims of creditors, to give effect to any bequest in the will, specific or residuary, comprising the property in question; and, therefore, even under the old law, it was quite unnecessary, as regarded the testator's competency of disposition, to go into the inquiry, whether he was, at the time of making the will, possessed of a term of years which formed part of his property at his decease (*y*); such an inquiry being no less irrelevant in the case of a bequest of leaseholds held by a chattel lease, than in that of a horse or a watch, or any other personal chattel."

Freeholds
pur auter vie.

VI.—Estates pur auter vie (*z*).—Mr. Jarman continues (*a*): "Freeholds pur auter vie require a distinct consideration in connection with the testamentary power. This species of estate stands distinguished from all other interests, freehold or chattel, by this peculiar quality, that it is capable of being rendered transmissible to either real or personal representatives, according to the terms of the instrument creating the estate, or rather the instrument vesting it in the deceased owner, or in the person under whom he derived his title by act of law: for it seems now to be admitted that the

(*u*) It is the duty of trustees to whom copyholds are devised to obtain admittance: *Reg. v. Garland*, L. R., 5 Q. B. 269. But copyholds may be so devised as to give the executors or trustees a common law power of sale without being admitted: *Glass v. Richardson*, 2 D. M. & G. 658; *Reg. v. Wilson*, 3 B. & S. 201. And the stat. 21 Hen. 8, c. 4, applies to copyholds: *Peppercorn v. Wayman*, 5 De G. & S. 230.

(*v*) *Re Somerville and Turner*, [1903] 2 Ch. 583.

(*w*) A rentcharge issuing out of leaseholds is a chattel real: *Re Fraser*, [1904] 1 Ch. 726.

(*x*) First edition, p. 53.

(*y*) See *Wind v. Jekyl*, 1 P. W. 575; see also *James v. Dean*, 11 Ves. 388.

(*z*) As to the creation by will of estates pur auter vie, see Chap. XXXIV.

(*a*) First edition, p. 53.

devolution of the estate is regulated by the words of limitation contained in the last conveyance, without regard to the mode of its original creation. Estates pur auter vie are devisable by the express terms of the Statute of Frauds, 29 Car. II., c. 3 (s. 12), the Act of Henry VIII. being (according to the prevalent and probably the better opinion) confined to estates of inheritance in fee simple" (b).

Though the Statute of Frauds required three witnesses to the devise of an estate pur auter vie, yet where the property devolved otherwise than to the heirs of the owner (i.e., where it was limited either to his executors or administrators, or to the last taker indefinitely, without any express mention of either class of representative), it was distributable as part of his personal estate, whether he died testate or intestate; and by a necessary consequence of this principle, an executor taking it as such was bound to give effect to any bequest or direction in the will affecting such property, though the will might not have been attested in the manner required by the statute in question (c). By the Wills Act, s. 3, the previous enactments respecting estates pur auter vie were repealed, and the testamentary power is expressly extended to such estates, "whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament"; and by sect. 6 it is enacted, that if no disposition shall be made of any estate pur auter vie of a freehold nature, it shall be assets in the hands of the heir, and that in case there shall be no special occupant of any estate pur auter vie, whether freehold or customary freehold, tenant right, customary, or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of the act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate (d).

Devolution
of estates
pur auter vie.

(b) *Anon.*, Cart. 211.

(c) *Ripley v. Waterworth*, 7 Ves. 425; in connection with which case, see *Bearpark v. Hutchinson*, 7 Bing. 178, 4 M. & Pay. 848, as to rents pur auter vie.

(d) Where a bastard, having the trust of an estate pur auter vie limited

to him and his heirs, dies without heir, there being thus no special occupant, the property goes in case of intestacy to the administrator in trust for the Crown: *Reynolds v. Wright*, 25 Beav. 100, 2 D. F. & J. 590. Or if there be a will appointing an executor but not disposing of the lease, the executor will

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Land
Transfer Act,
1897.

Devise by
quasi tenant
in tail of
estates pur
auter vie.

Sect. 1 of the Land Transfer Act, 1897 (quoted above, p. 64), clearly includes estates pur auter vie, even where there is a special occupant.

Mr. Jarman said in the first edition of this work (e): "A question often agitated, but never entirely settled, in regard to the devising power over estates of this description, was whether, where they were limited to the tenant pur auter vie, *and the heirs of his body*, they could be devised without some act on his part to bar the entail. It was admitted on all hands that if the property were undisposed of, it would devolve to the heir special per formam doni; it was equally clear that an alienation by deed (f) was an effectual bar to the entail; but the doubt was, whether the estate was devisable by will alone, without any such previous alienation. The authorities on the point are few and contradictory. In *Doe v. Luxton* (g), Lord Kenyon inclined to think that the devise was good; but this dictum stands opposed to that of Lord Redesdale in *Campbell v. Sandys* (h); and to the decision of Lord Manners in the case of *Dillon v. Dillon* (i), who held that a quasi tenant in tail of an estate pur auter vie could not by devise exclude the title of remainderman, and such was evidently the impression of Sir T. Plumer in *Blake v. Luxton* (j). The recent statute [1 Vict. c. 26] does not in terms dispose of this debateable point, but has, it should seem, done so in effect, by the language of the general enabling clause, sect. 3, which extends the devising power to 'all real estate and all personal estate which he (the testator) shall be entitled to, either at law or in equity, at the time of his death, *and which, if*

hold for his own benefit, unless the will be such as before the Act 1 Will. 4, c. 40, s. 2, constituted him a trustee: *Powell v. Merritt*, 1 Sm. & Gif. 381; *Cradock v. Owen*, 2 ib. 241.

(e) Page 55.

(f) That is, if made by the quasi tenant in tail in possession. "If made by tenant in tail in remainder, it must be with the concurrence of the owner of the previous estate in possession (*Slade v. Pattison*, 5 L. J. (N. S.) Ch. 51; *Allen v. Allen*, 2 D. & War. 307, 332; *Edwards v. Champion*, 3 D. M. & G. 202), and could never, therefore, be made by will" (editor's note, 4th ed.).

(g) 6 T. R. 293.

(h) 1 Sch. & Lef. 294.

(i) 1 Ball & Bea. 77. The editors of previous editions substituted for *Dillon v. Dillon* a reference to the case of *Hopkins v. Ramage* (Batty, 365), and

added: "The decision of Lord Manners in *Dillon v. Dillon*, 1 Ba. & Be. 77, does not touch the question, for the quasi tenant in tail died without issue, and therefore, at her death, there was nothing for the will to operate upon, and the learned Judge expressly rested his decision on this fact. In *Hopkins v. Ramage*, the circumstances were precisely similar, but the opinion of the Court was expressed in general terms."

(j) Coop. 185. "And of Sir E. Sugden in *Allen v. Allen*, 2 D. & War. 307, 326. So in *Re Barber's Settled Estates*, L. R., 18 Ch. D. 628, Fry, J., said that 'the analogy of a fee simple estate is to be applied as far as it can be, both as to the capacity and incapacity of alienation of an estate pur auter vie'" (additions made by the editors in previous editions of this work). And see *Re Michell*, [1892] 2 Ch. 87.

not so devised, bequeathed, or disposed of, would devolve upon the heir at law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator.'

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"The terms of this enactment evidently restrict it to cases in which property, in the absence of disposition, would devolve to the general real or personal representatives of the testator, as distinguished from the case now under consideration, in which the devolution would be to the heir *special*."

Leases for lives with a covenant for perpetual renewal are not uncommonly met with in Ireland (*k*).

Renewable leases for lives.

VII.—Incorporeal Hereditaments.—Existing rights of this nature, so far as they are alienable, can apparently be the subject of a devise. Thus a rentcharge, a seignory (*l*), or an advowson (*m*), or right of common in gross, can clearly be devised (*n*). Of course a right which is inseparable from a tenement (such as an easement or right of common for cattle levant and couchant) cannot be disposed of by will except with the tenement (*o*), or (in the case of an easement) by being devised to the owner of the servient tenement so as to be extinguished (*p*).

Devise of existing rights.

It seems equally clear that a rentcharge, easement, profit à prendre or similar right, which can be created by grant, can be created by devise de novo (*q*).

Creation de novo.

A way of necessity may be impliedly created by a devise of land (*r*), and the doctrine as to the creation of implied easements by the contemporaneous grant of adjoining pieces of land applies to devises (*s*).

Implication.

VIII.—Choses in Action.—Legal choses in action, such as debts, may be disposed of by will (*t*), and if they are given specifically,

Legal choses in action.

(*k*) *Roddy v. Fitzgerald*, 6 H. L. Ca. 823; *Prentice v. Brooke*, 5 L. R. Ir. 435.

(*l*) As to what will pass by the devise of a manor, see Chap. XXXV.

(*m*) As to devises of advowsons, see *Earl of Albemarle v. Rogers*, 7 Br. P. C. 522; *Briggs v. Sharp*, L. R., 20 Eq. 317; *Johnstone v. Baber*, 6 D. M. & G. 439, and cases cited in Chap. XXXV.

(*n*) For an enumeration of purely incorporeal hereditaments (which alone are here considered), see Williams on Real P. (20th ed.) 410; Challis, Real P. 45. To these may be added the right of appointing the principal or master of a hospital or school, granted by the Crown to a man and his heirs: *Atkins v. Mountague*, Cases in Ch. 214; *Att.-Gen. v. Brentwood School*, 3 B. & Ad.

59. As to the effect of devising a reversion or remainder under the old law, see ante, p. 66, n. (*q*).

(*o*) Williams on Commons.

(*p*) Easements and other rights appendant or appurtenant were formerly not considered hereditaments, but they are now always so treated: see an article by the editor in Law Quarterly Review, xxiv., 259.

(*q*) *Booth v. Smith*, 14 Q. B. D. 318. See also *Taws v. Knowles*, [1891] 2 Q. B. 564.

(*r*) *Pearson v. Spencer*, 1 B. & S. 571, 3 B. & S. 761.

(*s*) *Phillips v. Low*, [1892] 1 Ch. 47; *Milner's Safe Co. v. Great Northern and City Ry.*, [1907] 1 Ch. 208.

(*t*) *Re Prater*, 37 Ch. D. 481.

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it is the duty of the executors to get them in and hand them over to the legatee (*u*). The Wills Act does not enable the legatee to sue for them in his own name (*v*).

Government securities.

Money in the public funds, bonds of foreign governments, and other so-called government securities, are not choses in action in the strict sense, because no action lies to enforce them, but there is no doubt that they are personal property (*w*), and can therefore be disposed of by will.

Life insurance.

A person who effects a policy of insurance on his own life can *primâ facie* dispose of it by his will (*x*). Whether a specific bequest of a policy confers such a "derivative title" as to enable the legatee to sue for the policy moneys in his own name under the Policies of Assurance Act, 1867, does not seem to have been decided.

Non-bequeathable policy.

A person effecting an insurance on his own life may by the terms of the contract restrict his right to dispose of the policy by will (*y*), or may debar himself altogether from the right of testamentary disposition (*z*).

Friendly society.

By the Friendly Societies Act, 1896, which repealed and re-enacted the provisions of some earlier acts, a member of a friendly society may in certain cases, by writing under his hand, nominate a person to receive any moneys (not exceeding 100*l.*) payable by the society on the death of the member, and may in like manner revoke or vary any such nomination; it cannot be revoked by will, and if a nomination is in force at the death of the member, the money forms no part of his estate (*a*).

Torts.

As regards rights of action for tort, the general rule of the common law is that "*actio personalis moritur cum personâ*." In a few cases at common law, and in several cases by statute, the personal representatives of a deceased person can sue for injuries to his property, and, under Lord Campbell's Act, for a personal injury causing his death. In the latter case the damages recovered do not form part of the deceased's estate (*b*).

Equitable choses in action.

In certain cases an equitable chose in action may be disposed of by will. Thus where a conveyance has been executed under circumstances which would give the grantor a right in equity to have it set aside, such a right is clearly devisable (*c*).

(*u*) *Re Robson*, [1891] 2 Ch. 559.

(*v*) *Bishop v. Curtis*, 18 Q. B. 878.

(*w*) See *Ex parte Huggins*, 21 Ch. D.

90.

(*x*) See *Re Phillips*, 23 Ch. D. 235.

(*y*) *Re Davies*, [1892] 3 Ch. 63.

(*z*) See *A.-G. v. Rowse*, 36 Ch. D. 67, n.; *Urquhart v. Butterfield*, 37 Ch. D.

357, and cases there cited. They are referred to in the fifth edition of this work, p. 62.

(*a*) *Bennett v. Slater*, [1899] 1 Q. B. 45.

(*b*) See Clerk and Lindsell on Torts, p. 52.

(*c*) *Uppington v. Bullen*, 2 Dr. &

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Locality of
choses in
action.

The question whether a gift of "property" or "estate" in a particular place includes choses in action is often a difficult one. A gift of property in a particular district or country (whether in England or abroad) passes money arising from real estate situate there (*d*), and debts owing by persons resident there (*e*), and apparently stocks and shares which are only transferable there. In the case of shares which can be transferred either in England or in a foreign country on production of the share certificate, it seems that their locality is governed by the certificate: if it is in England at the time of the testator's death, the shares will be considered as situate in England (*f*).

How far a gift of "property" in a house, box, cabinet, &c., is effectual to pass choses in action, has been discussed in several cases. In *Re Prater* (*g*), a testator bequeathed "my property at R.'s bank"; at the time of his will and of his death he had at R.'s bank in Paris a cash balance and certificates of shares in French companies which apparently entitled any person holding them to the ownership of the shares: it was held that the cash balance and the shares passed by the bequest.

Choses in
action in a
house, &c.

This question is also discussed in the chapter on Legacies, with reference to bequests of personal property in a particular place.

Where a person contracts to purchase land, this is an interest which he can devise by will (*h*).

Contract to
purchase
land.

In the case of a person entering into such a contract and dying before 1878, his heir or devisee was entitled to the benefit of it; in other words, was entitled to consider the contract as having converted the personal estate, quoad the purchase money, into real estate, although from subsequent events, arising out of the situation of the deceased purchaser's estate, the contract should, as against the vendor, have been rescinded (*i*). But as regards the estates of

Right of
devisee.

War. 184, 1 Car. & L. 291; *Stump v. Gaby*, 2 D. M. & G. 623; *Gresley v. Mousley*, 4 De G. & J. 78.

(*d*) *Tyrone v. Waterford*, 1 D. F. & J. 613; *Guthrie v. Walrond*, 22 Ch. D. 573.

(*e*) *Nisbett v. Murray*, 5 Ves. 149; *Arnold v. Arnold*, 2 My. & K. 365; *Guthrie v. Walrond*, supra; *Re Clark*, [1904] 1 Ch. 294.

(*f*) *Re Clark*, [1904] 1 Ch. 294. The question is discussed more in detail in Chapter XXX., where *Re Clark* is stated.

(*g*) 37 Ch. D. 481. See *Re Robson*, [1891] 2 Ch. 559, where *Roberts v. Kuffin*, 2 Atk. 112, was also referred to.

A gift of a "house and its contents" does not, *primâ facie*, pass title deeds and share certificates: *Re Craven*, 99 L. T. 390; post, Chap. XXXV.

(*h*) *Morgan v. Holford*, 1 Sm. & G. 101. It is hardly necessary to say that only contracts which are legally binding are here referred to: see *Lacon v. Mertins*, 3 Atk. 1; *Rose v. Cunynghame*, 11 Ves. 550; *Buckmaster v. Harrop*, 7 Ves. 341.

(*i*) *Whittaker v. Whittaker*, 4 Br. C. C. 30. See *Garnett v. Acton*, 28 Beav. 333; *Hudson v. Cook*, L. R., 13 Eq. 417.

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persons dying after December 31, 1877, the Real Estate Charges Act, 1877, enacts that where a testator or intestate dies entitled to land of whatever tenure, which is at his death charged by way of lien for unpaid purchase-money, the devisee or legatee or heir shall not be entitled to have the money discharged out of any other estate of the testator or intestate, unless, in the case of a testator, a contrary intention appears from the will, (j). In such a case, therefore, all that the devisee or heir is entitled to is the land charged with the purchase-money (k).

Contract not binding.

But even under the old law, if from a defect of title or any other cause the contract was not obligatory on the purchaser at his death, his heir or devisee was never entitled to say he would take the estate with its defects, or have the purchase-money laid out in the purchase of another. Thus in *Broome v. Monck* (l), which was a case of defective title, Lord Eldon observed that the cases establish, that whatever is the state of liability of the party himself at his death, must be the state of liability to be considered upon questions between those representing him after his death (m); and if at his death he could not be compelled to take, clearly the heir could not say to the executor, "I will have the estate and shall pay you for it" (n).

Contract for sale of land.

The converse case of a testator entering into a contract for the sale of land devised by his will, often gives rise to the question whether the contract operates as a revocation of the devise. This question is discussed in Chapter XXII.

Right of residence or occupation.

IX.—Miscellaneous Rights and Interests.—A testator may give to A. the right of residing in or occupying a particular house or other property rent free, in terms which shew that the right is personal to A. and cannot be assigned by him to another (o). A.

(j) See *Puxley v. Puxley*, 1 N. R. 509 (before the Act), where the testator had contracted to purchase an estate, and taken a transfer of a mortgage on it; by his will he directed the purchase to be completed, and devised the estate to A.: it was held that A. was not entitled to the interest on the mortgage before the completion of the purchase.

(k) *Re Cockcroft*, 24 Ch. D. 94. The same rule applies to a contract for the purchase of ground rents by the lessor: *Re Kidd*, [1894] 3 Ch. 558.

(l) 10 Ves. 597. See also 1 Ves. 218; *Green v. Smith*, 1 Atk. 572; *O'Shea v. Howley*, 1 J. & Lat. 398. In such a case, unless the purchaser waives his

objection, there can be no conversion: *Re Thomas, Thomas v. Howell*, 34 Ch. D. 166.

(m) See acc. *Curre v. Bowyer*, 5 Beav. 6, n.; *Ingle v. Richards*, 28 Beav. 365; *Haynes v. Haynes*, 1 Dr. & Sm. 451, 452; *Hudson v. Cook*, L. R., 13 Eq. 417; *Lysaght v. Edwards*, 2 Ch. D. 516.

(n) The passing of the Real Estate Charges Act, 1877, has deprived this subject of much of its practical importance, and the remarks of Mr. Jarman have been therefore shortened.

(o) *May v. May*, 44 L. T. 412; *Mac-laren v. Stainton*, 27 L. J. Ch. 442; *Parker v. Parker*, 1 N. R. 508.

is, however, a tenant for life within the meaning of the Settled Land Acts (*p*), and his powers under the act cannot be restricted by any clause of forfeiture (*q*).

The cases in which a devise of the use and occupation of land gives the devisee an estate are considered elsewhere (*r*).

A testator may give a person the right of purchasing property forming part of the testator's estate, either at a price named by the testator, or at a price to be fixed by the executors, or by valuation or otherwise (*s*). If the price is to be fixed by the executors, they are bound to fix a reasonable price (*t*), but the Court will not interfere if they act in good faith (*u*). If any terms are imposed by the testator as to time, &c., they must be strictly complied with, otherwise the right will be lost (*v*); but if the offer is to be made by the executors, time is reckoned from the date when a complete offer is made (*w*).

Option of purchase.

It is not clear to what extent the ordinary law of vendor and purchaser applies to a purchase under an option. It seems that the person exercising the option is not necessarily entitled to an abstract of title, and even if he is, the terms of the will may be such that failure on the part of the executors to deliver an abstract will not absolve him from complying with the requirements of the will as to time (*x*). On the other hand, it has been decided that, in the absence of a direction to the contrary, he is entitled to have the property free from incumbrances (*y*).

Rights conferred by option.

An option of purchase given by will to A. B. is *prima facie* personal to him, and does not pass to his executors on his death (*z*), but the will may be so expressed as to confer a transmissible interest (*a*). It seems clear that if an option of purchase is not personal to the donee, its exercise must be confined to the period allowed by the Rule against Perpetuities (*b*).

Whether personal or transmissible.

(*p*) *Re Trenchard*, [1902] 1 Ch. 378; *Re Llanover*, [1903] 2 Ch. 16.

(*q*) Post, Chap. XXXIX.

(*r*) Post, Chap. XXXV.

(*s*) *Radnor v. Shafto*, 11 Ves. 448; *Waite v. Morland*, 12 Jur. N. S. 763.

(*t*) *Radnor v. Shafto*, ubi supra.

(*u*) *Edmonds v. Millett*, 20 Bea. 54.

(*v*) *Dawson v. Dawson*, 8 Sim. 346; *Brooke v. Garrod*, 3 K. & J. 608, 2 De G. & J. 62; *Austin v. Tawney*, L. R., 2 Ch. 143.

(*w*) *Lilford v. Keck*, 30 Bea. 295; *Austin v. Tawney*, supra.

(*x*) *Brooke v. Garrod*, supra.

(*y*) *Given v. Massey*, 31 L. R. Ir. 126;

Re Wilson, [1908] 1 Ch. 839. See *Re Davison and Torrens*, 17 Ir. Ch. 7. As to the cases on rights of pre-emption not conferred by will, see Sugden on V. & P. 188, n.; Dart's V. & P. 240 (6th ed.)

(*z*) *Re Cousins*, 30 Ch. D. 203. As to an option contained in a lease, see *Re Adams and Kensington Vestry*, 27 Ch. D. 394; *Friary Holroyd v. Singleton*, [1899] 2 Ch. 261.

(*a*) *Belshaw v. Rollins*, [1904] 1 Ir. R. 284.

(*b*) *L. & S. W. R. v. Gomm*, 20 Ch. D. 562, Dart, 241.

CHAPTER IV.

Compulsory purchase.

If a testator gives an option of purchase at a fixed price, and after his death the property is sold at a higher price under the compulsory powers of the Land Clauses Act, the donee of the option is entitled to the difference (c). A similar rule applies if the sale is by order of the Court (d).

Right of selection.

A gift to A. of such part of a certain property as shall be selected by him is valid (e). The right is a personal one, and therefore it would seem that if A. survives the testator and dies before selecting, the right is gone (f). But this would probably not be so where the part to be selected is indefinite and unrestricted, for then the gift is equivalent to a gift of the whole property (g).

Executory and contingent interests.

An executory or contingent interest in real or personal estate is disposable by will, if the nature of the contingency on which it is dependent be such that the interest does not cease with the life of the testator ; in other words, if it be descendible or transmissible. This doctrine, in regard to real estate, was recognised in *Goodtitle v. Wood* (h), and was finally established in *Roe d. Perry v. Jones* (i) by the Court of K. B. ; Lord Kenyon, C. J., drawing a distinction between such an interest and a mere possibility, like that which an heir has from his ancestor. Buller, J., observed, that if it was such an interest as was descendible, it was also devisable, as they must both be governed by the same principle. The converse of this proposition is equally true, namely, that an interest which is not transmissible cannot be devised (j). A contingent interest in personal property can be bequeathed by will if it is transmissible (k). As regards wills made since the year 1837, the statute of 1 Vict. c. 26, s. 3, has expressly provided that the testamentary power conferred by it "shall extend to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may have become vested."

Spes successionis.

"A spes successionis is not a title to property by English law" (l).

(c) *Re Cant's Estate*, 4 De G. & J. 503.

(d) *Re Kerry*, [1889] W. N. 3, 5 T. L. R. 178.

(e) See the cases cited in Chap. XIV.

(f) See Co. Litt. 145a.

(g) See *Arthur v. Mackinnon*, 11 Ch. D. 385, post, Chap. XIV.

(h) Willes, 211; s.c. cited 3 T. R. 94.

(i) 1 H. Bl. 30; s.c. in B. R. 3 T. R. 88; and see *Moor v. Hawkins*, 2 Eden, 342, Fearn, C. R. 366; *Selwyn v. Selwyn*, Burr. 1131; *Perry v. Phelps*,

17 Ves. at p. 182; *Ingilby v. Amcotts*, 21 Beav. 585, which also explains the sense in which "descendible" is to be here understood.

(j) The case of *Doe v. Tomkinson*, 2 M. & Sel. 165, cited by Mr. Jarman in support of the latter proposition, occurred under the old law.

(k) *Pinbury v. Elkin*, 1 P. W. 563; *Re Cresswell*, 24 Ch. D. 102; and other cases referred to post, Chap. XXXVII.

(l) Per Kay, J., in *Re Parsons*, 45

Rights of action (*m*) and entry (*n*) were not, under the old law, devisable, but the Wills Act has expressly extended the testamentary power to "all rights of entry for conditions broken and other rights of entry," so that a possibility of reverter is now devisable (*o*). And as to rights of action, the question cannot recur since the statute 3 & 4 Will. 4, c. 27, s. 36, abolishing real actions.

CHAPTER IV.

As to rights of action and entry.

Possibility of reverter.

Possession without title confers a devisable interest, which may be defended and recovered by the devisee against all but the true owner (*q*).

Possession de facto.

When a testator appoints a solicitor to be executor or trustee of his will, he sometimes empowers him to charge for services rendered by him in performing the duties of his office. Whether the right to make such charges is confined strictly to professional services or extends to other matters, depends on the language of the will (*r*).

Profit costs.

The right to charge profit costs is in the nature of a legacy (*s*), and the solicitor forfeits it by attesting the will (*t*).

In some cases (apart from the doctrine of powers) property passes under the will of a testator, although it never belonged to him. Thus where a gift of real or personal property by will to a child of the testator is preserved from lapse by sect. 33 of the Wills Act, and the child has left a will containing a sufficient residuary gift, the property bequeathed or devised to the child by the father's will passes under the residuary gift in the child's will (*u*). A similar result follows when personal property is expressly given by will to A., and in the event of his predeceasing the testator, then to his executors as part of his personal estate, and A. predeceases the testator, leaving a will containing a sufficient residuary bequest (*v*).

Where will takes effect ex postfacto.

Ch. D. at p. 56, where *Davis v. Angel*, 4 D. F. & J. 524, is referred to. See also *Allcard v. Walker*, [1896] 2 Ch. 369 at p. 380. As to the Irish case of *Re Beaufre's Trusts* (21 L. R. Ir. 397), see *Re Parsons*, supra; *Re Chichester's Estate*, [1908] 1 Ir. R. 297.

(*m*) *Baker v. Hacking*, Cro. Car. 387, 405. See also *Doe d. Cooper v. Finch*, 1 Nev. & M. 130, 4 B. & Ad. 283.

(*n*) *Goodright v. Forrester*, 8 East, 564, 1 Taunt. 578. See also *Cave v. Holford*, 3 Ves. 669; *Att.-Gen. v. Vigor*, 8 Ves. 282; *Doe d. Souter v. Hull*, 2 D. & Ry. 38; *Culley v. Doe d. Taylerson*, 11 Ad. & Ell. 1020; *Bunter v. Coke*, Salk. 237.

(*o*) See *Pemberton v. Barnes*, [1899]

1 Ch. 544. See the argument in *Leach v. Jay*, 6 Ch. D. 496, 9 Ch. D. 42.

(*q*) *Asher v. Whitlock*, L. R., 1 Q. B. 1; *Clarke v. Clarke*, Ir. R., 2 C. L. 395; *Hawksbee v. Hawksbee*, 11 Ha. 230.

(*r*) See *Re Fish*, [1893] 2 Ch. 413, and the cases there cited; *Clarkson v. Robinson*, [1900] 2 Ch. 722.

(*s*) *Re Thorley*, [1891] 2 Ch. 613.

(*t*) Post, p. 96.

(*u*) *Johnson v. Johnson*, 3 Ha. 157, and the other cases referred to in Chap. XIII., where the operation of the section is considered in detail.

(*v*) *Long v. Watkinson*, 17 Bea. 471; *Re Clay*, 54 L. J. Ch. 648. See Chap. XIII.

CHAPTER IV.

It is hardly necessary to say that personal property limited by settlement merely to the executors or administrators of the settlor may be disposed of by his will, since he himself takes absolutely under such a limitation (*w*).

So if land is limited, by virtue of a shifting clause, to A., and before it takes effect A. dies intestate, leaving B. his heir, and B. dies, having made a will containing a general devise of real estate, and then the shifting clause takes effect, the land passes by the devise (*x*).

Real estate.

X.—Operative Words of Testamentary Disposition.—The appropriate word for disposing of land and other real estate is “devise,” but of course any word indicating that intention, such as “bequeath,” although more properly applicable to personalty, is sufficient (*y*). A difficulty as to the intention in such cases arises where the gift is referential. Thus in *Jackson v. Hosie* (*z*), a testator made various specific dispositions of real and personal property, and went on to direct that as to the residue of the property “not hereinbefore specifically bequeathed,” it should be divided rateably among certain persons in proportion to “the bequests hereinbefore specifically given” to them: it was held that these words included devisees of real estate, although the testator had in other parts of his will used the word “devise” in disposing of his real estate. But an appointment of a person as “my residuary legatee” will only give him the testator’s personal estate, unless an intention to dispose of the realty is apparent (*a*). An appointment of a person as “executor of all my property,” or the like, may operate to pass land to him, either beneficially or as trustee (*b*).

“I make
A. B. my
heir.”

An appointment or acknowledgment of a person as the testator’s heir may operate as a general devise of his real estate (*c*).

(*w*) *Morris v. Howes*, 4 Hare, 599; *Mackenzie v. Mackenzie*, 3 Mac. & G. 559.

(*x*) *Ingilby v. Amcotts*, 21 Bea. 585.

(*y*) *Re Gibbs*, [1907] 1 Ch. 465.

(*z*) 27 L. R. Ir. 450. See *Hope v. Taylor*, 1 Burr. 268, stated post, Chap. XXVII. (“legacy” held to include devise of land).

(*a*) *Re Gibbs*, supra, and other cases cited in Chap. XXVII.

(*b*) See *Doe v. Haslewood*, 6 Ad. & E. 167, and other cases cited in Chap. XXVII.

(*c*) In *Spark v. Purnell* (Hob. 75), a testator devised part of his lands to

Anthony, and part to William, and willed that if either should die, one of them should be the other’s heir. The Court said: “If by my will I appoint that J. S., shall be heir of my land, he shall have it in fee; for such estate as the ancestor hath such he is to inherit. And, therefore, the said word (heir) in the latter clause, between William and Anthony, shall give him an estate for life to the survivor, because the brother to whom he is made heir, had but an estate for term of life before.” See *Tilly v. Collyer*, *Taylor v. Webb*, and other cases cited post, Chaps. XIV. and XIX.

The appropriate word for disposing of personal property, including leaseholds, is "bequeath," but the word "devise" was formerly used as an operative word for bequeathing personalty (*d*), and of course may at the present time be so used, if the intention is clear (*e*).

CHAPTER IV.
Personalty.

It is clear that if a testator appoints a person to be his residuary legatee, that will give him all the testator's residuary personal estate. The contest in such cases generally is, whether the words are sufficient, with the aid of the context, to pass the real estate (*f*).

Appointment
as residuary
legatee.

The cases in which an executor is entitled to the undisposed of personal estate are considered elsewhere (*g*).

Appointment
of executor.

(*d*) *Ewer v. Corbet*, 2 P. W. 148; *Hughes v. Pritchard*, 6 Ch. D. 24; *Re Rider v. Wager*, 2 P. W. 328. *Gibbs*, [1907] 1 Ch. 465; and other

(*e*) See *Re Lowman*, [1895] 2 Ch. 348, cases cited in Chap. XXVII.

(*f*) *Windus v. Windus*, 21 Bea. 373; (*g*) Chap. XXI.

CHAPTER V.

WHO MAY BE DEVISEES OR LEGATEES. (*d*)

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Disability of
corporations
to take
by devise.

I.—Corporations.—The history of the law is thus stated by Mr. Jarman (*a*) : “ The statute of 34 Hen. 8, c. 5, expressly excepted out of its enabling clause devises to bodies politic and corporate ; and, accordingly, it was held, that a devise to a corporation, whether aggregate or sole, either for its own benefit or as trustee, was void ; and the lands so devised descended to the heir, either beneficially or charged with the trust, as the case might be (*b*). The recent statute contains no such prohibition, the legislature having contented itself with regulating and defining the powers and capacities of testators, without in any manner interfering with, or attempting to define, the capacities of persons to take under testamentary dispositions, which it has left to be ascertained and determined by the application of the general principles of law. If, therefore, the disability of corporations to acquire real estate by devise had been created by the statute of Henry, the recent Act of 7 Will. 4 & 1 Vict. c. 26 would, by repealing that statute without reviving the prohibition, have had the effect of giving validity to such devises ; but this is not the case. The disability of corporations to hold real property was created by various antecedent statutes (*c*), which appear to have been founded on the principle that, by allowing lands to become vested in objects endowed with perpetuity of duration, the lords were deprived of

Mortmain
Acts.

(*a*) First edition, p. 57. By “ the recent statute ” Mr. Jarman of course means the Wills Act, 1837.

(*b*) *Sonley v. Clockmakers' Company*, 1 Br. C. C. 81.

(*c*) *Magna Charta*, c. 36 ; 9 Hen. 3, c. 36 ; 7 Edw. 1, c. 1 ; [13 Edw. 1, c. 32, and c. 33] ; 34 Edw. 1, st. 3 ; 13 Edw. 3, c. 3 ; 15 Rich. 2, c. 5 ; 33 Hen. 8, c. 10.

escheats and other feudal profits. Hence, the necessity of obtaining the King's licence, he being the ultimate lord of every fee in the kingdom; but this licence only remitted his own rights, and did not prevent the right of forfeiture accruing to intermediate lords. Doubts having arisen, however, at the Revolution how far such licence was valid (*d*), as being an exercise of the dispensing power formerly claimed by the Crown (but which, it is pretty evident, it was not, but merely a waiver of its own right of forfeiture (*e*)), the statute 7 & 8 Will. 3, c. 37, was passed, which provides that the Crown for the future, at its own discretion, may grant licences to alien or take in mortmain, of whomsoever the tenements shall be holden. At this day, therefore, the licence from the Crown protects against forfeiture to any intermediate lord."

The language of the old statutes is extremely vague, but their intention obviously was not only to prevent tenants in fee simple from aliening their land in mortmain to the injury of their superior lords, but also to prevent land from being "amortised" to the injury of the community. Consequently, when the practice grew up of granting licences to avoid forfeiture under the acts, it was considered necessary in every case to have the licence of the lord of the fee and other superior lords to enable the tenant to alien, and also the licence of the Crown to enable the corporation to hold; for, as Coke says, "Corporations have capacitie to take but not to retaine, unless they have a sufficient licence in that behalfe (*f*)."

After the Act 7 & 8 Will. 3, c. 37 (see above), it became the practice in granting a licence in mortmain for the Crown to authorise the corporation to acquire and hold lands, and also to authorise all persons to convey lands to the corporation (*g*). In more modern times, however, it seems to have been considered that a licence to a corporation to acquire and hold lands in mortmain, implied a licence to other persons to convey them to the corporation, and the express licence to do so fell into disuse (*h*). "The question whether, on the interpretation of this statute [7 & 8 Will. 3, c. 37], a

Double
licence
formerly
required.

Modern
practice.

(*d*) Hawk. P. C. 293.

(*e*) The licences, however, were generally so expressed as to imply a dispensing power: see Hargrave's note to Co. Litt. 99a.]

(*f*) Co. Litt. 2b.

(*g*) See generally as to the Statutes of Mortmain, Shelford on Mortmain; 2 Bl. Comm. 268 seq.; Hargrave's note to Co. Litt. 99a.

(*h*) Grant on Corporations, 573, note (*t*). See the mortmain clause in the private Acts incorporating the St. George's and Westminster Hospitals, given in *Re Ovey*, 31 Ch. D. at p. 115, where the capacity of the testator to devise real estate to them without a licence to alien in mortmain was taken for granted. So in *Perring v. Trail*, L. R., 18 Eq. 88.

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Mortmain,
&c., Act,
1888.

person, not having a licence to alien in mortmain, can alien to a corporation having only a licence for themselves to hold in mortmain (without the clause enabling all persons to alien to them), so as to prevent the entry of the immediate lord or of the Crown for the escheat, seems never to have been settled, and perhaps is more curious than practically important (*hh*)."

The Mortmain and Charitable Uses Act, 1888, which passed into law on August 13, 1888, repeals (sec. 13) the old statutes relating to gifts in mortmain, but the operation of this repeal is not retrospective, so that the law with regard to testamentary gifts coming under these categories, made by testators who died prior to the passing of the act, are still regulated by the former law. Sect. 1 of this act enacts that, "(1) Land shall not be assured to or for the benefit of, or acquired by or on behalf of any corporation in mortmain, otherwise than under the authority of a licence from Her Majesty the Queen, or of a statute for the time being in force, and, if any land is so assured otherwise than as aforesaid, the land shall be forfeited to Her Majesty from the date of the assurance, and Her Majesty may enter on and hold the land accordingly." Subsect. 2 of the same section provides that where the land is held of one or more mesne lords under Her Majesty, each mesne lord is to have the right of entering on and holding the land within a certain time, but the right of each superior lord is only to be exercised if the inferior lord fails to exercise his right of entry within the proper time. Sect. 2 enacts that, "It shall be lawful for Her Majesty the Queen, if and when and in such form as she thinks fit, to grant to any person or corporation a licence to assure in mortmain land in perpetuity or otherwise, and to grant to any corporation a licence to acquire land in mortmain, and to hold the land in perpetuity or otherwise (*i*)."

In this act, unless the context otherwise requires, "assurance" includes a gift, devise, bequest, or other assurance by will, and "assure" and "assuror" have corresponding meanings; and "land" includes tenements and hereditaments corporeal and incorporeal of whatever tenure and any estate or interest in land (*j*).

The act also provides (sect. 12) that "Nothing in this act shall affect the operation or validity of any charter, licence, or

(*hh*) Grant 103.

(*i*) This section is a partial re-enactment of s. 1 of stat. 7 & 8 Will. 3, c. 37, but it omits the important words "of whomsoever the same shall be holden," and fails to re-enact s. 2 of the same

statute, protecting from forfeiture lands aliened in pursuance of a licence so granted.

(*j*) This definition has been repealed and another substituted by the Mortmain &c. Act, 1891; see post, Chap. IX.

customs in force at the passing of this act enabling land to be assured or held in mortmain"; and further (sect. 13) that the repeal of previous enactments shall not affect "(a) any enactment not hereby repealed referring to any enactment hereby repealed, except that in lieu of that reference the unrepealed enactment shall be construed as if it referred to the corresponding provisions of this act; or, (b) the past operation of any enactment hereby repealed, or any instrument or thing executed, done, or suffered before the passing of this act; or, (c) any right, obligation, or liability acquired, accrued, or incurred under any enactment hereby repealed; or (d) any action, proceeding, or thing pending or uncompleted at the time of the passing of this act."

This act was obviously intended to consolidate and re-enact the former statutes relating to mortmain and charitable uses (*k*). But, unfortunately, the draftsman appears to have been imperfectly acquainted with the difficulties which had arisen under the old Mortmain Acts, for the wording of the new act seems to revive, instead of setting at rest, the question whether a general licence to a corporation to acquire and hold lands is sufficient to authorise a tenant in fee simple to alien his land to the corporation without a licence for that purpose. However, it seems incredible that any court should hold that such a licence is necessary, and it is submitted that there is nothing which prevents a corporation empowered to acquire and hold lands in mortmain from taking by devise in the ordinary way.

Effect of the recent act as regards gifts in mortmain.

Where, before the Wills Act, real estate was devised upon trust to a corporation not empowered to take lands by devise, although the devise was, of course, void at law, under the statute of Henry, yet the estate descended to the heir charged with the trust (supposing that it was not illegal under the statute 9 Geo. 2, c. 36, as being in favour of charity), in the same manner as where a devise to a trustee fails by the death of the devisee in trust in the testator's lifetime (*l*). And since the Wills Act, the trust would equally be upheld; the only difference being that the corporation trustee is now capable (except in cases within the Mortmain Act of 1736 or 1888) of taking by devise, though not, without licence, of holding.

Devises to corporations in trust.

It was held in *Flood's Case* (*m*) that a devise to a corporation

Devise to charitable corporation under 43 Eliz. c. 4.

(*k*) See *Re David, Buckley v. Royal National Life-boat Institution*, 41 Ch. D. at p. 175.

Richards, 1 D. & War. 258 (where, the lands being in Ireland, the charitable trust was valid).

(*l*) *Sonley v. Clockmakers' Company*, 1 Br. C. C. 81; *Incorporated Society v.*

(*m*) Hob. 136; 1 Eq. Ca. Abr. 95, pl. 6. *Bene't College v. Bishop of London*,

CHAPTER V. to charitable uses, although ineffectual to pass the legal estate by reason of the statute 34 Hen. 8, was good in equity under the statute 43 Eliz. c. 4. By the Act 9 Geo. 2, c. 36, as it is hardly necessary to point out, such devises were rendered wholly void, except in the case of corporations having a licence to acquire lands by devise (*n*). Whether devises to unlicensed charitable corporations are now valid under the Mortmain, &c., Act, 1891, is discussed in another place (*o*).

Exception in
favour of
certain cor-
porations, &c.

It should be observed, however, that devises to some corporations are authorised by act of parliament. For instance, the statute 43 Geo. 3, c. 107, enables persons to devise lands to the Governors of Queen Anne's Bounty; and the statute 43 Geo. 3, c. 108, authorises, under certain limitations, the devise to any persons or bodies politic or corporate, of land (not exceeding five acres), for the erection, repair, purchase, or providing of churches or chapels, where the liturgy of the United Church of England and Ireland shall be used, or of the mansion-house for the residence of the minister, or of any out-buildings, offices, churchyard, or glebe, for the same respectively. And similar enactments have been made in favour of many other charity corporations (*p*). And although generally devises for charitable uses are forbidden by the Act of 9 Geo. 2, c. 36, yet the 4th section of that statute, which excepts out of its operation gifts to the two English Universities, and the Colleges of Eton, Winchester, and Westminster, leaves devises to those corporations to be dealt with by the general law as settled by the Wills Act.

It may be added that sect. 7 of the Act of 1888, which repeals and re-enacts the Act of 9 Geo. 2, extends the exemption to gifts to the Universities of London and Durham, and the Victoria University, and the various colleges of the universities above mentioned (*q*).

The 6th section also excepts from the operation of Parts I. and II. of the act, under certain conditions, testamentary gifts for public parks, elementary schools, and public museums. There are numerous other acts which contain similar exemptions (*r*).

2 W. Bl. 1182, holding such a devise good at law, "rests on no solid foundation;" see per Lord St. Leonards, 1 D. & War. 305.

(*n*) See below, Chap. IX.

(*o*) Chap. IX.

(*p*) See Church Building Act, 9 Geo. 4, c. 42, and other statutes stated, post, Chap. X., and in Shelford on Charitable Uses. These exemptions are continued by s. 8 of the Act of 1888,

(*q*) The Universities are apparently excepted from Part I. of the Act only to the extent provided by their special Acts, see Tudor on Charities, &c., 427.

(*r*) Such as the Technical and Industrial Institutions Act, 1892, the Education Act, 1902, &c. See as to County Councils and other local authorities, the Mortmain, &c. Act, 1892.

It will of course be remembered that a power to hold land does not of itself empower a corporation to acquire land for charitable purposes. The two questions are quite distinct (*s*).

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The Companies (Consolidation) Act 1908, which repeals, and in effect re-enacts, the provisions of the Companies Act, 1862, enacts (sect. 16) that every company incorporated in accordance with the provisions of the act shall have power to hold lands; and (sect. 19) that a company formed for the purpose of promoting art, science, religion, charity, or any other like object, not involving the acquisition of gain by the company or by its individual members shall not, without the licence of the Board of Trade, hold more than two acres of land; but the Board of Trade may by licence empower any such company to hold lands in such quantity, and subject to such conditions, as they think fit. The use in these sections of the word "hold," without any word giving a power to acquire land, suggests a doubt whether a devise of land to a trading company by a testator not licensed to alien lands in mortmain would be valid, even if the company would have had power to purchase the land for the purpose of its business. But to hold such a devise void would be taking a highly technical view of the act, for it is admitted that a company formed under the act can purchase land, and that being so there is no reason why it should not be able to take by devise.

Companies
Act, 1862.

Questions on gifts by will to corporations sole do not often arise. They seem to labour under the same general incapacity to hold land without a licence in mortmain as corporations aggregate (*t*). It seems that since the passing of the Mortmain, &c., Act, 1891, land can be validly devised to a corporation sole (such as a rector or vicar) upon charitable trusts, but it must be sold in accordance with the act (*u*).

Corporations
sole.

A registered trade union, although not a corporation, is "a legal entity," and may be sued in its registered name (*v*). But a devise of land to such a society is invalid (*w*).

Quasi-
corporations.

A gift by will to a voluntary society or association of persons, such as a club, for their own benefit, is clearly good. But if it is

Voluntary
association.

(*s*) See post, Chap. IX.

(*t*) Co. Litt. 2b. Under the School Sites Act, 1841, and other Acts, corporations sole can hold land conveyed to them by deed. As to the Public Trustee, see Chap. XXIV.

(*u*) *Re Scowcroft*, [1898] 2 Ch. 638. The question whether land can be conveyed to a corporation sole for any

purpose not directly connected with his office has been much discussed, but apparently never decided.

(*v*) *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426.

(*w*) *Re Amos*, [1891] 3 Ch. 159: see Chap. IX.

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upon trust for future members of the association, it is clearly bad (*x*).

Law before
Naturaliza-
tion Act, 1870.

II.—Aliens.—The incapacity of alienage has been removed, as we have already seen, by the Naturalization Act, 1870 (*y*). But the act not being retrospective, and giving no protection to rights acquired by an alien before it was passed (*z*), it is still necessary to consider the old law. Alienage could not, strictly speaking, be ranked among the incapacities to take real estate by devise, as the property remained in the alien till office found, when it devolved to the Crown (*a*). On this principle, where lands were devised to an alien and another concurrently as joint tenants, the entirety did not vest in the latter (as would have been the effect if the devise to the alien had been absolutely void), but in both jointly; and if the Crown did not during the joint lives seize the alien's undivided moiety (as it might do after office found (*b*)), then, on the decease of the alien, leaving his co-devisee surviving, such moiety devolved to the latter by virtue of the *jus accrescendi*, which is incidental to every joint tenancy, subject, of course, to the Crown's right of seizure, after office; which would, by relation, have overreached the title of the surviving joint tenant to the alien's moiety (*c*). If, however, the alien survived his co-devisee, he did not, in the opinion of some persons, thereby become entitled to the entirety, he being disabled from acquiring a title by operation of law, even for the benefit of the Crown, on the principle that the law, by its own act, never gave an estate to one whom it did not permit to retain it (*d*); but though the principle is unquestionable, perhaps this application of it may be fairly excepted to, as the survivor seems to have been in by the original gift.

Where trust
declared in
favour of an
alien went to
the Crown.

Where a trust in lands for life or any greater estate was created in favour of an alien by will or otherwise, the Crown upon office found was entitled to the benefit of the trust (*e*). The Crown took, not for any reason arising out of the doctrine of tenures (*f*),

(*x*) Post, Chap. X.

(*y*) 33 Vict. c. 14, s. 2, ante, p. 59.

(*z*) *Sharp v. St. Sauveur*, L. R., 7 Ch. 351. See as to children born abroad of a British subject, *De Geer v. Stone*, 22 Ch. D. 243.

(*a*) *Duplessis v. Att.-Gen.*, 1 Br. P. C. 415. See *Barrow v. Wadkin*, 24 Beav. 1; *Sharp v. St. Sauveur*, supra.

(*b*) *King v. Boys*, Dy. 283b.

(*c*) *Forset's Case*, cit. 1 Leon. 47, 4 Leon. 82.

(*d*) See *Collingwood v. Pace*, 1 Vent,

417; *Bridg. by Ban.* 414.

(*e*) *Barrow v. Wadkin*, 24 Beav. 1; *Sharp v. St. Sauveur*, L. R., 7 Ch. 323; overruling *Ritson v. Stordy*, 3 Sm. & Gif. 230.

(*f*) Escheat or forfeiture. Forfeiture there was not: and the crown cannot, at common law, take the trust of realty by escheat, *Burgess v. Wheate*, 1 Ed. 177; 1 W. Bl. 123; *Davall v. New River Company*, 3 De G. & S. 394; *Beale v. Symonds*, 16 Beav. 406. (See now the Intestates Estates Act, 1884,

but by its prerogative on grounds of public policy (*g*), a title which extended, à fortiori, to the trust of chattel interests in land (*h*), except such as an alien might himself hold (*i*). But the proceeds of real estate, which was impressed with a trust for conversion, could be given to an alien, and the Crown had no claim, this not being a trust conferring on the alien an interest in land, but merely a right to have the land converted into money; and the policy of the law in regard to mortmain (which had been much pressed in argument as analogous in principle) depending upon considerations entirely different (*j*).

The disabilities of alienage might be removed partially by a grant of letters of denization from the Crown, or wholly by an act of parliament investing the alien with the rights and privileges of a British subject. Such acts, in favour of the particular individual, were superseded by the Act 7 & 8 Vict. c. 66 (now repealed), which (sect. 6) empowered the Secretary of State to grant certificates of naturalisation, having the same effect as the ordinary

Naturalisa-
tion and
denization.

In Co. Litt. 191a, n. vi. 11, Mr. Butler suggests that a better ground in favour of the claim of the crown might, perhaps, have been found, by resorting to its acknowledged prerogative of being entitled to the bona vacantia, or every species of property of which no owner is discoverable: but the suggestion was never acted upon. As to Lord Loughborough's often-cited dictum, that "the crown comes under no head of equity," *Walker v. Denne*, 2 Ves. jun. 179, see per Romilly, M. R., in *Barrow v. Wadkin*. The dictum appears to be warranted when used with reference to a trust for conversion in a case where there is a total failure of the objects of the trust. Thus, in *Walker v. Denne*, the crown was held not entitled to enforce against the next of kin a trust for laying out money in land where there was a total failure of cestuis que trust, and the only result would be to enable the crown to claim by escheat: and in *Taylor v. Haygarth*, 14 Sim. 8, where real and personal estate was devised to trustees on trust for sale, and the surplus proceeds were left undisposed of, and all legacies and annuities had been satisfied out of the personalty, Sir L. Shadwell, V.-C., held, on a failure of heirs and next of kin, that the trustee was entitled for his own benefit, and that the crown was not entitled to a decree for sale merely that it might take the produce as bona vacantia. But it does not follow "because the crown

could not enforce the execution of a trust to sell in favour of a non-existing person, that therefore the crown could have no benefit of a trust for an existing person, the beneficial interest in which had through that person become vested in the crown;" per M. R., 24 Beav. 17. In *Henchman v. Att.-Gen.*, 3 My. & K. 485, the claim of the crown to a sum of money provided by the will to be paid by the devisee of lands to a charity, and assumed to be an exception from the devise (see post, Chap. XIII.), was negatived, and the money held to sink for the benefit of the devisee. The difference between this case and that of the alien, is that in the latter there is a person who can take though he cannot hold; in the former the object cannot take.

(*g*) Co. Litt. 2b.

(*h*) See *Middleton v. Spicer*, 1 Br. C. C. 201; *Taylor v. Haygarth*, 14 Sim. 8; *Cradock v. Owen*, 2 Sm. & Giff. 241; *Powell v. Merritt*, 1 ib. 381; *Reynolds v. Wright*, 25 Beav. 100, 2 D., F. & J. 590; *Read v. Stedman*, 26 Beav. 495. These cases relate to a total failure of next of kin; and if they differ in principle from the point noticed in the text, go rather beyond what is needed to establish that point.

(*i*) Co. Litt. 2b, and infra.

(*j*) *Du Hourmelin v. Sheldon*, 1 Beav. 79, 4 My. & Cr. 525; and see *Master v. De Croismar*, 11 Beav. 184.

CHAPTER V.

acts of naturalisation; and enacted (sect. 5) that every alien friend might, by grant, lease, assignment, bequest, representation, or otherwise, take and hold any lands or tenements for the purpose of residence, occupation, or trade, for any term not exceeding twenty-one years, as if he were a natural-born subject.

An act of naturalisation was always so framed as not to render valid antecedent conveyances by the alien, the terms of the enactment being, that he shall be and is henceforth naturalised, &c. (*k*); and the Act 7 & 8 Vict. is in equivalent terms. But letters of denization expressly authorise the denizen to hold lands theretofore granted (*l*), and he may even hold such as devolve to him by act of law, except, of course, that formerly he could not claim by descent from or through his father, if an alien (*m*).

Foreigners.

As regards disabilities imposed on aliens by the laws of their own countries, the general rule seems to be that the English courts disregard all personal disabilities and disqualifications unknown to English law (*n*).

Gifts to
attesting
witnesses.

III.—Gifts to Attesting Witnesses.—Under the Statute of Frauds, a devise of land was required to be attested by “credible” witnesses, a character which persons having a beneficial interest under the will were held not to sustain, and accordingly, a will of freehold estate attested by such persons was invalid; and that, too, not only as to the part which created the interest of the attesting witness, but in regard to the whole (*o*).

Stat. 25 Geo.
2, c. 6.

It was soon found that the holding a will of freeholds to be invalid on account of the existence of an interest, however remote or minute, in any one of the attesting witnesses, was productive of much inconvenience; and it being apparent that to render the witness competent, by depriving him of the benefit which affected his disinterestedness, was far better than to sacrifice the entire will, the statute 25 Geo. 2, c. 6 (*p*), was passed, which, after reciting the 29 Car. 2, c. 3, s. 5, provided, that beneficial devises, legacies, &c., to attesting witnesses, other than and except charges on lands, &c., for payment of debts, should, so far only as concerned such attesting witnesses, or any person claiming under

(*k*) *Fish v. Klein*, 2 Mer. 431.

(*l*) *Fourdrin v. Gowdey*, 3 My. & K. 383.

(*m*) Sir M. Hale in *Collingwood v. Pace*, 1 Vent. 417. Otherwise if the father was a denizen at the son's birth.

(*n*) *Worms v. De Valdor*, 49 L. J. Ch. 261; *Re Selof's Trust*, [1902] 1 Ch. 488.

(*o*) As to the question whether the competence of the witness could be restored by a subsequent release of his interest, see *Lowe v. Jolliffe*, 1 W. Bl. 365; *Goodtitle v. Welford*, Dougl. 139; *Doe v. Hersey*, 4 Burn's Eccl. Law, 27; *Brograve v. Winder*, 2 Ves. jun. 636.

(*p*) Ir. Parl. 25 Geo. 2, c. 11,

them, be null and void ; and such person should be admitted as a witness to the execution of such will or codicil within the intent of the said Act, notwithstanding such devise, &c. ; but it was enacted (sect. 2), that any creditor, whose debt should be charged on lands, &c., by will or codicil, and who should attest the execution of such will or codicil, should, notwithstanding such charge, be admitted as a witness to such execution (g).

By the Wills Act the legislature has adopted the principle, and extended the operation, of the enactments in the statute 25 Geo. 2, c. 6, which it repeals, except as to the colonies in America. Stat. 1 Vict. c. 26.

Sect. 14 provides that if any person, who shall attest the execution of a will, shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid. Will not to be void on account of incompetency of attesting witnesses.

Sect. 15 provides that if any person shall attest the execution of any will to whom, or to whose wife or husband, any beneficial devise, legacy, estate, interest, gift or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife or husband, be utterly null and void ; and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment, mentioned in such will. Gift to an attesting witness or wife or husband of witness to be void.

Sect. 16 provides that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof. Creditor attesting to be admitted a witness.

Sect. 17 provides that no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof. Executor to be admitted a witness.

These enactments preclude, as to wills coming within their provisions, all questions arising under the old law as to the effect

(g) For points decided on this statute, see the 4th edition of this Work, Vol. I, pp. 71, 72. Remarks upon new law as to interested witnesses.

CHAPTER V.

Points
decided on
1 Vict. c. 26,
s. 15.

Evidence
admissible to
shew that
legatee did
not sign
as witness.

of a gift to the husband or wife of an attesting witness, and they extend the disqualification of the witness to take beneficially to wills of every description; the act having, by assimilating the execution of wills of real and personal estate, destroyed all ground for distinguishing between them in regard to this point.

Upon the construction of the 15th section, it has been decided that a legatee under a will does not lose his legacy by attesting a codicil which confirms the will (*r*): and further, that a residuary legatee by so doing, does not lose his share of the residue, although the codicil in fact increases that share by revoking some particular legacies (*s*). Each witness attests only the instrument to which he puts his name. Consequently, if a will consists of separate sheets of paper, executed by the testator on the same day, but separately attested, a legatee under one of them does not forfeit his legacy by reason of his having attested one or more of the other sheets (*t*). Again, where a will attested by a legatee is re-published by a codicil attested by other witnesses, the gift to the legatee is made good (*u*). And this benefit is not lost to the legatee by his subsequent attestation of a second codicil (*v*). But where by will a legacy was bequeathed in a contingency which failed, and by a codicil attested by the legatee, the legacy was made absolute, the legatee was held disqualified to take the absolute legacy (*w*). And, following the rule regarding wills of real estate under the pre-existing law, a witness is held to be disqualified to take as legatee although he is a supernumerary (*x*). But evidence is admissible to shew under what circumstances the supernumerary signed, and if it appears that he did not sign as a witness (e.g., if he did not sign at the request of the testator, or contemporaneously with the attesting witnesses) he will not lose his legacy (*y*). According to numerous cases, the rule is, that if a will contains the names of three or more persons who appear to be attesting witnesses, some of them being legatees, all the names must be included in the probate, in order that the question whether the legatees did or did not sign as witnesses may be decided in a court of equity (*z*).

(*r*) *Gurney v. Gurney*, 3 Drew. 208; *Tempest v. Tempest*, 2 K. & J. 642, 7 D. M. & G. 470; *Re Marcus*, 57 L. T. 399, unless he also attested the will itself (*ib.*).

(*s*) *Gurney v. Gurney*, *supra*.

(*t*) *Re Craven*, 99 L. T. 390.

(*u*) *Anderson v. Anderson*, L. R., 13 Eq. 381.

(*v*) *Re Trotter*, [1899] 1 Ch. 764.

(*w*) *Gaskin v. Rogers*, L. R., 2 Eq. 284.

(*x*) *Wigan v. Rowland*, 11 Hare, 157; *Cozens v. Crout*, 42 L. J. Ch. 840.

(*y*) *Randfield v. Randfield*, 30 L. J. Ch. 179, *ii*, where there were two attestations.

(*z*) *Wigan v. Rowland*; *Cozens v. Crout*, *supra*; *In bonis Mitchell*, 2 Curt. 916; *In bonis Forest*, 31 L. J. P. 200; *In bonis Raine*, 34 L. J. P. 125; *In bonis Smith*, *ib.* 19.

But in *In bonis Sharman* (a), where the general rule was recognised, the question had to be decided by the Court of Probate, because on it depended the further question to whom the grant was to go. Lord Penzance held on the evidence that the residuary legatee did not sign as an attesting witness, and directed her name to be omitted from the grant. This decision appears to be generally regarded as laying down the rule that it is the function of the Court of Probate to decide the question in all cases, (b) and that if the name of a person is included in the probate as an attesting witness, that is conclusive on the Court of Construction (c). But the rule laid down by the earlier cases is, it is submitted, more in accordance with principle.

It has been held that a person who attests the attestation of a marksman is himself an attesting witness to the will, and a legacy to him consequently fails (d).

It has further been held, upon the construction of this section, that where there is a testamentary gift for life, which fails by reason of the attestation of the will by the donee, or by his or her wife or husband, with remainder to the children of the donee, and in default of children then over, the remainder to the children, if in existence at the testator's death, will not be defeated, but will be accelerated and become an immediate interest (e); but that, if there is then no child of the donee for life, the ultimate gift upon the determination of the life interest cannot be accelerated, but during the life of the donee, and until birth of issue, the income of real estate will belong to the testator's heir-at-law (f). In the case of personalty the interim income would, on the same principle, go to the testator's next of kin (g).

Acceleration of remainders where life interest is given to attesting witness.

The gift which fails by the operation of the section is not struck out of the will for all purposes; consequently if there is a gift to "A. or her children," and A.'s husband attests the will, the failure of the gift to A. does not make the substitutionary gift to her children take effect (g).

The validity of a devise or bequest will not be destroyed, under

Marriage of devisee or legatee after attestation to attesting witness.

(a) L. R., 1 P. & D. 661.

(b) *In bonis Murphy*, Ir. R., 8 Eq. 300; *In bonis Smith*, 15 P. D. 2.

(c) *Re Faux*, [1888] W. N. 249; *Re Lanceley*, [1889] W. N. 31. These were cases of personalty. As to realty, see *Randfield v. Randfield*, 30 L. J. Ch. 179, n, and the Land Transfer Act, 1897, s. 1.

(d) *Wigan v. Rowland*, 11 Hare, 157. But if it were shewn that he attested

the signature or mark of the attesting witness at the request of the latter and not of the testator, would not this take the case out of the section, on the principle stated in *Randfield v. Randfield*?

(e) *Jull v. Jacobs*, 3 Ch. D. 703; *Re Clark*, 31 Ch. D. 72.

(f) *Re Townsend's Estate*, 34 Ch. D. 357.

(g) *Aplin v. Stone*, [1904] 1 Ch. 543.

CHAPTER V.

Power for solicitor trustee to make professional charges.

Where attesting witness is trustee.

Executor now not entitled to undisposed-of personalty.

Devise to heir; its effect under the old law.

sect. 15 of the Wills Act, if an attesting witness, who, at the time of the attesting act, takes no benefit under the will, subsequently marries the devisee or legatee (*h*).

A direction by will that a solicitor executor or trustee may make professional charges, creates a benefit under the will within the meaning of this section; and consequently if the solicitor attests the will, he is precluded from claiming the right to make the charges (*i*).

A gift to an attesting witness as trustee is not invalidated by sect. 15 (*j*).

In *Re Fleetwood* (*k*), Hall, V.C., held that where a gift is made by will to a trustee upon a parol trust, a person who attests the will cannot take any benefit under the trust, but the point was not argued, and the decision has not been followed in Ireland (*l*).

In allowing an attesting witness to be appointed executor, whether he be or be not in terms made an executor in trust, regard is evidently had to the statute of 1 Will. 4, c. 40, which precludes executors from claiming, by virtue of their office, the beneficial interest in the undisposed-of personal estate of their testator, to which, by the pre-existing law, an executor was entitled, where the will did not afford any presumption of a contrary intention, a point which was often difficult of solution.

IV.—Devise to Testator's Heir.—Another disability to take by devise formerly arose out of the doctrine, that where a title by descent and a title by devise concurred in the same individual, the former predominated, and the heir was in by descent and not by purchase. If however the quality of the estate which the heir took by the devise differed from that which would have descended upon him, he acquired the property as devisee (*m*).

(*h*) *Thorpe v. Bestwick*, 6 Q. B. D. 311.

(*i*) *Re Barber*, 31 Ch. D. 665; *Re Pooley*, 40 Ch. D. 1; *Re Trotter*, [1899] 1 Ch. 764.

(*j*) *Cresswell v. Cresswell*, L. R., 6 Eq. 69.

(*k*) 15 Ch. D. 594.

(*l*) *O'Brien v. Condon*, [1905] 1 Ir. R. 51. The point was referred to in *Sullivan v. Sullivan*, [1903] 1 Ir. R. 193.

(*m*) See as to the effect of devises to a testator's heir under the former law, *Haynsworth v. Pretty*, Cro. El. 833, 919, Moo. 644; *Clerk v. Smith*, 1 Salk. 241; *Chaplin v. Leroux*, 5 M. & Sel. 14; *Doe v. Timins*, 1 B. & Ald. 530; *Manbridge*

v. Plummer, 2 My. & K. 93. As to copyholds, *Smith v. Triggs*, 1 Str. 487. That in cases of marshalling, the heir, under an express devise to him, had the rights of a devisee, see *Biederman v. Seymour*, 3 Beav. 368; à fortiori, since the stat. 3 & 4 Will. 4, c. 106, s. 3; see *Strickland v. Strickland*, 10 Sim. 374. As to devises to co-heiresses of an estate in joint tenancy or in common, see *Anon.*, Cro. El. 431; *Swaine v. Burton*, 15 Ves. 365. As to the effect of a devise to several co-heirs or co-heiresses, or one of them, see *Bear's Case*, 1 Leon. 112, 315; Co. Litt. 163b; *Reading v. Royston*, 1 Salk. 242. And as to the devise of a contingent remainder to the

Whether the doctrine in question extended to testamentary appointments was a point of some nicety, and occasioned much discussion (*n*), into which, however, it is not now proposed to enter, as questions of this nature cannot arise under any will, future or recent; the statute of 3 & 4 Will. 4, c. 106, s. 3, having provided that, when any land shall have been devised by any testator who shall die after December 31, 1832, to the heir, or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent (*o*).

Stat. 3 & 4 Will. 4, c. 106, s. 3, making a heir-devisee a purchaser.

It has been decided that the word "heir" includes "heirs," and that the section operates to alter the quality of the estate taken by the heir, so that if a testator leaves co-heiresses, they take as joint tenants under a devise to them, and not as coparceners (*p*).

V.—Illegitimate Children.—A bastard in esse, whether born or unborn, is competent to be a devisee or legatee of real or personal estate; and the only question that now admits of discussion, in regard to gifts to such persons, is, whether they are sufficiently designated as the objects of them (*q*); and this depends on rules of construction of great practical importance in the preparation of wills, and which will hereafter receive examination. Whether a gift can be made to bastards not procreated, is a vexata quæstio, which will be fully considered in a later part of this work (*r*).

Devises and bequests to bastards.

VI.—Infants, Females covert, Lunatics, &c.—Infants (including infants en ventre sa mère (*s*)) and insane persons are not incapacitated from taking by devise or bequest, though they cannot manifest their acceptance; for acceptance will be presumed unless it would work injury to the devisee or legatee. But they cannot give effectual releases, or exercise a right of election (see Chapter XVI), and according to Mr. Roper (*t*), where a legacy is given to an infant, the executor cannot pay it to the infant or to any one on his behalf.

Infants and lunatics.

testator's heir at law, see 1 Sanders Uses, 133, n., 4th ed., citing *Cholmondeley v. Clinton*, 2 J. & W. 1.

(*n*) See *Hurst v. Earl of Winchelsea*, 1 W. Bl. 187, 2 Ld. Ken. 444, 2 Burr. 879; *Langley v. Sneyd*, 7 J. B. Moo. 165, 3 Br. & B. 243, 1 S. & St. 45.

(*o*) The negative words seem to exclude the claim of a devisee-heir of copyholds (which are expressly included in the Act) to disclaim the devise and take as heir, *Bickley v. Bickley*, L. R., 4 Eq. 216.

(*p*) *Re Baker*, 79 L. T. 343; *Owen v.*

Gibbons, [1902] 1 Ch. 636.

(*q*) See *Gordon v. Gordon*, 1 Mer. 141; *Earle v. Wilson*, 17 Ves. 528; *Evans v. Massey*, 8 Pri. 22.

(*r*) See *Blodwell v. Edwards*, Cro. Eliz. 509; see also Co. Litt. 3b; *Wilkinson v. Adam*, 1 Ves. & B. 422; *Re Connor*, 2 J. & L. 459. As to devises and bequests to illegitimate children, see Chap. XLIII.

(*s*) *Burdet v. Hopegood*, 1 P. W. 486; *Mogg v. Mogg*, 1 Mer. 654.

(*t*) *Legacies*, 880.

CHAPTER V.

This is clearly so where the infant's father is living (*u*). In order to relieve executors from responsibility in the case of legacies bequeathed to infants, the Legacy Duty Act, 1796, s. 32 (*v*), provided that where a legacy could not be paid by reason of the infancy of the legatee, the executor might pay the money into Court. In the opinion of several eminent text writers (*w*) (and, it is believed, of the profession at large), payment into Court under this Act was the only way in which an executor could discharge himself from responsibility. However, in the Irish case of *M'Creight v. M'Creight* (*x*), Brady, L.C., decided, though with some hesitation, that having regard to the terms of the statute 12 Car. 2, c. 24, a testamentary guardian can give a valid receipt for a legacy bequeathed to his ward. In *Re Cresswell* (*y*), where a legacy had been paid into Court under the Legacy Duty Act, Fry, J., refused to order it to be paid out to the testamentary guardian of the infant, on the ground that he was not "the person entitled thereto" within the meaning of the Act, but the learned judge disclaimed any intention of throwing doubts on the correctness of the decision in *M'Creight v. M'Creight*.

A testator may, of course, expressly authorise payment of a legacy to an infant (*z*), or to a parent, guardian, or other person on his behalf, and the legacy may properly be paid accordingly.

Married
women.

Property devised or bequeathed to a married woman, unless given to her separate use, was formerly subject to her husband's rights in respect of it. Accordingly if a legacy was given to a married woman, without more, the money could not be paid to her (*a*), for nothing but an actual payment to the husband, or a release by him, would be a discharge as against the wife surviving (*b*). But the executors might, in a proper case, decline to pay the legacy to the husband except upon the terms of his making a proper settlement on his wife (*c*).

Devise by
husband to
wife.

It may be mentioned that even at common law, although a man could not convey land to his wife during the coverture, he could devise it to her by will, "for that such devise taketh no effect till after the death of the devisor" (*d*).

(*u*). *Dagley v. Tolferry*, 1 P. Wms. 285.

(*v*) Repealed by the Trustee Act, 1893. See s. 42 of that Act.

(*w*) Lewin on Trusts, 6th ed. 311; Williams on Pers. Prop. 11th ed. 399.

(*x*) 13 Ir. Eq. 314.

(*y*) 45 L. T. 468.

(*z*) *Re Denekin*, 72 L. T. 220. As to this case see Chap. XXX.

(*a*) Roper on Leg. 887.

(*b*) *Ib.* 895; *Harrison v. Andrews*, 13 Sim. 595.

(*c*) Roper, 888.

(*d*) Litt. s. 168.

Where property is acquired by a married woman as her separate property, either because it is expressly given to her separate use (e), or because she takes it under the Married Women's Property Act, 1882 (f), she is entitled to receive it as if she were a feme sole.

CHAPTER V.

Separate use.

VII.—Traitors and Felons.—By the Forfeiture Act, 1870, where any person has been sentenced to death or penal servitude upon any charge of treason or felony, the Crown may appoint an administrator of his property, and all real and personal property to which the convict becomes entitled between the date of his conviction and the completion of his sentence, or his pardon, vests in the administrator for the purposes of the act. Before this act, all property, both real and personal, accruing to a felon or traitor during the term above referred to, was forfeited to the Crown by virtue of its prerogative (g). After completion of the sentence or pardon, his right to acquire and hold property was restored to him (h).

Abolition for forfeiture for treason and felony.

VIII.—Unascertained Persons.—A gift to a person who is not ascertained at the date of the will is not invalid for that reason, unless the result would be to enable the testator to make a testamentary disposition by a subsequent unattested instrument, or by an act which is testamentary in its nature (i).

It may be added that an animal cannot take by devise or bequest, as appears clearly from the doctrine of our law with regard to monsters (j). It is equally clear, on principle, that an animal cannot be a cestui que vie for the purpose of creating an estate pur autre vie, or a "life" within the meaning of the Rule against Perpetuities (k). The question whether a trust can be created for the benefit of an animal is discussed in Chapter XXIV. A trust for the benefit of animals may be good as a charity (l).

Animals.

(e) Ante, pp. 53, 54.

(f) Ante, p. 57.

(g) Co. Litt. 2b. "An attainted person is considered in law as one civiliter mortuus. He may acquire, but he cannot retain." *Bullock v. Dodds*, 2 Barn. & Ald. 258; *Roberts v. Walker*, 1 R. & Myl. 752.

(h) *Stokes v. Holden*, 1 Keen. 145; *Barnett v. Blake*, 2 Dr. & S. 117; *Gough*

v. Davies, 2 K. & J. 623; *Re Thompson's Trusts*, 22 Bea. 506; *Re Harrington's Trust*, 29 Bea. 24, and cases there cited.

(i) See *Stubbs v. Sargon*, 2 Keen. 255; 3 Myl. & Cr. 507; post, p. 134.

(j) See Chap. XLII.

(k) As to the decision in *Re Dean*, 41 Ch. 553, see Chap. X.

(l) See Chap. IX.

CHAPTER VI.

EXECUTION AND ATTESTATION OF WILLS.

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Effect of *lex
domicilii* and
lex rei sitæ.

THE remarks in this chapter as to the formalities required for a valid will, apply only to wills intended to operate according to the law of England. If the will of an English testator is intended to dispose of land situate out of England, it must be borne in mind that testamentary dispositions of immoveable property are governed by the *lex rei sitæ* (a), and accordingly care must be taken to ascertain and comply with the formalities required for the validity of wills by the law of the country where the property is situate. Sometimes, also, a doubt may arise whether an Englishman, who has been long resident abroad, has, at the time of making his will, an English or a foreign domicile; in such a case it will be prudent that the will should be in such form and so attested and executed as to be valid not only according to English law, but also according to the law of the foreign country by which it is apprehended that the disposition of his moveable property may possibly be regulated (b).

If the will of a person domiciled in a foreign country has been proved there, it will generally be accepted as valid by the Court of Probate here (c).

(a) Ante, p. 1.
(b) Ante, p. 18.

(c) Ante, p. 7.

I.—Privileged Wills.—The only kind of privileged will now recognised by law (*d*) is a will made by a soldier or sailor in certain circumstances. Section 11 of the Wills Act enacts that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of the Act. A similar saving was contained in the Statute of Frauds (sect. 23); the operation of this saving has, to a considerable extent, been restricted by various statutes.

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Wills made
by soldiers
and sailors.

By the Navy and Marines (Wills) Act 1865 (28 & 29 Vict. c. 72), a will made by any seaman (*e*) or marine (*f*) or other person (*g*), belonging to His Majesty's naval or marine force, is not valid to pass any wages or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, unless it is written and executed with the formalities required for ordinary wills, with the additional requirement that one of the attesting witnesses must (if the will is made on board one of His Majesty's ships) be a commissioned officer, chaplain or warrant or subordinate officer belonging to His Majesty's naval or marine or military force, or (if the will is made elsewhere) be an officer or chaplain of the rank above mentioned, or the governor, agent, physician, surgeon, assistant surgeon or chaplain of a naval hospital, or a justice of the peace, or the incumbent, curate or minister of a church or place of worship in the parish where the will is executed, or a British consular officer, or an officer of customs, or a notary public. Special provisions are made as to the execution of wills of seamen or marines while prisoners of war. Notwithstanding the foregoing provisions, if the will of a marine in actual military service, or a mariner or seaman at sea, is not made in conformity with them, the Admiralty may pay or deliver his wages, moneys or effects to any person claiming to be entitled thereto under such will, if, having regard to the special circumstances of the death of the testator, the Admiralty are of opinion that compliance with the requirements of the act may be dispensed with.

Navy and
Marines
(Wills) Act,
1865.

The Merchant Shipping Act, 1894, provides that where a deceased seaman (*h*) or apprentice has left a will, the Board of Trade may

Merchant
Shipping Act,
1894.

(*d*) As to the old law on this subject, see Swinburne on Testaments, part i., s. 13.

(*e*) Including petty officer.

(*f*) Including non-commissioned officer.

(*g*) Other than commissioned, war-

rant and subordinate officers, assistant engineers and kroomen.

(*h*) Including every person (except masters, pilots, and apprentices) employed or engaged in any capacity on board a ship.

CHAPTER VI. refuse to pay or deliver any property of his which has come into the hands of the Board to any person claiming under the will, unless (if made on board ship) it is in writing and signed or acknowledged by the testator in the presence of and attested by the master or first or only mate of the ship; if the will was not made on board ship, the Board may refuse to pay or deliver the property to any person claiming under the will, and not related to the testator by blood or marriage, unless the will is in writing and signed or acknowledged by the testator in the presence of and attested by two witnesses, one of whom is a mercantile marine superintendent, or a minister of religion officiating in the place where the will is made, or where there are no such persons, a justice, British consular officer, or an officer of customs.

Subject to the provisions of these acts, the old law is still in force. Cases under it are of comparatively rare occurrence, and it will therefore be sufficient to state some of the more important rules (i).

Age of testator.

Any soldier or sailor coming within the exception contained in sect. 11 of the Wills Act, if over the age of fourteen years, may dispose of his goods and chattels, either by a written or by a nuncupative will (j).

Written will.

A written will is one which is written by the testator or committed to writing by his direction. It may be of the most informal character (k), and it does not require to be signed or even seen by him (l), but strict proof is required of the history of every alleged will, even if written and signed by the testator (m).

Nuncupative will.

A nuncupative will "is when the testator without any writing doth declare his will before a sufficient number of witnesses" (n).

Evidence required to prove nuncupative will.

A nuncupative will, in the proper sense of the term, requires to be proved by very clear and satisfactory evidence. In most, if not all, of the cases in which a nuncupative will has been admitted to probate, the testator was in extremis at the time of making it (o). But the term "nuncupative will" is often applied to an informal written will made by a soldier on active service.

Lapse of time.

It is said that a written will made by a soldier on active service

(i) For details see Swinburne, part i.

(j) Swinburne, 114; Co. Litt. 111a, 114; *In bonis Farquhar*, 4 No. of C. 651; *In bonis M'Murdo*, L. R., 1 P. & D. 540

(k) *Gathward v. Knee*, [1902] P. 99; *May v. May*, ib. 103, n; *In bonis Scott*, infra; *In bonis Gordon*, 21 T. L. R. 653.

(l) See *Allen v. Manning*, 2 Add. 490 *In bonis Taylor*, 1 Hagg. 641; *In bonis Scott*, [1903] P. 243.

(m) *Machin v. Grindon*, 2 Lee. 406; *Crisp v. Walpole*, 2 Hagg. 531; *Rutherford v. Maule*, 4 Hagg. 213; *Bussell v. Marriott*, 1 Curt. 9.

(n) Swinburne, 87.

(o) See *Morrell v. Morrell*, 1 Hagg. 51; *In bonis Scott*, supra; *Lemann v. Bonsall*, 1 Add. 389. Blackstone's definition of a nuncupative will supports this doctrine (Comm. ii. 500).

remains in force for an indefinite time after he has left the army (p) : CHAPTER VI.
sed quære.

An informal testamentary document may be proved as a soldier's will, although it contains an expression of intention to make a formal will at some future time (q). Provisional will.

Alterations in a soldier's will are presumed to have been made during military service (r). Alterations.

It has been held that a purser or surgeon in the navy comes within the description "mariner or seaman"; and it should seem that the term "mariner or seaman" includes every person in His Majesty's navy, as well the admiral or commander-in-chief as a common seaman (s). The expression "mariner or seaman" includes merchant seamen (t). Who is a "mariner or seaman."

A naval surgeon returning home from service invalided on a passenger steamer, is considered to be "at sea" within the meaning of the statute, but it does not follow that a seaman by profession, who is at sea on some occasion wholly dissociated from his profession, is entitled to the benefit of the statute (u). A ship in harbour or in a river has been held to be at sea within the meaning of the statute (v), and it is even said that if a sailor has joined a vessel and commenced a voyage in it, a will made in the course of that voyage is within the statute, although it was in fact made on shore (w). The term "soldier" includes officers (x) and surgeons, (y) but it has been held, on the construction of the words "any soldier being in actual military service," that the privilege is confined to those who are on an expedition (z). It will, therefore, not extend to an officer or soldier quartered in barracks at home or abroad (a); or to an officer on a tour of inspection of troops in his district (b). But the will of an officer or soldier on his way to join his regiment on active service (c), or made after an order to mobilise has been received (d), is within the statute. "At sea."

(p) *In bonis Leese*, 17 Jur. 216.

(q) *Gatward v. Knee*, [1902] P. 99.

(r) *In bonis Tweedale*, L. R., 3 P. & D. 204.

(s) *In bonis Hayes*, 2 Curt. 338; *In bonis Saunders*, L. R. 1 P. & D. 16; *Earl of Euston v. Lord Henry Seymour*, cit. 2 Curt. 339; *In bonis Rae*, 27 L. R. Ir. 116.

(t) *Morrell v. Morrell*, 1 Hagg. 51.

(u) *In bonis Saunders*, supra.

(v) *In bonis M'Murdo*, L. R., 1 P. & D. 540, and cases there cited; *In bonis Patterson*, 79 L. T. 123.

(w) *In bonis M'Murdo*, supra.

(x) *Drummond v. Parish*, 3 Curt. 522.

(y) *In bonis Donaldson*, 2 Curt. 386; (surgeon in East India Company's service).

(z) *Drummond v. Parish*, 3 Curt. 522.

(a) *White v. Repton*, 3 Curt. 818; but see *In bonis Hiscock*, [1901] P. 78.

(b) *In bonis Hill*, 1 Rob. 276.

(c) *Herbert v. Herbert*, D. & Sw. 10; *In bonis Thorne*, 11 Jur. 569, 34 L. J. P. 131; *In bonis Hiscock*, [1901] P. 78. (The headnote of this case speaks of the will as "nuncupative," but it was obviously a written one).

(d) *Gatward v. Knee*, [1902] P. 99; *May v. May*, ib. 103, n.

CHAPTER VI.

Freehold
land.

II.—Ordinary Wills.—(a) *Law before 1838.*—The 5th section of the Statute of Frauds (29 Car. 2, c. 3) required that all devises and bequests of any lands or tenements (e), devisable either by force of the Statute of Wills, or by that statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, should be in writing and signed by the party so devising the same, or by some other person in his presence and by his express direction, and should be attested and subscribed in the presence of the said devisor, by three or four credible witnesses.

Personal
estate.

As regards personal estate, it has been already mentioned that before the Statute of Wills (stat. 1 Vict. c. 26) any person over the age of fourteen years could dispose of his goods and chattels by a written will. Nuncupative wills were not formally abolished by the Statute of Frauds, but were placed under such restrictions as practically abolished them (f), except in the case of wills made by soldiers and sailors (g). The statute did not interfere with written wills, for the validity of which, as already explained, neither the signature of the testator, nor any attestation, was necessary (h).

Copyholds
not within
the Statute of
Frauds.

Copyholds were held not to be within the clause in the Statute of Frauds, which required wills of land, &c., to be attested by three witnesses (i). The consequence was that any instrument which was adequate to the testamentary disposition of personal estate was sufficient for the devise of copyholds. And accordingly, not only did an unattested writing signed by the testator operate as an effectual devise of copyholds, but testamentary papers, neither authenticated by the signature, nor even in the handwriting of the testator, were adjudged to be sufficient if reduced to writing during the lifetime of the testator and by his direction. Equitable interests in copyholds were governed by the same rule (j).

Wills Act.

(b) *Modern Law.*—The statute 1 Vict. c. 26 (sect. 9), provides, "That no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned ; (that is to say) it shall be signed

(e) Observe that the word "hereditaments" is omitted in this clause, though occurring in the next, see *Buckridge v. Ingram*, 2 Ves. jun. 662 ; but no question seems ever to have been raised on this omission. See further as to the law before 1838, the fourth edition of this work, pp. 77 et seq.

(f) Statute of Frauds, s. 19.

(g) Ante, p. 102.

(h) Ante, p. 102.

(i) See 2 P. W. 258 ; 1 Ves. sen. 227 ; 7 East, 322.

(j) *Tuffnell v. Page*, 2 Atk. 37 ; 2 P. W. 261, n. ; *Cary v. Askew*, 1 Cox, 243 ; *Wildes v. Davies*, 1 Sm. & Giff. 475 ; and as to equitable interests in customary freeholds passing by surrender, 3 Sim. 385 ; Amb. 299 ; 3 Russ. 108.

at the foot or end thereof by the testator, or by some other person in his presence, and by his direction ; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time ; and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

This statute has thus abolished all distinctions in regard to the mode of execution and attestation between the various species of property.

It will be observed, that though by the statute 1 Vict. c. 26, the ceremonial of execution is somewhat varied, yet several of its details remain unaltered, so that the cases decided under the Statute of Frauds, bearing upon the interpretation of the words "signature," "presence," "direction," "other person," "attested," "subscribed," which are common to both enactments, bear equally upon the interpretation of the same words in the statute of Victoria.

It may here be mentioned that if a will appears on the face of it to have been executed and attested in accordance with the requirements of the act, the maxim "*omnia præsumentur ritè esse acta*" applies, unless it is clearly proved by the attesting witnesses that the will was not in fact duly executed (*k*). But if the evidence is clear probate will be refused (*l*). Even where the document is informal (as where there is no attestation clause or the clause is incomplete) it may be assumed to have been duly executed (especially if it is a holograph will), although no evidence of its due execution is forthcoming (*m*). The question is further discussed in connection with the attestation clause (*n*).

Where a will has never been proved and has disappeared since the death of the testator, the maxim "*omnia præsumentur*" may be applied (*o*).

III.—Will must be in Writing.—The first condition requisite under the Wills Act to render valid any testamentary disposition, is that such disposition shall be "in writing." No particular form

(*k*) *Lloyd v. Roberts*, 12 Moo. P. C. 158; *Wright v. Sanderson*, 9 P. D. 149; *Wyatt v. Berry*, [1893] P. 5; *Woodhouse v. Balfour*, 13 P. D. 2; *Dayman v. Dayman*, 71 L. T. 699; *Byles v. Coz*, 74 L. T. 222; *Pilkington v. Gray*, [1899] A. C. 401; *In bonis Moore*, [1901] P. 44; *Whiting v. Turner*, 89 L. T. 71; *Clery v. Barry*, 21 L. R. Ir. 152 (signature not by testator).

(*l*) *Glover v. Smith*, 57 L. T. 60.

(*m*) *In bonis Peverett*, [1902] P. 205; *Vinnicombe v. Butler*, 13 W. R. 392; *In bonis Nicks*, 34 L. J. P. 30; *In bonis Rees*, ib. 56; *Clarke v. Clarke*, 5 L. R. Ir. 47; *In bonis Malins*, 19 L. R. Ir. 231. See *Gregory v. Her Majesty's Proctor*, 4 N. of C. 620; *Marsh v. Marsh*, 30 L. J. P. 77, and other cases cited post, p. 108.

(*n*) *Infra*, p. 121.

(*o*) *Harris v. Knight*, 15 P. D. 170.

Decisions on the Statute of Frauds.

Presumption of due execution.

Lost will.

Writing includes printing, &c.

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Blanks.

is required (*p*). A printed or lithographed form of a will, with or without blanks for names of legatees, amounts of legacies, &c., to be filled up in ink, satisfies this requirement of the act (*q*). Such instruments are constantly admitted to probate without question (*r*). But where a will is written on a printed form, probate may be granted of the written portion only, if it appears that the testator did not intend the printed portion to form part of his will (*s*). And even where the whole is admitted to probate, the fact that a printed or lithographed form has been used may affect the construction of the will (*t*). A will is not invalid by reason of blank spaces being left in it (*u*), or a blank page (*v*). Any difficulty which may arise by reason of the blanks, or any similar error, must be determined by the Court of Construction.

Will written in pencil.

And if blanks in a will (which is written in ink) are filled up in pencil before execution, the matter so inserted will be included in the probate (*w*).

Parol trust.

A will may be written in pencil (*x*). But where a printed form was filled up partly in ink and partly in pencil, and the writing in ink made sense with the form without help from the writing in pencil, part of which was written over by the ink, the ink writing alone was held to be the will (*y*). As to the effect of pencil alterations in a will written in ink, see below, pp. 157, 158.

Will affected ex postfacto.

The statutory requirement that a will must be in writing has been disregarded by the courts, in cases where it has been proved that a person to whom property has been given by will, holds it upon a parol trust (*z*).

There are also cases in which documents written by a testator after the execution of his will are allowed to affect its operation.

(*p*) *Oldroyd v. Harvey*, [1907] P. 326, stated in the next Chapter.

(*q*) See the Interpretation Act, 1889, s. 20.

(*r*) See *In bonis Adams*, L. R. 2 P. & D. 367.

(*s*) *In bonis Moore*, [1892] P. 378.

(*t*) See *Re Spencer*, 54 L. T. 597, stated in Chap. XVII.

(*u*) *Corney v. Gibbons*, 1 Rob. 705; *In bonis Kirby*, 1 Rob. 709. As to the construction of a will with blanks, see the cases referred to post, Chaps. XIV, XV; also *Re Harrison*, 30 Ch. D. 390; *Re Macduff*, [1896] 2 Ch. 451; *In bonis Hubbuck*, [1905] P. 129.

(*v*) *In bonis Wotton*, L. R. 3 P. & D. 159; *In bonis Fuller*, [1892] P. 377; *In bonis Rice*, Ir. R. 5 Eq. 176.

(*w*) *Kell v. Charmer*, 23 Bea. 195.

(*x*) The general rule is that what is

written in pencil is *prima facie* deliberative, and under the old law, which allowed very informal wills of personality, the question often arose whether testamentary depositions in pencil were to be treated as final. As in the case of *Bateman v. Pennington*, 3 Moo. P. C. C. 223, where the will was written in ink and signed by the testator in pencil, but unattested. Such a case could not happen at the present day. See the cases on alterations in pencil cited in Chap. VII.

(*y*) *In bonis Adams*, L. R., 2 P. & D. 367. *In bonis Bellamy*, 14 W. R. 501, was a similar case, but it is too shortly reported to be of much value.

(*z*) See Chap. XXIV, where the case of *In bonis Marchant*, [1893] P. 254, is referred to.

Thus in *Re Davy* (a), it seems to have been assumed by all parties that a testator could, by making entries in his ledger, determine whether advances made by him to his children should be taken in part satisfaction of the bequests made to those children by his will. So in *Townsend v. Townsend* (b) memoranda made by a testatrix after the execution of her will were held admissible to shew (in effect) that by a gift of stock in the A. Company, she meant to bequeath stock in the B. Company.

IV.—Signature by Testator.—The next condition prescribed for the validity of a will is that it should be signed, which suggests the inquiry what amounts to a “signing” by the testator (c). It has been decided that a mark is sufficient (d), even if the testator is able to write (e), and though his name does not appear on the face of the will (f). A mark being sufficient, of course the initials of the testator’s name would also suffice (g). And it would be immaterial that he signed by a wrong or assumed name (since that name would be taken as a mark (h)), or that against the mark was written a wrong name (i), and that the testator was also wrongly named in the body of the will (j), or that his hand was guided in making the mark (k). But where an intending testator executes the wrong will by mistake, it has no testamentary effect (l).

Sealing alone will not as a general rule satisfy the statutory requirement that a will must be signed by the testator (m). But it is conceived that a distinctive seal, if shown to have been impressed by the testator with the design of authenticating the instrument, would be good as a signature by mark. And, accordingly, in an Irish case (n), a seal with the testator’s initials engraved thereon, impressed *animo testandi*, was held to be a sufficient signature.

Will must be signed.

Mark, a sufficient signing.

Initials.

Wrong name.

Wrong will.

Sealing, insufficient.

(a) [1907] W. N. 210.

(b) 1 L. R. Ir. 180. This case is stated in Chap. XXXV.

(c) Of course, a testator can sign in pencil, as his signature or acknowledgment in the presence of witnesses would exclude all question as to the act being merely deliberative.

(d) The “mark” must leave a trace; it is not sufficient to point to or touch the paper with a dry pen: see *Kevil v. Lynch*, Ir. R. 8 Eq. 244, 9 ib. 249, where it was held (as a matter of fact) that a somewhat dubious kind of mark had been made.

(e) *Taylor v. Dening*, 3 Nev. & P. 228; s. c. nom. *Baker v. Dening*, 8 Ad. & Ell. 94; *Donnelly v. Broughton*, [1891]

A. C. 435.

(f) *In bonis Bryce*, 2 Curt. 325.

(g) *In bonis Savory*, 15 Jur. 1042.

(h) *In bonis Redding*, 2 Rob. 339; *In bonis Glover*, 11 Jur. 1022; and see the corresponding cases as to signature of a witness, post, p. 115.

(i) *In bonis Clarke*, 27 L. J., Prob. 18.

(j) *In bonis Douce*, 8 Jur. N. S. 723, also reported s. n. *In bonis Douse*, 31 L. J. P. 172; ante, p. 31.

(k) *Wilson v. Beddard*, 12 Sim. 28.

(l) See ante, p. 30.

(m) *Smith v. Evans*, 1 Wils. 313; *Ellis v. Smith*, 1 Ves. jun. 11; *Grayson v. Atkinson*, 2 Ves. 459; *Wright v. Wakeford*, 17 Ves. 456.

(n) *In bonis Emerson*, 9 L. R., Ir. 443.

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Signature by
another for
testator.

Both statutes expressly permit the testator's signature to be made by some other person by his direction, provided that it is made in his presence (*o*). That other person may, it seems, be one of the witnesses (*p*), and it is immaterial that he signed his own name instead of the name of the testator (*q*). And where the testator directed a person to sign the will for him, which that person did by writing at the foot, "this will was read and approved by C. F. B., by C. C. in the presence of &c.," and then followed the signatures of the witnesses, the will was held good (*r*). And on the ground that whatever would be good as a signature, if made by the testator, must be equally good if made by his direction, an impression of his name stamped by his direction was held good, as a mark would also have been (*s*).

One signature
of several
sheets
sufficient.

One signature, of course, is sufficient, though the will be contained in several sheets of paper (*t*); and it will generally be presumed that all the sheets were put together in the same order at the time of execution as at the testator's death (*u*); and that any apparent alteration in their order and paging was made before execution (*v*). This presumption may, of course, be rebutted (*w*). And in *In bonis Madden* (*x*), where the sheets were found pinned together, and the testatrix's signature and the attestation clause were on the first sheet, the Court came to the conclusion that the sheets had been inadvertently misplaced.

Sheets not
fastened
together.

It is not even necessary that the sheets of the will should be physically connected, or fastened or held together; if the evidence satisfies the Court that when the last sheet was signed and attested the other sheets were in the room, and that the testator treated them as together constituting his will, that is sufficient. In coming to this conclusion the Court may, if the evidence is conflicting or defective, draw inferences from the provisions of the will and other circumstances (*y*).

(*o*) *Kevil v. Lynch*, Ir. R. 8 Eq. 244.

(*p*) *In bonis Bailey*, 1 Curt. 914;
Smith v. Harris, 1 Rob. 262.

(*q*) *In bonis Clark*, 2 Curt. 329

(*r*) *In bonis Blair*, 6 N. of C. 528.

But in *Burke v. Moore*, Ir. R. 9 Eq. 609, where the name of the testator was subscribed by B. by his direction, and the signature (but not the direction), was made in the presence of and attested by two witnesses, it was held that the will was not duly executed, partly, it seems, because the signature had not been acknowledged by the testator: *sed quære*. As to this case see post, p. 114, n. (*k*)

(*s*) *Jenkins v. Gais'ord*, 3 Sw. & Tr. 93.

(*t*) *Lewis v. Lewis*, [1908] P. 1.

(*u*) *Marsh v. Marsh*, 30 L. J. P. 77.
And see *Bond v. Seawell*, 3 Burr. 1775.

(*v*) *Rees v. Rees*, L. R., 3 P. & D. 84. As to the presumption regarding other alterations see post, p. 156.

(*w*) See *Treloar v. Lean and Leonard v. Leonard*, post, p. 147.

(*x*) [1905] 2 Ir. R. 612.

(*y*) *Gregory v. Her Majesty's Proctor*, 4 N. of C. 620. In that case the Court was assisted by the fact that the will was holograph. See *In bonis M'Key*,

But it seems that this rule does not apply unless a dispositive part of the will is contained on the sheet which bears the signature and attestation. The signature may indeed be on a separate piece of paper containing nothing but the signature and attestation, but in that case the piece of paper must be in some way "attached" to the will itself, and the fact of its having been so attached before execution must be proved (z). What degree of "attachment" is required does not seem to be satisfactorily settled. In *In bonis Braddock (a)*, Hannen, Pres., seemed to think that the papers must be "physically connected," as with a piece of tape, or a pin (b): clearly paste or a wafer would be sufficient (c). But in *Lewis v. Lewis (d)*, where the two sheets of paper alleged to contain the will (the signatures of the witnesses being on the first sheet, and the testator's signature on the second), were merely held together by the testator's finger and thumb, it was held by Bargrave Deane, J. that this was a sufficient attachment.

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Signature and attestation on separate sheet.

In considering whether or not several pieces of paper constitute the will, declarations made by the testator both before and after execution are admissible to shew that it was his intention to make dispositions in conformity with those which are found upon the several sheets of paper (e).

Extrinsic evidence.

In a case where the testimonium at the end referred to the preceding sides of the sheet of letter paper as being subscribed by the testator, the fact of those sides not being so signed was held not to affect the validity of the will, as the testator evidently intended the signing and sealing of the last side to apply to the whole (f). But the signature must have been made with the design of authenticating the instrument; for it should seem that if the testator contemplated a further signature which he never made, the will must be considered as unsigned (g).

Further signature contemplated.

Conversely, if a testator has duly executed his will, and afterwards signs his name to it again, in the presence of two persons who also sign their names, it may appear from the circumstances that this was not intended as a re-execution of the will, but was done for some other purpose (h).

Ir. R. 11 Eq. 220, where the evidence was insufficient.

(z) *Cook v. Lambert*, 32 L. J. P. 93; *In bonis Horsford*, L. R. 3 P. & D. 211; *In bonis West*, 32 L. J. P. 182.

(a) 1 P. D. 433, stated post, p. 117; see *In bonis Horsford*, L. R. 3 P. & D. 211.

(b) As in *In bonis Madden*, [1905] 2 Ir. R. 612.

(c) *In bonis Gausden*, 31 L. J. P. 53; *Cooke v. Lambert*, 32 L. J. Pr. 93.

(d) [1908] P. 1; post, p. 111, n. (m).

(e) *Gould v. Lakes*, 6 P. D. 1.

(f) *Winsor v. Pratt*, 5 J. B. Moo. 484.

(g) See *Griffin v. Griffin*, 4 Ves. 197, n.; *Coles v. Trecothick*, 9 Ves. 249; *Walker v. Walker*, 1 Mer. 503; *Sweetland v. Sweetland*, 34 L. J. P. 42.

(h) *Dunn v. Dunn*, L. R. 1 P. & D. 277.

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Having regard to the necessity (referred to in the next section of this Chapter) that the signature should not be above or precede the dispositive part of the will, it seems advisable, when a testator is in extremis, that the first or only signature should be at the end; for it has sometimes happened that a testator who has begun to sign the several sheets has expired or become insensible before he had reached the last.

Provision
requiring the
signature to
be at the foot
or end—

V.—Position of Testator's Signature.—The statute 1 Vict. c. 26, as amended, has introduced a condition in this respect not formerly essential to the validity of a will, namely, that the signature of the testator must be somewhere near the end of the instrument, and so as not to be immediately over, or preceding any of the dispositive parts of the instrument, but it need not immediately follow or be under any of the dispositive parts; whereas formerly the signature might be in any part of the instrument. The provision in the original enactment requiring the signature of the testator to be at the “foot or end” of the will (which was evidently intended only to do away with the former rule that the name of the testator written in the commencement thus:—“I, A. B., do make, &c,” was a sufficient signature), seems at first to have answered the purpose intended; subsequently however, the Courts came to the conclusion that the words “foot or end” were to be construed strictly, and that if the signature did not immediately follow under the dispositive part of the will, and in such a manner that nothing could be written between the signature and the last words, the will was not properly executed (*i*). To obviate the inconveniences arising from these decisions, it was enacted by statute 15 & 16 Vict. c. 24:—

—repealed by
15 & 16 Vict.
c. 24.

“1. That where by an act of 1 Vict. (c. 26), it is enacted that no will shall be valid unless it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction, every will shall so far only as regards the position of the signature of the testator, or of the person signing for him as afore-said, be deemed to be valid within the said enactment, as explained by this act, if the signature shall be so placed at (*j*), or after, or following (*k*), or under, or beside, or opposite to (*l*) the end of the will, that it shall be apparent on the face of the will that the testator

(*i*) See the decisions on this point collected and observed upon, Sugd. R. P. Statutes.

(*j*) *In bonis Woodley*, 33 L. J. P. 154.

(*k*) *In bonis Wright*, 34 L. J. P. 104.

(*l*) *In bonis Williams*, L. R., 1 P. & D. 4, and cases there cited; *In bonis Ainsworth*, L. R., 2 P. & D. 151; *Royle v. Harris*, [1895] P. 163.

intended to give effect, by such his signature, to the writing signed as his will (*m*), and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately (*n*) after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature (*o*), or by the circumstance that the signature shall be placed among the words of the testimonium clause (*p*), or of the clause of attestation (*q*), either with or without a blank space intervening, or shall follow, or be after, or under, or beside, the attestation clause (*qq*), or the names (*r*), or one of the names, of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature (*s*), or by the circumstance that there shall appear to be sufficient space (*t*) on or at the bottom of the preceding side or page, or other portion of the same paper, on which the will is written, to contain the signature, and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under

(*m*) *In bonis Hammond*, 32 L.J.P. 200, where the will was folded up and signed by the testator on the outside, so that the witnesses could not see anything of the will; so in *In bonis Pearsons*, 33 L.J.P. 177. In *Trott v. Trott*, 29 L.J.P. 156, the testator's name occurring as the last word of a holograph will, was held a sufficient signature. In *Lewis v. Lewis*, [1908] P. 1, the testator wrote the dispositive part of the will on one sheet of paper, and at the bottom of this the witnesses wrote their names; on the top of another sheet the testator wrote a kind of declaration as to the paper being his will, commencing, "I, David Lewis," he acknowledged this as his signature, and it was held to be a sufficient execution. The case is referred to ante, p. 109. In *Sweetland v. Sweetland*, 34 L.J.P. 42, the first five sheets were signed and attested, but not the sixth and last, and the whole was rejected. See also *Margary v. Robinson*, 12 P.D. 8; *In bonis Hughes*, ib. 107, in each of which cases the signature was written in the wrong place.

Parol evidence is admissible to show *quo animo* the testator signed his name, *Dunn v. Dunn*, L.R., 1 P. & D. 277.

(*n*) *Page v. Donovan*, 3 Jur. N.S. 220, where the signature was at the end of a notarial certificate, immediately following the will, and detailing the cir-

cumstances under which it was made, and it was held good.

(*o*) See *In bonis Fuller* [1892] P. 377, where the whole of the disposing portion of a will was written on the first side of a sheet of foolscap; the second and third sides were blank, and the attestation clause and signatures were on the fourth side. It was held that the will was duly executed.

(*p*) *In bonis Mann*, 28 L.J.P. 19; *In bonis Torre*, 8 Jur. N.S. 494; *In bonis Dinmore*, 2 Rob. 641; *In bonis Cotton*, 6 N. of C. 307.

(*q*) *In bonis Walker*, 31 L.J.P. 62; *In bonis Huckvale*, L.R., 1 P. & D. 375; *In bonis Casmore*, ib. 653; *In bonis Pearn*, 1 P.D. 70; *In bonis Moore*, [1901] P. 44.

(*qq*) *In bonis Standley*, 7 N. of C. 69.

(*r*) *In bonis Jones*, 34 L.J.P. 41; *In bonis Puddlephatt*, L.R., 2 P. & D. 97; *In bonis Horsford*, L.R., 3 P. & D. 211; *In bonis Usborne*, 25 T.L.R. 519.

(*s*) *In bonis Horsford*, L.R., 3 P. & D. 211; *In bonis Williams*, L.R., 1 P. & D. 4. If, however, at the time of execution the paper is so folded that no writing is visible, it must be proved that the will was written before the testator signed, *In bonis Hammond*, 32 L.J.P. 200.

(*t*) *In bonis Williams*, L.R., 1 P. & D. 4; *Hunt v. Hunt*, ib. 209; *In bonis Archer*, L.R., 2 P. & D. 252.

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the said act or this act shall be operative to give effect to any disposition or direction which is underneath, or which follows it (*u*): nor shall it give effect to any disposition or direction inserted after the signature shall be made (*v*).

"2. The provisions of this act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a Court of competent jurisdiction, in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the Ecclesiastical Courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto, in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a Court of competent jurisdiction, in consequence of the defective execution of such will."

The wording of this statute may perhaps seem needlessly particular to the reader who has not consulted the decisions which led to its enactment; but it is unnecessary to treat of those decisions here, since the 2nd section of the statute renders it impossible that the validity of any will should now be determined by them.

VI.—Acknowledgment of Testator's Signature.—The statute 1 Vict. c. 26, placed the law with regard to the acknowledgment of wills on a new footing. The signature of the testator is to be

(*u*) *In bonis Greated*, 2 Jur. N. S. 1172; *In bonis Dallow*, L. R., 1 P. & D. 189; *In bonis Woods*, ib. 556; *In bonis White*, [1896] 1 Ir. R. 269; in all these cases the appointment of executors followed the signature. But in a few cases the Court has been satisfied by the mode of writing, or by the context, that a part which physically followed the signature belonged properly to that which preceded it, as in *In bonis Ainsworth*, L. R. 2 P. & D. 151. So where a sentence, which want of space prevented being completed at the bottom of a page, was continued, with an asterisk of reference, on a previous page, or at the back, *In bonis Kimpton*, 33 L. J. P. 153; *In bonis Birt*, L. R., 2 P. & D. 214 (the heir at law consented, but the decision is clearly wrong); and see *In bonis Wilkinson*, L. R., 6 P. D. 100 (alteration); *In bonis Greenwood*, [1892] P. 7. In *In bonis Anstee* [1893] P. 283, probate was granted of one page only of a will signed by the testator, containing an unfinished sentence com-

pleted on the next page. Compare *In bonis White*, 30 L. J. P. 55; *In bonis Gee*, 78 L. T. 843; *In bonis Dearle*, 47 L. J. P. 45; *Millward v. Buswell*, 20 T. L. R. 714. So where the will was written on the first and third sides, which it filled, and the signature was written cross-ways on the second: *In bonis Coombs*, L. R., 1 P. & D. 302. And where, a lithographed form occupying the first page, the will was written on and filled the second and third, but was signed in the form, this was held good, *In bonis Wotton*, L. R., 3 P. & D. 159. (See the remarks on this case in *Royle v. Harris*, [1895] P. 163, and compare *In bonis Ffrench*, 23 L. R. Ir. 433; *In bonis Gilbert*, 78 L. T. 762.) In all these cases it was proved that the part in question was written before execution. This proof failed in *In bonis White*, 30 L. J. P. 55, and the part was rejected. See also *In bonis Dearle*, 39 L. T. 93.

(*v*) *In bonis Arthur*, L. R., 2 P. & D. 273.

"made" or "acknowledged" (the "signature," and not, as formerly, the "will," being the subject of acknowledgment) in the simultaneous presence of the witnesses (*w*), whereas formerly the signature might be "made" before one, and the will acknowledged before the rest, or acknowledged before all the witnesses separately, without any of them having seen the signature.

As to this point, the following decisions have been made with regard to acknowledgment:—

(a) The signature to be acknowledged may be made by the testator, or by another for him (*x*).

(b) A testator, whether speechless or not, may acknowledge his signature by gestures (*y*).

(c) There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature (*z*), not even though the testator should expressly declare that the paper to be attested by them is his will (*a*).

(d) When the witnesses either saw or might have seen the signature, an express acknowledgment of the signature itself is not necessary, a mere statement that the paper is his will (*b*), or a direction to them to put their names under his (*c*), or even a request by the testator (*d*), or by some person in his presence (*e*), to sign the paper, is sufficient (*f*).

(*w*) *Moore v. King*, 3 Curt. 243, 2 N. of Cas. 45, 7 Jur. 205; *Hindmarsh v. Charlton*, 8 H. L. C. 160; *Wyatt v. Berry*, [1893] P. 5. As to what is the "presence" of the witnesses, see *Smith v. Smith*, L. R., 1 P. & D. 143; and the cases, *supra*, on the "presence" of the testator.

(*x*) *In bonis Regan*, 1 Curt. 908. See *Burke v. Moore*, *ante*, p. 108, n. (*r*).

(*y*) *In bonis Davies*, 2 Rob. 337; and see *Parker v. Parker*, Milw. Ir. Eccl. Rep. 545.

(*z*) *In bonis Harrison*, 2 Curt. 863; *Ilott v. Genge*, 3 Curt. 160, 4 Moo. P. C. C. 265; *In bonis Swinford*, L. R., 1 P. & D. 631; *In bonis Trinder*, 3 N. of C. 275; *In bonis Ashton*, 5 N. of C. 548; *In bonis Pearn*, 1 P. D. 70; *Kelly v. Keatinge*, Ir. R. 5 Eq. 175. Compare cases cited *supra*, n. (*m*), and see *Faulds v. Jackson*, 6 N. of C. Supp. 1.

(*a*) *Hudson v. Parker*, 1 Rob. 14; *Shaw v. Neville*, 1 Jur., N. S., 408; *In bonis Gunstan*, *Blake v. Blake*, 7 P. D. 102; *Beckett v. Howe*, L. R., 2 P. & D. 1, *contra*, must be regarded as overruled.

(*b*) *In bonis Davis*, 3 Curt. 748; *In*

bonis Ashmore, *ib.* 756; *Gwillim v. Gwillim*, 29 L. J. P. 31; *In bonis Huckvale*, L. R., 1 P. & D. 375.

(*c*) *In bonis Philpot*, 3 N. of C. 2; *Gaze v. Gaze*, 3 Curt. 451; and see other cases mentioned by Lord St. Leonards, R. P. Stat. p. 338 et seq. (who seems to think that some of the decisions above cited are conflicting, or the earlier ones overruled by the later ones), and in Wms. Exors., Pt. I., Bk. II., Ch. II., s. 2.

(*d*) *In bonis Thomson*, 4 N. of C. 643; *Keigwin v. Keigwin*, 3 Curt. 607, 7 Jur. 840; *Wright v. Sanderson*, 9 P. D. 149; *Daintree v. Butcher*, 13 P. D. 102.

(*e*) *In bonis Bosanquet*, 2 Rob. 577; *Faulds v. Jackson*, 6 N. of C. Supp. 1; *In bonis Jones*, 1 Jur. N. S. 1096; *Inglesant v. Inglesant*, L. R., 3 P. & D. 172; *In bonis Bishop*, 30 W. R. 567. But see *Morritt v. Douglas*, L. R., 3 P. & D. 1, where the evidence failed to convince the Court that the testator was aware of the request of the third party.

(*f*) The decision in *In bonis Arthur*, L. R., 2 P. & D. 273, seems open to question; and see *In bonis Rawlins*, 2 Curt. 326.

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(e) When the signature is seen or expressly acknowledged, it is not material that the witnesses are not told that the instrument is a will (g), or are deceived into thinking that it is a deed (h).

(f) It is of course sufficient, on a re-execution, merely to acknowledge the signature made on a former execution (i).

VII.—Attestation and Subscription by Witnesses.—The next statutory requisition is, that the will (j) be “attested and subscribed” by the witnesses.

Simultaneous presence of witnesses.

It follows from what has been above stated that the will must be signed by or for the testator, and his signature must be acknowledged, before either of the witnesses signs (k). The signature must be made or acknowledged in the presence of the witnesses simultaneously, and not at different times (l), and they must themselves subscribe their names in the presence of the testator (m), though not necessarily in the presence of each other (n).

What a sufficient subscription ;
—a mark ;
—initials ;

A mark has been decided to be a sufficient subscription (o) ; but it is never advisable, where it can be avoided (and, now that the art of writing is so common, seldom necessary), to employ marksmen as witnesses. The initials of the witnesses also amount to a sufficient subscription, if placed for their signatures, as attesting the execution (p) ; but not if they are placed in the margin opposite to, and apparently for the purpose only of identifying, alterations (q).

(g) *Keigwin v. Keigwin*, sup. ; *Faulds v. Jackson*, 6 N. of C. Supp. 1 ; *In bonis Moore*, [1901], P. 44.

(h) Sugd. R. P. Stat. p. 340 ; but see the observations of Sir H. J. Fust, in *Willis v. Lowe*, 5 N. of C. 432.

(i) *In bonis Dewell*, 17 Jur. 1130.

(j) See *In bonis Topham*, 7 N. of C. 272, where an addition to the will was made after one witness had signed.

(k) *In bonis Olding*, 2 Curt. 865 ; *In bonis Byrd*, 3 Curt. 117 ; *Cooper v. Bockett*, ib. 648 ; *Charlton v. Hindmarsh*, 1 Sw. & Tr. 433, *Hindmarsh v. Charlton*, 8 H. L. C. 160. See also *In bonis Summers*, 2 Rob. 295, where, however, the testator acknowledged the will (if anything) and not his signature. As to what is sufficient evidence that the testator signed before the witnesses in cases where there is no direct proof that they saw the testator's signature, see *Cooper v. Bockett*, supra ; *Gwillim v. Gwillim*, 29 L. J. P. 31 ; *Pearson v. Pearson*, L. R., 2 P. & D. 451 ; *Fischer v. Popham*, L. R., 3 P. & D. 246 ; *Wright v. Sanderson*, 9 P. D. 149. *In Burke v. Moore*, Ir. R. 9 Eq. 609, the

will had been signed by another person at the testator's request, and attested, but even if this execution was good (as to which see ante, p. 108), the testator destroyed the effect of it by himself signing the will with a mark after the witnesses had written their names.

(l) *In bonis Allen*, 2 Curt. 331 ; *In bonis Simmonds*, 3 ib. 79 ; *Moore v. King*, ib. 243 ; *Wyatt v. Berry*, [1893] P. 5 ; *Brown v. Skirrow*, [1902] P. 3.

(m) *In bonis Norton*, 2 Jur. N. S. 309.

(n) *Faulds v. Jackson*, 6 N. of C. Supp. 1, Sugd. R. P. S. 342. The dictum contra in *Casement v. Fulton*, 5 Moo. P. C. C. 140, has not been followed in *In bonis Webb*, 1 Deane, 1. See also *British Museum v. White*, 3 M. & Pay. 689 ; *Sullivan v. Sullivan*, 3 L. R. Ir. 299. See Sol. J., vol. liii. pp. 212, 482.

(o) *Harrison v. Harrison*, 8 Ves. 185 ; *Addy v. Griz*, id. 504 ; *In bonis Amis*, 2 Rob. 116 ; *In bonis Ashmore*, 3 Curt. 756 ; *Clarke v. Clarke*, 5 L. R. Ir. 47 (a strong case).

(p) *In bonis Christian*, 2 Rob. 110.

(q) *In bonis Martin*, 1 Rob. 712 ; *In bonis Cunningham*, 29 L. J. P. 71.

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A witness need not sign his own name, if the name actually subscribed be intended to represent his name (*r*): or a description (without any name) is sufficient, if intended to identify him as witness (*s*). But if a wrong name be signed with the intention of making it appear that the will was attested by the person to whom that name belongs, instead of the actual witness, the subscription is insufficient (*t*). And if the witness signs part of his full name in such a way as to shew that he does not intend it as a complete signature, this is no attestation (*tt*). Sealing is not sufficient (*u*). If the witness cannot write, his hand may be guided by another person (*v*), or another person may write the witness's name while the witness holds the top of the pen (*w*); in fact, there seems to be no distinction in these respects between the words "sign" and "subscribe"; any act, therefore, which, as before noticed, would be a good signature by a testator, would be a good signature by a witness,—with, however, these exceptions, that the subscription of the witness is required to be made in the presence of the testator, and must not, as in the case of a testator, be a signature made by some other person for the witness, or by the witness himself at some other time, and merely acknowledged by him in the presence of the testator (*x*).

—wrong name;

—sealing;

—guiding the hand.

Difference between signature by witness and by testator.

Where the will has been once attested by a witness, it is not sufficient for him, on a re-execution, to go over his name with a dry pen; he must do some act apparent on the face of the paper (*y*); otherwise it is no more than an acknowledgment. And where a witness to a former execution, on attesting a will for the second time, did not again write her name, but after her name written on the first execution, wrote the name of her residence, "Bristol," Sir H. J. Fust considered that to be no proof of the attestation, and decided that the will was not properly re-executed (*z*). So where a witness to a former execution, on attesting a re-execution of a

Must be an act apparent on the paper,

See also *In bonis Shearn*, 50 L. J. P. 15; *In bonis Streatley*, [1891] P. 172.

(*r*) *In bonis Olliver*, 2 Spinks, 57.

(*s*) *In bonis Sperling*, 33 L. J. Prob. 25. Whatever is written, it must be with the intention that it shall represent the writer's name or otherwise identify him: *In bonis Eynon*, L. R., 3 P. & D. 92; *In bonis Maddock*, ib. 169.

(*t*) *Pryor v. Pryor*, 29 L. J. P. 114; *In bonis Leverington*, 11 P. D. 80.

(*tt*) *In bonis Maddock*, L. R., 3 P. & D. 169; *M'Conville v. M'Creesh*, 3 L. R. Ir. 73.

(*u*) *In bonis Byrd*, 3 Curt. 117. But see ante, p. 107.

(*v*) *Harrison v. Elvin*, 3 Q. B. 117; *In bonis Frith*, 27 L. J. P. 6.

(*w*) *In bonis Lewis*, 31 L. J. P. 153. But prima facie not so if the witness can write, *In bonis Kileher* (or *Kilcher*), 6 N. of C. 15.

(*x*) *Moore v. King*, 3 Curt. 243; *In bonis Cope*, 2 Rob. 335; *In bonis White*, 7 Jur. 1045; *In bonis Mead*, 1 N. of C. 456; *In bonis Duggins*, 39 L. J. P. 24; *Horne v. Featherstone*, 73 L. T. 32.

(*y*) *Playne v. Scriven*, 1 Rob. 772, *In bonis Cunningham*, 29 L. J. P. 71; *In bonis Maddock*, L. R., 3 P. & D. 169; *Horne v. Featherstone*, supra.

(*z*) *In bonis Trevanion*, 2 Rob. 311.

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—and descriptive of the witness.

Position of witness's signature.

Applicability of attestation to several distinct parts of a will;

will, wrote the day of the month against his former signature, and crossed one of the letters in it, not intending that the mark made by crossing the letter should stand for his signature, but supposing that the addition of the date was equivalent to a repetition of the signature, it was held by Sir C. Cresswell that the will was not duly re-executed (*a*). In these cases the attestation was insufficient, because there was no proof that the word "Bristol" in the one case, and the mark across the letter in the other, were intended to represent the witness's signature. They were nothing more than acknowledgments of the former signatures. The signature must be such as is descriptive of the witness, whether by a mark, or by initials, or by his full name (*b*), or by a description without name (*c*); a view which necessarily denies efficacy as a signature to the writing of the date.

The signature of the witnesses may be placed in any part of the will; for instance, the will ending on the first side of a sheet of letter paper, the witnesses may sign on the fourth side (*d*); and the will ending on the middle of the third side, and two of the witnesses signing at the end, and another signing in a vacant space on the second side opposite the other two, was held a sufficient attestation by three witnesses under the Statute of Frauds (*e*). And if the witnesses sign their names opposite alterations in the will, and not in the proper place, it may be proved by parol evidence that they intended to attest the testator's signature (*f*). So where they sign in a blank space in the body of the will (*g*). But it must of course be proved that any part of the will which follows the signatures of the witnesses was written before they signed (*h*). An attestation clause is not required (*i*).

A will may be composed of several clauses written at distinct intervals, and one memorandum of attestation subscribed to the last part may apply to the whole, including as well what was long before written as what had been recently added, though the antecedent part bears a different date, and is complete in itself, independently of the latter (*j*). And the same general doctrine

(*a*) *Charlton v. Hindmarsh*, 1 Sw. & Tr. 433; *Hindmarsh v. Charlton*, 8 H. L. C. 160.

(*b*) *Per Lord Chelmsford*, 8 H. L. Ca. 171.

(*c*) *In bonis Sperling*, 33 L. J. P. 25.

(*d*) *In bonis Chamney*, 1 Rob. 757, *In bonis Braddock*, 1 P. D. 433; *In bonis Fuller*, [1892] P. 377; ante, p. 111.

(*e*) *Roberts v. Phillips*, 4 E. & B. 450.

(*f*) *In bonis Streatley*, [1891] P. 172.

(*g*) *In bonis Ellison*, [1907] 2 Ir. R. 480.

(*h*) *In bonis Jones*, 1 N. of C. 396. See *Byles v. Cox*, 74 L. T. 222, where the signature of one witness appeared above that of the testator.

(*i*) *Post*, p. 120.

(*j*) *Carleton v. Griffin*, 1 Burr. 549; *In bonis Catrall*, 33 L. J. P. 106; see post, p. 132.

applies to a will whose contents are distributed through several sheets of paper, which would be adequately attested by a single memorandum, provided all the detached parts were present when the act of attestation took place; and which fact it seems would be presumed, unless the contrary were distinctly proved (*k*), as would also that of the attestation being intended to apply to the whole. The presumption would be somewhat less strong, of course, when each of the several papers has a distinct independent character, as where one is a will and the other a codicil, or where they consist of two separate codicils: and would fail altogether where the memorandum does not follow the whole. Thus where will and codicil were on different sheets found pinned together, the codicil being signed by the testatrix but not attested, an attestation clause written on the back of the will was not held to be applicable to the codicil without proof that it was so intended, and that the sheets were pinned together at the time of subscription (*l*). So where there is an evident intention that each paper or sheet shall be separately attested; as, where a testator signed five sheets, and the witnesses subscribed the first four, and the fifth sheet contained an attestation clause only, and there was no evidence to show that the witnesses attested the last signature, the will was held not to have been properly executed (*m*); and where two instruments purporting to be a will and codicil were written on different pages of the same sheet of paper, and both were signed by the testatrix, but the first alone was attested, the codicil was rejected (*n*).

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—to several
testamentary
papers;

—to will and
codicil.

A will written in duplicate is not duly executed by the testator signing one copy, and the witnesses attesting and subscribing the other (*o*).

Duplicate
will.

In every case the Court must be satisfied that the names were written *animo attestandi*; and their position may for this purpose be material: where, for instance, on one page the will was written, signed by the testator and subscribed by one witness, and on the next page a memorandum or inventory of property was written, to which three names were subscribed, it was held that these names could not be deemed to have been so placed *animo attestandi* (*p*):

*Animus
attestandi.*

(*k*) *Bond v. Seawell*, 3 Burr. 1775.

(*l*) *In bonis Braddock*, 1 P. D. 433. As to the kind of attachment required where the will is on several sheets of paper, see *In bonis Gausden*, 31 L. J. P. 53, and other cases cited ante, p. 109.

(*m*) *Ewen v. Franklin*, 1 Deane, 7; *Sweetland v. Sweetland*, 34 L. J. P. 42; *In bonis Dilkes*, L. R., 3 P. & D. 164; *Phipps v. Hale*, ib. 166.

(*n*) *In bonis Taylor*, 2 Rob. 411; and see per Lord Campbell, 24 L. J. Q. B. 175; *In bonis Pearse*, L. R., 1 P. & D. 382; *Woodroffe v. Creed*, [1894] 1 Ir. R. 508.

(*o*) *In bonis Hatton*, 6 P. D. 204.

(*p*) *In bonis Wilson*, L. R., 1 P. & D. 269. See also *Dunn v. Dunn*, ib. 277, referred to ante, p. 109.

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though it would not necessarily follow that a person did not sign as a witness because he also intended his signature to serve another purpose, e.g., his acceptance of the executorship (*q*).

Where an executed will was altered, and the witnesses put their initials in the margin opposite the alterations, it was held that the will was not properly re-executed (*r*). But this decision seems questionable, for the initials were intended to represent the signatures, and it was proved (extrinsic evidence being admissible on this question) that they were written with the intent to attest the will.

Sometimes it is important to prove that a person who writes his name on a will does not do so as witness ; for example, where he is a legatee under the will (*s*).

“ Presence ”
of testator.

VIII.—Subscription in “ Presence ” of Testator.—The will, it will be observed, is required to be subscribed by the witnesses, in the “ presence ” of the testator (*t*). The design of the legislature, in making this requisition, evidently was, that the testator might have ocular evidence of the identity of the instrument subscribed by the witnesses ; and this design has been kept in view by the Courts in fixing the signification of the word “ presence.” To constitute “ presence,” in the first place, it is essential that the testator should be mentally capable of recognising the act which is being performed before him ; for, if this power be wanting, his mere corporal presence would not suffice. Thus, if a testator, after having signed and published his will, and before the witnesses subscribe their names, falls into a state of insensibility (whether permanent or temporary) the attestation is insufficient (*u*).

Mental con-
sciousness
essential.

And the testator ought not merely to possess the mental power of recognising, but be actually conscious of, the transaction in which the witnesses are engaged ; for if a will were attested in a secret and clandestine manner, without the knowledge of the testator, the fact of his being in the room in which it was done would not avail (*v*). Nor, on the other hand, would the circumstance of the testator not being in the same room invalidate the attestation, if it took place within his view. Thus, in the case of *Shires v. Glascock* (*w*), the testator being in extreme illness, the

(*q*) *Griffiths v. Griffiths*, L. R., 2 P. & D. 300.

(*r*) *In bonis Martin*, 6 N. of C. 694.

(*s*) *Dunn v. Dunn*, L. R., 1 P. & D. 277 ; *In bonis Sharman*, ib. 661 ; *In bonis Murphy*, Ir. R. 8 Eq. 300 ; *In bonis Smith*, 15 P. D. 2.

(*t*) This requirement was also made

by the Statute of Frauds in the case of wills of lands.

(*u*) *Right v. Price*, Doug. 241.

(*v*) See *Longford v. Eyre*, 1 P. W. 740 ; *Jenner v. Finch*, 5 P. D. 106.

(*w*) 2 Salk. 688. See also *Davy v. Smith*, 3 Salk. 395 ; *In bonis Trimmell*, 11 Jur. N. S. 248.

witnesses after he had signed his will withdrew into a gallery, between which and the testator's chamber there was a lobby with glass doors, and the glass broken in some places; in this gallery the witnesses subscribed the will; it was proved that the testator might have seen from his bed, through the lobby and the broken glass window, the table in the gallery where the witnesses subscribed; and this was adjudged to be sufficient; for (it was observed) the statute required attesting in his presence to prevent obtruding another will in place of the true one; here the signing was within view of the testator; he might have seen it, and that was enough. And if the witnesses subscribe their names in the same room where the testator lies, though the curtain of the bed be drawn close, it is a good subscribing, because it is in his power to see them, and what is done shall be construed to be in his presence (x).

Sufficient if the testator might have seen.

It is not even necessary that the testator should be in the same house with the witnesses. In *Casson v. Dade* (y), where a feme covert, having power to make a writing in the nature of a will, executed the instrument in her carriage outside her attorney's office, the witnesses attending her; after having seen the execution, they returned into the office to subscribe it; and it was sworn by a person in the carriage that the testatrix might have seen what passed through the window of the office: Lord Thurlow was of opinion that the will was well executed.

Testator and witnesses need not be in same house.

Upon the same principle it is clear, that the mere contiguity of the places occupied by the testator and the witnesses respectively will not suffice, if the testator's view of the witnesses' proceedings is necessarily obstructed. Thus, in *Eccleston v. Petty* (z), where the witnesses proved that the testatrix signed the will in her bed-chamber, and they subscribed it in the hall, and it was not possible from her chamber to see what was done at the table in the hall, there being a passage and eight or ten turning stairs between those places, the will was held not to be duly attested (a).

Mere contiguity not sufficient, if the testator's view be interrupted.

And it was not enough, that in another part of the same room the testator might have perceived the witnesses, if in his actual position he could not (b). And, therefore, in *Doe d. Wright v. Manifold* (c), where the testator was in bed in a room, from one part of which he might, by inclining his head into the passage, have seen

Testator must be capable of seeing in his actual position.

(x) *Newton v. Clarke*, 2 Curt. 320.

(y) 1 Br. C. C. 99, Dick. 586.

(z) Carth. 79, and see *In bonis Colman*, 3 Curt. 118; *In bonis Ellis*, 2 Curt. 395; *In bonis Newman*, 1 Curt. 914.

(a) *Carter v. Seaton*, 85 L. T. 76 is to

the same effect.

(b) *Brown v. Skirrow*, [1902] P. 3.

(c) 1 M. & Sel. 294; *Norton v. Bazett*, 1 Deane, 259; *Jenner v. Finch*, 5 P. D. 106.

CHAPTER VI. the witnesses attest the will, but not in the situation in which he was, the attestation was decided not to be good. Lord Ellenborough said :—" In favour of attestation it is presumed, that if the testator might see, he did see ; but I am afraid, that if we get beyond the rule which requires that the witnesses should be actually within reach of the organs of sight, we shall be giving effect to an attestation out of the devisor's presence, as to which the rule is, that where the devisor cannot by possibility see the act doing, that is out of his presence."

Where a testator is unable to move without assistance ;
—where he is blind.

If the testator be unable to move without assistance, and have his face turned from the witnesses, so that it is out of his power to see them, if he so wished, the attestation will be insufficient (*d*). Where the testator is blind, it has been decided that the position of the witnesses must be such, that the testator, if he had had his eyesight, might have been able to see them sign (*e*).

Where the evidence fails to show in what part of the room the subscription took place, it would be presumed that the most convenient was the actual spot, and the ordinary position of a table, likely to have been used, would be taken into consideration (*f*).

It is scarcely necessary to add, that the nature of the occasion of the witnesses' absence, whether for the ease or at the solicitation of the testator or otherwise, is wholly immaterial (*g*).

Due execution when presumed.

IX.—Attestation Clause unnecessary.—A form of attestation is expressly dispensed with by the statute 1 Vict. c. 26. No particular form of words was essential even under the old law to constitute an attestation (*h*). And accordingly, probate has been granted of a will where both the witnesses deposed that the requirements of the act had not been complied with, the Court being satisfied by the circumstances that the evidence was mistaken (*i*) ; and in

(*d*) *Tribe v. Tribe*, 1 Rob. 775.

(*e*) *In bonis Piercy*, 1 Rob. 278.

(*f*) *Winchilsea v. Wauchope*, 3 Russ. 444.

(*g*) *Broderick v. Broderick*, 1 P. W. 239 ; *Machell v. Temple*, 2 Show. 283.

(*h*) As to the evidence of due attestation, under the old law, when the validity of the will was called in question, see *Hands v. James*, Comyn. 531 ; *Croft v. Pawlet*, 2 Str. 1109 ; *S. C.*, 8 Vin. Ab. 128, pl. 4 ; *Brice v. Smith*, Willes, 1 ; *Randcliffe v. Parkyns*, 6 Dow, 202 ; *Doe v. Davies*, 9 Q. B. 648 ; *Hitch v. Wells*, 10 Beav. 84. And as to when due execution would have been

presumed, see *Hands v. James* ; *Croft v. Pawlet*, supra ; *In bonis Seagram*, 3 N. of C. 436 ; *In bonis Mustow*, 4 N. of C. 289 ; *In bonis Johnson*, 2 Curt. 341 ; *In bonis Luffman*, 5 N. of C. 183 ; *In bonis Dickson*, 6 ib. 278 ; *Trott v. Trott*, 29 L. J. P. 156.

(*i*) *Leech v. Bates*, 6 N. of C. 699. A fortiori, where the adverse evidence of one witness is opposed by the affidavit of the other (deceased) witness, *Wright v. Rogers*, L. R., 1 P. & D. 678. So, where the witness had no precise recollection of what occurred, *Wright v. Sanderson*, 9 P. D. 149 ; *Woodhouse v. Balfour*, 13 P. D. 2 ; *In bonis Colyer*,

another case, where the witnesses so deposed, but not positively, their evidence was allowed to be rebutted by that of another person present at the execution, assisted by the attestation clause, whence it appeared that the requirements of the statute had been complied with (*j*). And in a case where the attestation clause stated that the will was signed in the presence of the attesting witnesses, and it appeared from the evidence that it was only acknowledged in their presence, having been signed before they were called in, probate was granted (*k*). But where there was nothing but a formal attestation clause on one side, and the adverse testimony of both witnesses on the other, probate was refused (*l*).

As a general rule, the presumption of compliance with the statutory requirements will not be made, unless the will appears on the face of it to have been duly executed. But if the will is found among the testator's papers at his death, and there are no suspicious circumstances, due execution may be presumed, even if there is no attestation clause (*m*). And in a recent case (*n*), where the will was signed by the testatrix and two other persons (both of whom were dead), without any attestation clause, the rule "*omnia præsumentur rite esse acta*" enabled the Court to hold the will duly executed, although there was no evidence to prove the handwriting of one of the alleged witnesses. If the will is lost, due execution must be proved (*o*), and the testator's written declarations of the fact are insufficient, though accompanied by a document referred to by him as a copy of his will, and representing the will as duly executed (*p*). The presumption of due execution is clearly rebutted where it is sworn by competent persons that the names of the

Presumption
not always
made.

14 P. D. 48; *Whiting v. Turner*, 89 L. T. 71. See *Foot v. Stanton*, 1 Deane 19; 2 Jur. N. S. 380.

(*j*) *Bayliss v. Sayer*, 3 N. of C. 22; see also *Gove v. Gaven*, 3 Curt. 151; *Blake v. Knight*, ib. 547; *Pennant v. Kingscote*, ib. 642; *In bonis Hare*, ib. 54; *Cooper v. Bockett*, ib. 648; *Brenchley v. Still*, 2 Rob. 162; *Chambers v. Queen's Proctor*, 2 Curt. 433; *Keating v. Brooks*, 4 N. of C. 253; *In bonis Noyes*, ib. 284; *Burgoyne v. Showler*, 1 Rob. 5; *Thomson v. Hall*, 16 Jur. 1144; *In bonis Attridge*, 6 N. of C. 597; *Bennett v. Sharp*, 1 Jur. N. S. 456; *Farmar v. Brock*, 2 Jur. N. S. 670; *In bonis Holgate*, 29 L. J. P. 161; *Lloyd v. Roberts*, 12 Moo. P. C. C. 158; *In bonis Thomas*, 28 L. J. P. 33; *Gwillim v. Gwillim*, 29 L. J. P. 31; *Cregreen v. Willoughby*, Jur. N. S. 590; *In bonis Huckvale*,

L. R., 1 P. & D. 375; *Smith v. Smith*, ib. 143 (where witness saw testatrix writing, but did not see her signature).

(*k*) *In bonis Moore*, [1901] P. 44.

(*l*) *Croft v. Croft*, 34 L. J. P. 44; *Wyatt v. Berry*, [1893] P. 5. But see *Wright v. Sanderson*, supra, p. 120, n. (*i*).

(*m*) See the cases cited ante, p. 105.

(*n*) *In bonis Peverett*, [1902] P. 205. Compare *Harris v. Knight*, 15 P. D. 170.

(*o*) As in *In bonis Gardner*, 27 L. J. P. 55; *Eckersley v. Platt*, L. R., 1 P. & D. 281. The contents of the will and its existence at the testator's death must also be proved, post, pp. 152 seq. Where the will has been lost since the testator's death, see *Harris v. Knight*, ante, p. 105.

(*p*) *In bonis Ripley*, 1 Sw. & Tr. 68; *Atkinson v. Morris*, [1897] P. 40; *Eyre v. Eyre*, [1903] P. 131.

CHAPTER VI.

Attestation
clause is
unnecessary.

seeming witnesses are fictitious, and are in the testator's own handwriting (*q*).

The provision in the statute 1 Vict. c. 26, enacting that no form of attestation shall be necessary, has been much observed upon; but it seems to mean only that no clause need be appended to the will, stating that the requirements of the act have been complied with (*r*); and is not inconsistent with the provision that the witnesses are to "attest," as well as subscribe the will, the word "attest" meaning merely to act as a witness, which might in fact be done without subscription (*s*); although upon the construction of the act it may be that no attestation will satisfy its requirements, except through the outward mark of subscription (*t*). The "subscription," "attestation," and "form of attestation," thus refer to matters essentially different (*u*).

Suggestion
as to framing
attestation
clauses.

Still, it will be the duty of persons who superintend the execution of wills, not to be content with a bare subscription of the witnesses' names, but to make them subscribe a memorandum of attestation, recording the observance of all the circumstances which the statute makes necessary to constitute a valid execution; (i.e., that the signature was made, or acknowledged, by the testator in the presence of the witnesses, both being present at the same time, and that they subscribed their names in his presence); for, though such statement in the memorandum of attestation is not conclusive, and does not preclude inquiry into the fact, it would afford a much stronger presumption that the statutory requisition had been complied with, than where it is wanting; and in the absence of such a memorandum, the witnesses are always called upon by the Court of Probate to make an affidavit that the statute was in fact complied with. It will not be advisable for a testator, except where absolutely necessary, to avail himself of the privilege, which the Wills Act expressly confers, of acknowledging the signature before the witnesses, instead of signing it in their presence, or of the permission to sign by the hand of another. The latter expedient, indeed, ought to be restricted in practice (though the legislature has not so limited it) to cases of extreme physical weakness, rendering

As to
testator's
signature.

(*q*) *In bonis Lee*, 4 Jur. N. S. 790.

(*r*) *Bryan v. White*, 14 Jur. 919.

(*s*) *Ricketts v. Loftus*, 4 Y. & C. 919; and see *Freshfield v. Reed*, 9 M. & Wels. 404; *Burdett v. Spilsbury*, 10 Cl. & Fin. 340; *Hudson v. Parker*, 1 Rob. 14, 8 Jur. 788. See *Ford v. Kettle*, L. R., 9 Q. B. D. 139, a bill of sale case.

(*t*) See per Sir C. Cresswell, *Charlton*

v. Hindmarsh, 28 L. J. P. 132.

(*u*) An attestation clause, if used, is no part of the will, and any words in the clause purporting to describe the operation of a testamentary instrument, such as "whereby the first codicil is cancelled," do not affect the construction or effect of the instrument: *In bonis Atkinson*, L. R., 8 P. D. 165.

it impossible or difficult for the testator to write his name ; in such cases, even the exertion of making a mark might be oppressive. Where a testator is unable to write from ignorance, perhaps a mark is to be preferred to a signature by the hand of another, as being the more usual mode of execution by illiterate persons ; for in regard to this and all other particulars, the prudent course is to make the execution of the will conform as much as possible to the testator's ordinary mode of executing instruments. Where the will is signed by a third person on behalf of the testator, the signature, of course, should, though, as we have before seen, it need not necessarily, be in the name of the testator, rather than that of the amanuensis, who should merely be designated in the memorandum of attestation ; where it would be proper (though not necessary) that the peculiar mode of execution should be stated.

CHAPTER VI.

As to signing by mark, or by amanuensis.

X.—Number of Witnesses.—Wills of real and personal estate are now subject to the same rule as to the ceremonial of execution, and such rule differs from that which previously obtained in regard to either species of property ; two witnesses, instead of three, as formerly, are required to a will of freehold land, and two witnesses are also necessary to a will of personal estate or copyholds, which formerly required no attestation.

Two witnesses required.

XI.—Credibility of Witnesses.—It will be observed, that in the clause above stated, which regulates the attestation of wills, the legislature has dropped the requisition of credibility, as an ingredient in the qualification of the witnesses ; and has, moreover, (s. 14,) expressly provided, that if any person who shall attest the execution of a will shall, at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness, to prove the execution thereof, such will shall not on that account be invalid.

Attesting witnesses not required to be credible.

“ It seems to have been generally considered,” Mr. Jarman remarks (*v*), “ that this provision not only qualifies persons who have been rendered infamous by conviction for crime to be attesting witnesses (as it clearly does), but, that it even gives validity to the attesting act of an idiot or lunatic. This, however, seems very questionable. The signature, it will be observed, is required to be made or acknowledged by the testator in the *presence* of the witnesses ; which would seem to imply that they should be mentally conscious of the transaction, according to the construction which

Persons incompetent to give evidence qualified.

CHAPTER VI.

Doubt whether qualification extends to lunatics, or other persons mentally incapable.

Suggestion as to selection of witnesses.

was given (as we have seen (*w*)) to the same word occurring in the devise clause of the Statute of Frauds, which required that the attesting witnesses should subscribe in the testator's 'presence'; such requisition being held not to be satisfied in a case, in which the testator fell into a state of insensibility, before the witnesses had subscribed their names to the memorandum of attestation; and the 14th section of the recent statute seems to be perfectly consistent with such a construction; for that clause does not in terms dispense with all personal qualifications in the witnesses to perform the act; it only removes the legal disqualification, arising out of his incompetency to give evidence of the fact in a judicial proceeding, which evidently may co-exist with intellectual capacity, as in the case of a person whose credibility of character has been destroyed by conviction for crime, a species of disqualification which was peculiarly inconvenient, as the testator might have been unaware of its existence, so that there was a special reason for its removal, which does not apply to palpable infirmity. Surely, if the legislature intended to enact so novel (not to say absurd) a doctrine, as that the functions of an attesting witness might be performed by any one who could scratch a paper without the least glimmering of intellectual consciousness, this would have been done in terms more clear and explicit, than by providing that persons incompetent to be admitted as witnesses to prove the execution of a will, should be sufficient attestators—expressions which seem rather to suppose a personal ability on the part of the witnesses to *perform* the act, but a legal disability to *prove* it. Perhaps the point is not very likely to occur in practice; for no testator would think of choosing an idiot (*x*) or lunatic as an attesting witness to his will, unless he were content to have his own sanity called in question. And here it may be observed, that the enlarged licence now given, in regard to the qualification of witnesses to wills, will

(*w*) Ante, p. 118, n., and see the judgment of Dr. Lushington in *Hudson v. Parker*, 1 Rob. 14, 8 Jur. 786.

(*x*) "Supposing such persons to be, technically speaking, competent attesting witnesses, the effect of employing two such witnesses would be to render it necessary to have recourse to the testimony of other persons, for the purpose of proving the circumstances of the execution, which could not, in such case, be done (as it usually is) out of the mouths of the witnesses themselves; and it is to be observed that, although in the case of a deceased witness, proof

of handwriting is sufficient, the presumption being, that the will was duly attested, especially if the facts essential thereto were recorded in a memorandum of attestation, which was subscribed by the deceased, yet it does not follow that any such presumption would arise in the case of a lunatic witness, whose subscription (though his handwriting might be proved), could not be considered as affording any security that attention had been paid to the requisitions of the statute."

(Note by Mr. Jarman.)

not induce any prudent person to abate one jot of scrupulous anxiety that the duty of attesting a will be confided to persons, whose character, intelligence, and station in society, afford the strongest presumption in favour of the fairness and proper management of the transaction ; and preclude all apprehension in purchasers and others, as to the facility with which the instrument could be supported in a court of justice, against any attempt to impeach it ; and now that the requisite number of witnesses is reduced to two, it is the more easy, as well as important, that the selection should be governed by a regard to such considerations. A devise or bequest to an attesting witness still, as under the old law, does not affect the validity of the entire will, but merely invalidates the gift to the witness, whose competency the legislature has established, by destroying his interest ; and hence the remarks on this enactment have more properly found a place in a preceding chapter, which treats of the disqualifications of devisees " (y).

XII.—Alterations.—Owing to the general rule that alterations, interlineations, &c., made in a will, are presumed to have been made after execution, it is always advisable, when alterations are made in a will before execution, to identify them by the initials of the testator and witnesses, or by a reference to them in the attestation clause. This matter is considered in the next Chapter, in connection with the subject of alterations made after execution.

Should be identified.

Unattested alterations in a will may be incorporated by reference or implication in a codicil (yy).

Unattested alterations.

XIII.—Incomplete Wills.—Cases sometimes occurred under the old law, and may possibly arise under the present, in which something more than a mere compliance with legal requirements was made necessary to the efficacy of the will by the testator himself, he having chosen to prescribe to himself a special mode of execution ; for in such case, if the testator afterwards neglects to comply with the prescribed formalities, the inference to be drawn from these circumstances is, that he had not fully and definitively resolved on adopting the paper as his will (z). The presumption is slight

As to incomplete papers.

(y) Ante, p. 92.

(yy) *In bonis Heath*, [1892] P. 253. Compare *Oldroyd v. Harvey*, [1907] P. 326, stated in Chap. VII.

(z) Accordingly, under the old law, which did not require wills of personalty to be authenticated by the testator's signature or by attestation, the Prerogative Court in several instances refused

probate of wills concluding with the words "In witness," &c., but not signed, *Abbot v. Peters*, 4 Hagg. 380 ; or to which an attestation clause had been added, but not used, *Beatty v. Beatty*, 1 Add. 154 ; see also *Doker v. Goff*, 2 Add. 42 ; *Walker v. Walker*, 1 Mer. 503 ; *Scott v. Rhodes*, 1 Phillim. 12 ; *Harris v. Bedford*, 2 Phillim. 177 ; *Stewart v.*

CHAPTER VI.

where the instrument is duly signed and attested, and perfect in all other respects, but must apparently be rebutted by some evidence before it can be admitted to probate (*a*).

Where, however, the testator's design of perfecting the paper is frustrated by sudden death, or insanity, or any other involuntary preventing cause, no inference of the absence of matured testamentary intention arises from the imperfect state of the document, which, therefore, notwithstanding its defect, will be accepted as the will of the deceased, provided it fully discloses his testamentary scheme (*b*).

But this doctrine in favour of imperfect papers obtains only where the defect is in regard to some formal act, which the testator has prescribed as necessary for the authentication of his will, and not where it applies to the contents of the instrument; for, if in its actual state the paper contains only a partial disclosure of the testamentary scheme of the deceased, it necessarily fails of effect, even though its completion was prevented by circumstances beyond his control (*c*).

In short, the presumption is always against a paper which bears self-evident marks of being unfinished; and it behoves those who assert its testamentary character distinctly to show, either that the deceased intended the paper in its actual condition to operate as his will, or that he was prevented by involuntary accident from completing it (*d*). And probate will not be granted of such defective papers, without the consent or citation of the next of kin (*e*).

It ought to be observed, however, that we are not to rank among inchoate or unfinished testamentary papers, one which is shown

Contents
of the paper
must be
complete.

Presumption
against
unfinished
papers.

Informal
paper
intended as a
present will.

Stewart, 2 Moo. P. C. C. 193. Questions as to the testamentary validity of incomplete papers rarely occur in practice, now that authentication of signature and attestation is essential to such validity.

(*a*) Per Sir J. Nicholl in *Beatty v. Beatty*. See also 1 Wms. Exors., Pt. I., Bk. II., Ch. II., s. 2. It is obvious that such cases are not very likely to occur under the present law, and indeed the point does not even seem to have as yet arisen.

(*b*) *Huntington v. Huntington*, 2 Phillim. 213; see also *Cary v. Askew*, 1 Cox, 251; *Allen v. Manning*, 2 Add. 490; *Bradford v. Young*, 29 Ch. D. 617 (unsigned will made in 1827).

(*c*) *Montefiore v. Montefiore*, 2 Add. 354; see also *Griffin v. Griffin*, 4 Ves. 197, n. This case afforded two sufficient grounds for the rejection of the

paper; first, that it was not the whole will; and, secondly, that its completion was not prevented by inevitable circumstances. But loss of part of a will once complete does not necessarily exclude the remainder from probate, *Sugden v. Lord St. Leonards*, 1 P. D. 154; unless it substantially alters the sense of the remainder, e. g., where a gift of residue alone remains, the part containing gifts of legacies being lost, see *Woodward v. Goulstone*, 11 App. Ca. 469.

(*d*) *Reay v. Cowcher*, 1 Hagg. 75, 2 ib. 249; *Wood v. Medley*, 1 ib. 661; *In b. Robinson*, ib. 643; *Bragge v. Dyer*, 3 Hagg. 207; *Gillow v. Bourne*, 4 Hagg. 192. As to the contrary presumption in favour of a regularly executed and apparently complete will, vide *Shadbolt v. Waugh*, 3 Hagg. 570; *Blewitt v. Blewitt*, 4 Hagg. 410.

(*e*) *In bonis Adams*, 3 Hagg. 258.

to have been intended to perform the office of a present will (if the expression may be allowed), though executed for a temporary purpose, as appears by the testator having designated it a "memorandum of an intended will," or "head of instructions," or "a sketch of an intended will which I intend to make when I get home," &c. And it has frequently occurred that a testator has ultimately adopted as his final will a paper so originally designed as instructions for, or in contemplation of, a more formal testament (*f*).

In all such cases, however, the Ecclesiastical Court required very distinct evidence of a testator eventually adhering to and adopting, as his deliberate will, the preliminary document, in case he afterwards lived long enough to have executed a more complete instrument (*g*). But cases of this kind depend so much upon their particular circumstances, that little is to be learnt from general statements; and the inquirer into the subject is recommended to consult the cases referred to in the notes, a full statement of which the limits of the present work do not allow (*h*).

The execution of testamentary powers is treated of in Chapter XXIII.

XIV.—Defective Execution supplied by Reference, express or implied.—It remains to be considered in what cases a codicil, duly attested, communicates the efficacy of its attestation to an unattested will or previous codicil, so as to render effectual any devise or bequest which may be contained in such prior unattested instrument. It was repeatedly decided, in cases not affected by the Wills Act, where the several attested and unattested instruments were written on the same paper, that the latter were rendered valid (*i*). In these cases the attested codicil referred to the unattested document. Without a reference of some kind the mere fact that the two instruments are written on the same piece of paper, the attested one after the other, is not sufficient to incorporate them (*j*). But a very slight reference is sufficient (*k*).

Whether attestation of codicil applies to previous will.

Before the Act 1 Vict. c. 26.

(*f*) *Barwick v. Mullings*, 2 Hagg. 225; *Hattatt v. Hattatt*, 4 Hagg. 211; *Torre v. Castle*, 1 Curt. 303; 1 Wms. Exors. 72 et seq., 8th ed.

(*g*) *Dingle v. Dingle*, 4 Hagg. 388; *Coppin v. Dillon*, ib. 361. A subsequent complete will of course supersedes "Instructions for a Will." But sometimes the subsequent will refers to and incorporates the instructions; see *Wood v. Goodlake*, 1 N. of C. 144.

(*h*) As to informal wills made by soldiers and sailors, see *Gattward v.*

Knee, [1902] P. 99, supra, p. 102.

(*i*) *De Bathe v. Lord Fingal*, 16 Ves. 167; *Carleton v. Griffin*, 1 Burr. 549; *Doe v. Evans*, 1 Cr. & Mees. 42, 3 Tyr. 56. These cases are stated and discussed in the fourth edition of this work, Vol. I. p. 114.

(*j*) *In bonis Drummond*, 2 Sw. & Tr. 8; *In bonis Tovey*, 47 L. J. P. 63; *In bonis Willmott*, 6 W. R. 409.

(*k*) *Guest v. Willasey*, 12 J. B. Moo. 2, 3 Bing. 614; *In bonis Widdrington*, 35 L. J. P. 66.

CHAPTER VI.

Remarks
upon the
preceding
cases.

Where the
unattested
document
is not
referred to.

The result would have been the same if the unattested will and the attested codicil had been detached; the only effect of their being united in the same paper being to render unnecessary any express reference to the unattested document for the purpose of identifying it. The observations which fell from the Court of K. B. in *Utterton v. Robins* (l) indicate a strong inclination in that Court to this opinion. And the point is not now open to question. Thus in *Aaron v. Aaron* (m), a testator made a will and two codicils, each on a separate paper; the first codicil was unattested; by the second the testator recited his will dated &c., and a codicil annexed thereto and dated &c., and described it as a second codicil to his said will: this codicil was duly attested, and it was held by Sir K. Bruce, V.-C., that the first codicil was set up by the second. It could make no difference, he observed, whether the codicil was written on the same paper as the will or not; a codicil was referred to, and there was no dispute what the instrument was.

It should seem, however, that where the attested codicil is detached from, and does not refer to, the unattested will or previous codicil, it will not have the effect of curing the defective execution of such prior testamentary document.

Thus, in *In bonis Marchant* (n), the testatrix left two testamentary documents, the first of which contained directions as to the disposition of her property, and appointed A. as executor, but was not executed by her: the second bequeathed all her property to B. "for the purposes I require him to do absolutely." This was duly executed as a will. It was held that the first document was not incorporated in the second, but probate was granted to A. to administer the property according to the trusts of the first document.

Again, in *Utterton v. Robins* (o), where a testator, by several unwitnessed memoranda, subsequent to his will, which was duly attested, left a freehold house, which, among other estates, he had acquired since the date of the will, to his daughter, and afterwards made the following codicil, which was duly attested:—"I make this a further codicil to my will, which bears date 12th Sept., 1823; I give and devise all real estates, purchased by me since the execution of my said will, to the trustees therein named, their heirs, &c., to the uses and upon the trusts therein expressed concerning the

(l) 1 Ad. & Ell. 423, 2 Nev. & M. 821.
(m) 3 De G. & S. 475. See also
Allen v. Maddock, 11 Moo. P. C. C. 427,
stated post, p. 131.

(n) [1893] P. 254. See below, p. 135,

and post, Chap. XXIV, where the decision is criticised.

(o) 1 Ad. & Ell. 423, 2 Nev. & M. 821.

residue of my real estates ; ” it was certified on a case from Chancery, that the house passed to the trustees and not to the daughter.

In this case the language of the second codicil seemed to repel the supposition that the testator intended the estates purchased since the execution of the will to pass by the prior codicil ; unless, indeed, when he speaks of his “ will,” he is to be understood (*p*) as referring to all the prior testamentary documents, including the unattested codicil, according to the principle laid down by Shadwell, V.-C., in *Gordon v. Lord Reay* (*q*), where a testator, by a second codicil (which was duly attested), after reciting his will (which was also duly attested) by date, expressly confirmed all his provisions and bequests in it in favour of a certain individual : and the V.-C. was of opinion that this confirmation had the effect of entitling her to the benefit of a charge created on his freehold estates, by a prior unattested codicil, on the ground that the second codicil amounted to a republication (*r*) of the first. “ The first codicil,” he said, “ is part of the will, and if the second codicil is a republication of the will, it is a republication of everything that is part of the will. The second codicil does refer to the will ; it ratifies and confirms the will and everything that is part of it.”

Whether
“ will ”
includes a
codicil added
thereto.

But this decision seems to be erroneous, because, as Jessel, M.R., pointed out (*s*), the second codicil did not refer to the testator’s will in general terms : “ the only reference,” said the M. R., “ was to a will bearing date a certain day, that is, as I understand it, to a described instrument, which excludes instruments of subsequent date. . . . It may well be, that where you describe a will generally without date, and say, ‘ I confirm my will,’ you might interpret the word ‘ will ’ as including the whole of the testamentary disposition (*t*) ; but it does appear to me that that was not the case in *Gordon v. Lord Reay*.” In *Burton v. Newbery*, the testator made his will, and then made a

(*p*) Not that he was in fact so understood ; the Court shewed not obscurely that it thought there was no sufficient reference to the will. Besides, the testator had not purchased any real estate since the execution of his “ will ” in the wider sense.

(*q*) 5 Sim. 274 ; see also *Crosbie v. Macdoul*, 4 Ves. 610 ; *Farrer v. St. Catherine’s College*, L. R., 16 Eq. 19 ; *Green v. Tribe*, 9 Ch. D. 231 ; all referred to post, Chaps. VII. and VIII. where the comprehensiveness of the word “ will ” is considered with reference to the subject of revocation and revival.

(*r*) As to republication, see post, Chap. VIII.

(*s*) In *Burton v. Newbery*, 1 Ch. D. 234. *Gordon v. Lord Reay* was treated as an authority (together with *Doe v. Evans*) by K. Bruce, V.-C., in *Aaron v. Aaron*. See also *Radburn v. Jervis*, 3 Beav. 460.

(*t*) See *Pigott v. Wilder*, 26 Beav. 90, where the reference was to the will of another person. See also *Fuller v. Hooper*, 2 Ves. 242 ; *Jauncey v. Att.-Gen.*, 3 Giff. 308, where the question was whether “ legacies herein mentioned ” included legacies given by codicil.

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codicil which was attested by A. and B., who took benefits under the codicil, and afterwards made another codicil "to my last will dated," &c., which was duly attested, but did not refer to the prior codicil (all these instruments being on separate papers), and it was held by the M.R. that the second codicil did not republish the first, and, consequently, that the gifts to A. and B. under the first codicil failed. But the decision is not relevant to the present discussion (*u*).

Since the statute 1 Vict. c. 26, the point discussed in *Gordon v. Lord Reay* can hardly arise, because an unattested paper is not now, as it formerly was, admissible to probate, and cannot properly be regarded as part of the will, or as a codicil to it.

If a testator makes several codicils, some of which are, but others are not, duly attested, a subsequent codicil confirming "his will and codicils" confirms only the duly attested codicils. This point was determined in *Croker v. Marquis of Hertford* (*v*). Dr. Lushington delivered the judgment of the Privy Council, and said, that "the strict and primary sense of the word 'codicil' was a testamentary instrument which would, per se, become valid immediately on the death of the testator; that the words of the codicil in the case before him, when so interpreted, were sensible with reference to extrinsic circumstances; for there were codicils duly executed so as to come within the strict and primary sense; therefore, according to the rule of construction stated by Mr. Wigram (*w*), however capable the words might be of another and popular interpretation, or however strong the intention of the testator, the strict and primary sense must be adhered to." On the same principle, Sir H. J. Fust held (*x*), that codicils not duly attested, though written on the same paper as the will, were not ratified by a codicil of subsequent date which referred only to the will. But, as was implied in the reasons given for those decisions, the case is different where there is no instrument which satisfies the strict meaning of the words of reference. Another rule of construction stated by the same learned writer (*y*) then prevails. For where there is nothing in the context of a will to make it apparent that a testator has used words in any other than their strict and primary sense, but his words, so interpreted, are insensible with reference to extrinsic

Unattested
codicil not
included
in term
"codicil";

—nor in the
term "will";

—unless
there is
no duly at-
tested codicil;

(*u*) The point decided in *Burton v. Newbery* (and in the case of *French v. Hoey*, [1899] 2 Ir. R. 472) relates more properly to the question of republication, because there was no controversy as to the due execution of the first codicil. See post, Chap. VIII.

(*v*) 4 Moo. P. C. C. 339, affirming s. c. (nom. *Countess Ferraris v. Marquis of Hertford*), 3 Curt. 468.

(*w*) Wigram on Wills, p. 17.

(*x*) *Haynes v. Hill*, 13 Jur. 1058.

(*y*) Wigram on Wills, Prop. 3.

circumstances, the Court may look into the extrinsic circumstances to see whether the meaning of the words be sensible in any popular or secondary sense, of which with reference to these circumstances they are capable. Accordingly, in *Ingoldby v. Ingoldby* (2), where there was a paper purporting to be a codicil, and subsequently the testator duly executed a codicil not referring to the paper, except by being called "another codicil to my will," Sir H. J. Fust held that the first paper, purporting to be a codicil, was thereby rendered valid, and he distinguished the case from *Croker v. Marquis of Hertford*, on the ground that there were not, as in that case, any duly executed codicils to which the last codicil could be held to refer. But it would seem that the commencement of a series of documents with the words "This is a first," "second," "third codicil," would not of itself be sufficient to render valid an intermediate document which is not duly executed or attested (a).

In *Allen v. Maddock* (b), the subject was fully discussed by Lord Kingsdown. In that case a will was made and signed in the presence of one witness only. Afterward the testatrix made a codicil which commenced—"This is a codicil to my last will and testament," and was duly executed. No other will having been found, it was held by the Judicial Committee, upon parol evidence of the circumstances, that the two papers, as together containing the will and codicil, were entitled to probate. From Lord Kingsdown's judgment, it is clear that the question whether an imperfectly executed paper is made effectual by a later perfectly executed one, depends on the question whether the earlier paper is incorporated in the later: in other words, whether the reference be such as, with the assistance (if necessary) of parol evidence of the circumstances, to be sufficient to identify it. Difficulties will of course sometimes arise upon the evidence (c); for instance, a reference by a testator to his last will, or to a first or second codicil, is a reference in its own nature to one instrument to the exclusion of all others, and the description identifies the instrument (d), but a general reference to codicils, of which there may be several, is different, and probably not easy to render effectual by extrinsic evidence. But where the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to the

—or duly
attested will.

To supply
defect of
execution the
defective
instrument
must be in-
corporated.

(2) 4 N. of C. 493.

(a) *Stockil v. Punshon*, 6 P. D. 9. See *In bonis Heathcote*, ib. 30, 32, and *Paton v. Ormerod*, [1892] P. 247, where a revoked will was held not to be incorporated by a reference to a settle-

ment, *infra*, p. 137.

(b) 11 Moo. P. C. C. 427, affirming 3 Jur. N. S. 965.

(c) See *In bonis Allnutt*, 33 L. J. P. 86; *Eyre v. Eyre*, [1903] P. 131.

(d) *Eyre v. Eyre*, [1903] P. 131.

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admission of the evidence that by possibility circumstances might have existed in which the instrument referred to could not have been identified. In short, any unattested paper which would have been incorporated in an attested will or codicil executed according to the Statute of Frauds, is now in the same manner incorporated if the will or codicil is executed according to the requirements of the Act of 1 Vict. c. 26, but with this important distinction, that since that act an unattested codicil is not part of the will for any purpose, and consequently is not incorporated or confirmed by a codicil of subsequent date referring only to the will. The decision in *Allen v. Maddock* (e) has been adopted and followed in the recent case of *In bonis Heathcote* (f).

The principle being thus the same under both statutes, it follows that, subject to the distinction just noted, the circumstance of the well-executed instrument being written on the same paper as the imperfectly executed one, must still be regarded as materially helping to identify the latter as the document referred to by the former (g). And a distinction may fairly be drawn between a case where the later and well-executed instrument contains a reference, more or less particular, to another document, and a case where the later and well-executed instrument contains no express reference to any other; in the latter case the mere circumstance of its being on the same paper with others may possibly furnish ground for implying a reference to all the others, so as to incorporate and set up all. Such appears to have been the case in *Guest v. Willasey* (h), where the third codicil was thus—"I now appoint A. to be my executor in the room of B. above mentioned, with full power to act, &c. Witness my hand." So in *In bonis Catrall* (i), where, underneath his will, a testator wrote and signed some unattested additions; and under these he afterwards wrote some further additions, which were duly signed and attested; it was held by Sir W. P. Wilde that the presumption was that this signature and attestation were intended to apply, and that they gave effect, to all that went before. But this presumption is rebutted by an express reference of narrower scope. Thus, a reference to the "will" does not set up an unattested writing, though all three are

(e) See 11 Moo. P. C. C. 455, 461; and as to incorporation, *infra*, p. 135.

(f) 6 P. D. 30.

(g) *In bonis Terrible*, 1 Sw. & Tr. 140. In *In bonis Smith*, 2 Curt. 796, 1 N. of C. 1, and *In bonis Claringbull*, 3 N. of C. 1, this circumstance existed; but

even without it they are covered by *Allen v. Maddock* and *Ingoldby v. Ingoldby*, *supra*. See also *Oldroyd v. Harvey*, [1907] P. 326, stated in the next chapter.

(h) 2 Bing. 429, 3 Bing. 614.

(i) 33 L. J. P. 106.

on the same paper, the unattested writing, as we have seen, not being a part of the will (*j*).

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An unexecuted alteration in a will is not rendered valid by a codicil ratifying and confirming the will, unless in such codicil the alteration be specially referred to (*k*), or unless it be proved affirmatively by extrinsic evidence, that the alteration was made before the codicil (*l*); and even then, if it appear to be deliberative only, it will not be included in the probate (*m*).

Unexecuted alterations when rendered valid by subsequent codicil.

A codicil which is only to take effect in an event which does not happen, may nevertheless have the effect of setting up an unattested will to which it refers (*n*).

Conditional codicil.

Cases in which there is reference to an existing paper, it is obvious, stand upon quite a different footing from those in which a testator (as often occurred under the old law) attempts to create, by a will duly attested, a power to dispose by a future unattested codicil. To allow such a codicil to become supplementary to the contents of the will itself, would, it is obvious, tend to introduce all the evils against which the Statute of Frauds was directed, and, indeed, give to the will an operation in the testator's lifetime, contrary to the fundamental law of the instrument. Accordingly, where a testator by a will, attested by three witnesses, devised his real estate to trustees, upon trust (subject to certain limitations thereby created) to convey the same to such persons and for such estates as he by deed or will, attested by two witnesses, should appoint; and the testator, professing to exercise this assumed power, executed an instrument attested by two witnesses, which he styled a deed-poll, and thereby carried on the series of limitations commenced in his will: it was decided, after much consideration, that this instrument operated as a codicil to the will, and, consequently, was incapable of affecting the freehold lands, for want of an attestation by three witnesses (*o*).

Testator cannot by his will empower himself to dispose by an unattested codicil.

(*j*) *In bonis Willmott*, 1 Sw. & Tr. 36; *In bonis Peach*, ib. 138. See also *Haynes v. Hill*, 1 Rob. 795; *In bonis Phelps*, 6 N. of C. 695; *In bonis Hutton*, 5 N. of C. 598; *In bonis Spotten*, 5 L. R. Ir. 403.

(*k*) *Lushington v. Onslow*, 12 Jur. 465; *In bonis Heath*, [1892] P. 253. As to presuming when alterations were made, see Chap. VII. post, p. 156.

(*l*) See per Sir H. J. Fust, in *Lushington v. Onslow*; *In bonis Tegg*, 4 N. of C. 531; *In bonis Wyatt*, 31 L. J. P. 197.

(*m*) *In bonis Hall*, L. R., 2 P. & D. 256.

(*n*) *In bonis Da Silva*, 30 L. J. P. 171.

(*o*) *Habergham v. Vincent*, 2 Ves. jun. 204, 4 Br. C. C. 353; *Rose v. Cunynghame*, 12 Ves. 29; *Wilkinson v. Adam*, 1 V. & B. 422; *Whytall v. Kay*, 2 My. & K. 765; *Countess Ferraris v. Marquis of Hertford*, 3 Curt. 468; *Briggs v. Penny*, 3 De G. & S. 546; *Johnson v. Ball*, 5 De G. & S. 85. See also *Re Boyes*, 26 Ch. D. at p. 535. These cases are to be distinguished from *Smith v. Attersoll*, 1 Russ. 266, where the paper was signed by the trustees, and operated as an admission of the trust. As to the admission of parol

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Stubbs v. Sargon.
Devisee to be ascertained by future event or act.

In *Stubbs v. Sargon* (p) it was contended that, on the same principle, a devise of realty to "the persons who shall be in co-partnership with me at the time of my decease, or to whom I shall have disposed of my business," was void, as leaving it for the testator by some further act, not authorised by the Statute of Frauds, to select the devisee. But Lord Langdale, and on appeal Lord Cottenham, held the devise good. Lord Cottenham compared the case to that of a father having two sons, and devising his property to such one of them as should not become entitled to an estate from a third person; here the act of a third person determines who shall take the father's estate. But the act is not testamentary; if it were, one man would be making another man's will. And if not testamentary when done by a third person, it cannot be so when done by the testator himself; otherwise a testator could not devise to such person as, at his death, should be his wife or servant. And Lord Langdale said, if the description was such as to distinguish the devisee from every other person, it was sufficient without entering into the question whether the description was acquired by the devisee after the date of the will, or by the testator's own act in the ordinary course of his affairs, or in the management of his property.

The act must not be testamentary.

The question is, therefore: Is the supplementary act testamentary? If it is, the devise is void; if it is not, then, although it is the sole act of the testator, the devise is good.

The point frequently arises where a testator by his will directs part of his property to be disposed of in such way as he shall by letter, memorandum, &c., or the like, direct; it is clear that no such document can have any testamentary operation, unless executed as a will, or incorporated by a subsequent will or codicil (r).

The cases above referred to must be distinguished from those in which the Courts have given a testamentary operation to unattested documents under the doctrine of trusts (s).

evidence to prove a trust, see post, Chap. XV. In *Metham v. Duke of Devon*, 1 P. W. 530, a testator directed his executors to pay a sum of money as he should by deed appoint; and subsequently, by a deed referring to the will, he made an appointment, which the Court held to be valid, on the ground that the deed was a part of the will, and in the nature of a codicil. The report does not state whether the deed was admitted to probate, as of course it ought to have been.

(p) 2 Keen, 255, 3 My. & C. 507.

(r) See *In bonis Lancaster*, 29 L. J. P. 155; *Johnson v. Ball*, 5 De G. & S. 85; *In bonis Warner*, 10 W. R. 566; *In bonis Mathias*, 3 Sw. & Tr. 100; *In bonis MacGregor*, 60 L. T. 840; *Scott v. Browrigg*, 9 L. R. Ir. 246.

(s) See Chap. XXIV. There are also cases (referred to ante, pp. 106-7) in which documents written by the testator after the execution of the will are allowed to affect its operation.

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Reference to extrinsic documents allowable.

XV.—Incorporation of Non-testamentary Documents.—The rule that a document may be incorporated in a will by reference, is not confined to unattested wills and other documents intended to have a testamentary operation, but extends to any document referred to by a testator in order to elucidate or to explain his intention. The document, if sufficiently identified, is then said to be incorporated in the will. Thus where a person by his will devises all the lands which were conveyed to him by a certain indenture (specifying the deed), or devises lands to the uses declared by a particular indenture of settlement, it is clear that the indentures so referred to may be consulted for this purpose, without violating the principle of the enactment, which requires an attestation by witnesses, the testator's intention to adopt the contents of such instrument being manifested by a will duly attested (*t*); and it would, it is conceived, be immaterial whether the paper so referred to was in the testator's handwriting, or in that of any other person, and whether it professed to be testamentary or not, as it founds its claim to be received as part of the will, not on its own independent efficacy, but on the fact of its adoption by the attested will.

But whatever be the precise nature of the document referred to, it must be clearly identified as the instrument to which the will points (*u*). Two things are necessary: first, that the will should refer to some document as then in existence (*v*); secondly, proof that the document propounded for probate was, in fact, written before the will was made, and was identical with that referred to in the will.

Requisites for incorporation.

(i.) As to the first point, a clause which "ratifies and confirms a deed, dated, &c., and made between &c.," answers this requirement and incorporates the deed (*w*). But there should be no ambiguity. A reference to a document as "made or to be made" gives strong ground for concluding that the document had not already been made (*x*). So a reference to persons or things "hereinafter

1. Will must refer to a document as then existing.

(*t*) See *Habergham v. Vincent*, 2 Ves. jun. 204; also *Molineux v. Molineux*, Cro. Jac. 144.

(*u*) See *Dillon v. Harris*, 4 Bligh, N. S. 329.

(*v*) *Van Straubenzee v. Monck*, 32 L. J. P. 21; *In bonis Sunderland*, L. R., 1 P. & D. 198; *In bonis Pascall*, ib. 606; *Symes v. Applebe*, 57 L. T. 599; *In re Barber*, W. N. 1879, p. 141. This requirement was not complied with in *In bonis Marchant*, [1893] P. 254.

(*w*) *Sheldon v. Sheldon*, 8 Jur. 877; *Bizzey v. Flight*, 3 Ch. D. 269. But see *In bonis Hubbard*, L. R., 1 P. & D. 53, and *qu.*; but as the deed referred to was valid per se, its rejection from the probate seems to have been immaterial.

(*x*) *In bonis Skair*, 5 N. of C. 57; *In bonis Astell*, ib. 489, n. See also *In bonis Hakewell*, 1 Deane, 14; and *In bonis Countess of Pembroke*, 1 Deane, 182, is perhaps referable to this ground.

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named" (y), or to "the annexed schedule" (z), is not so clear a reference to any document as then existing as to incorporate writings that follow the signature of the testator and of the witnesses, although it be proved that, in fact, such writings were in existence before the will was executed; much less if the evidence on this last point is hesitating (a). Again, if a testator attempts to dispose of chattels by referring to them in his will as "articles of personal use, the destination or gift of which may by memoranda or labels thereon be indicated," this is nugatory (b). And if the will refers to a document as a future document, and the testator afterwards executes a codicil confirming the will, the document is not thereby incorporated, although it was in fact written before the date of the codicil (c). The will must be so worded that, speaking from the date of the codicil, it shall refer to the document as then existing (d).

2. The document referred to must be proved to have existed at the date of the will.

(ii.) With regard to the evidence necessary to prove that the document propounded for probate was in existence at the date of the will, and that it is the same as that which is referred to therein: if the reference is distinct (e.g., to date, heading, and other particulars), and if the document propounded agrees in these particulars with the description contained in the will, its previous existence and identity will, in the absence of circumstances or evidence tending to a contrary conclusion, be assumed (e). Where the reference is less distinct, yet if it be in terms sufficiently definite to render the document capable of identification, extrinsic evidence is admissible, together with such internal evidence as may be found in the document itself, to supply the necessary proof.

Thus, in *Allen v. Maddock* (f), an unattested will was held to have

(y) *In bonis Watkins*, L. R., 1 P. & D. 19; *In bonis Brewis*, 33 L. J. P. 124; *In bonis Dallow*, L. R., 1 P. & D. 189.

(z) *Singleton v. Tomlinson*, 3 App. Ca. 413, 414, per Lord Cairns; s. c. sub nom. *Watson v. Arundell*, Ir. R. 11 Eq. 53. Moreover the schedule was not annexed but indorsed (being on the fourth side of a sheet of paper on which the will was written), a discrepancy pointed out by Lord Blackburn, 3 App. Ca. 425. But as to this see *In bonis Ash*, 1 Deane, 181.

(a) Ante, note (z).

(b) *Re Fane*, 2 T. L. R. 510.

(c) *In bonis Smart*, [1902] P. 238. This was the result arrived at by Gorell Barnes, J., after an examination of the earlier cases, including *In bonis Hunt*, 2 Rob. 622; *In bonis Truro*, L. R., 1 P. & D. 201; *In bonis Rendle*, 68

L. J. P. 125. See also *In bonis MacGregor*, 60 L. T. 840; *In bonis Mary Reid*, 38 L. J. P. 1; *Durham v. Northen*, [1895] P. 66. In *In bonis Daniell*, 8 P. D. 14, a codicil, referring only to one gift as being contained in an unattested list not referred to in the will, nor apparently in existence at the date of the will, was held to incorporate the whole list.

(d) *In bonis Stewart*, 32 L. J. P. 94; *In bonis Truro*, L. R., 1 P. & D. 201; *In bonis Lancaster*, 29 L. J. P. 155; *In bonis Warner*, 10 W. R. 566.

(e) *Swete v. Pidsley*, 6 N. of C. 190.

(f) 11 Moore, P. C. C. 427. See also on the point that the document must be sufficiently identified, *In bonis Countess of Durham*, 3 Curt. 57; *In bonis Pewtner*, 4 N. of C. 479; *In bonis Darby*, ib. 427; *Jorden v. Jorden*, 2 N. of C. 388; *In*

been incorporated in a duly executed codicil by the heading: "This is a codicil to my last will and testament," no other document having been found to answer to the reference (*g*). And where a document headed "Instructions for the will of J. Wood," disposed of the residue "in such manner as I shall direct by my will to be indorsed hereon," and the testator afterwards made a will, which, though not indorsed on the "instructions," was expressed to be made in "pursuance of the instructions for his will," no other instructions being found; it was held that the "instructions" in question were incorporated in the will (*h*). The evidence in the latter case was certainly slight. In *University College of North Wales v. Taylor* (*i*), the testator, shortly after executing a will, wrote out a document setting forth his wishes with reference to certain charitable bequests contained in his will; a few months afterwards he made a new will, in which he gave legacies to the same charitable institutions, to be held and applied "upon such terms and conditions and subject to such rules and regulations as are contained and specified in any memorandum amongst my papers written or signed by me relating thereto": it was held by the Court of Appeal that the document was not sufficiently identified to bring the case within the doctrine laid down in *Allen v. Maddock*.

Probate of unattested papers was refused in *In bonis Garnett* (*j*), and *Eyre v. Eyre* (*k*) for want of sufficient evidence to identify them. In *Paton v. Ormerod* (*l*), a recital in a will that the testatrix had settled certain property was held not to incorporate an old and revoked will by which she had dealt with that property, and evidence that she referred to some other settlement was not admitted.

Evidence required.

It is a circumstance frequently relied on that the document propounded for probate was shewn to some person before execution of the will, as the paper therein referred to (*n*).

An incorporated document may be revoked by destruction (*o*).

Revocation.

bonis Dickens, 3 Curt. 60; *In bonis Almosnino*, 1 Sw. & Tr. 508; *In bonis Willesford*, 3 Curt. 77; *In bonis Bacon*, 3 N. of C. 644; *In bonis Mercer*, L. R., 2 P. & D. 91; *In bonis Greves*, 1 Sw. & Tr. 250 (where the evidence of identity failed); but see *In bonis Edwards*, 6 N. of C. 306; *Collier v. Langebear*, 1 N. of C. 369. *In bonis Sotheron*, 2 Curt 831, would not now be followed.

(*g*) See above, p. 131.

(*h*) *Wood v. Goodlake*, 1 N. of C. 144.

Compare *In bonis Pascall*, L. R. 1 P. & D. 606; *In bonis Gill*, L. R., 2 P. & D. 6.

(*i*) [1907] P. 228; [1908] P. 140.

(*j*) [1894] P. 90.

(*k*) [1903] P. 131. See also *In bonis*

Kehoe, 13 L. R. Ir. 13.

(*l*) [1892] P. 247.

(*n*) *In bonis Smartt*, 4 N. of C. 38; *In bonis Bacon*, 3 N. of C. 644.

(*o*) *Re Coyte*, 56 L. T. 510.

CHAPTER VI.

Probate of
incorporated
documents,

—not neces-
sary, to give
jurisdiction to
the Court of
Construction.

Although an incorporated document is entitled to probate—i.e., to be set out at length in the probate copy—there is no necessity for so proving it in order to bring it within the cognizance of the Court of Construction; for if it is not included in the probate copy, the Court will look at the original document. Thus, in *Bizzey v. Flight* (p), A. made a voluntary settlement which, as to certain bank shares and mortgages, was incomplete, so that the shares still belonged to A. at her death, and she by will “confirmed the settlement, dated, &c.”: the settlement was not included in the probate. Hall, V.-C., said: “If a will confirms an instrument which is sufficiently identified, and probate passes leaving in the clause containing the confirmation, the instrument must, I consider, be had regard to as if it were set out in the probate.” He held that the effect was as if the testatrix had declared “that the shares specified in the settlement should be held on the following trusts,” and had then set out the trusts. So in *Quihampton v. Going* (q), where a testator referred to certain entries he had made in his ledger, as explaining his will, Jessel, M.R., held that the ledger was incorporated in the will, and, though not admitted to probate, could be looked at by a Court of Construction, and that the entries therein were for the purposes of distribution of the estate conclusive—i.e., the M.R. treated them as part of the will, and not merely as evidence. These cases remove the doubt regarding the competence of the Court of Construction expressed by Dr. Lushington in *Sheldon v. Sheldon* (r).

Two wills.

The question what documents should be included in the probate copy often arises where a testator has made distinct wills, one of property in England, another of property abroad. Generally the

(p) 3 Ch. D. 269. The trusts that were invalid under the settlement being incorporated in and made part of the will, assumed the testamentary character in all respects, and became subject to ademption, &c.

(q) 24 W. R. 917. See also *Singleton v. Tomlinson*, 3 App. Ca. 404, where probate had been refused: but this was not relied on.

(r) 8 Jur. 877. But as the regular practice of the Court of Probate is to require every paper entitled to probate to be proved, and the original (*In bonis Pewtner*, 4 N. of C. 479), or if it cannot be procured, an authenticated copy (*In bonis Dickens*, 3 Curt. 60, *In bonis Howden*, 43 L. J. P. 26), to be deposited, it is inexpedient to declare trusts of per-

sonalty by reference to another instrument. And although where a paper is in the hands of strangers who refuse even to produce it (*In bonis Battersbee*, 2 Rob. 439; *In bonis Sibthorp*, L. R., 1 P. & D. 106) the rule is wholly dispensed with; and where the paper is of excessive length probate has been granted omitting the whole (*In bonis Marquis of Lansdowne*, 32 L. J. P. 121; *In bonis Dundas*, 32 L. J. P. 165; *In bonis Balme*, [1897] P. 261) or the immaterial parts (*In bonis Countess of Limerick*, 2 Rob. 313), showing that the question is one of convenience; yet it appears by the foregoing cases that special application is generally necessary to procure a relaxation of the rule.

former only need be proved here (s). But if one refers to or confirms the other in such a way as to incorporate it, both will be included in the probate (t).

If an incorporated document is very lengthy or cumbrous, the Court of Probate will sometimes allow it to be omitted from the probate copy, proper provision being made for its custody and production (u).

Omission of incorporated document from probate.

The cases where the Court enforces the execution of trusts not appearing on the face of the will or of any document incorporated in it, are considered in another chapter (v).

Undisclosed trusts.

Although a will which has been revoked by destruction cannot, strictly speaking, be revived by a subsequent codicil (w), practically the same effect can be produced by the doctrine of incorporation. Thus in *In bonis Lindsay* (x), a testator who had destroyed an early will made a codicil in which he referred to its provisions as contained in a draft of it which was before him, in such a way as to shew an intention to incorporate them in the codicil.

Incorporation of copy of destroyed will.

(s) *In bonis Astor*, 1 P. D. 150; *In bonis Coode*, L. R., 1 P. & D. 449; *In bonis Callaway*, 15 P. D. 147; *In bonis De La Rue*, 15 P. D. 185; *In bonis Seaman*, [1891] P. 253; *In bonis Fraser*, ib. 285; *In bonis Lockhart*, 69 L. T. 21; *In bonis Tamplin*, [1894] P. 39. As to the case of a man making a will confined to property abroad, see *In bonis Mann*, [1891] P. 293; *In bonis Murray*, [1896] P. 65; *In Estate of Paul*, 23 T. L. R. 716.

(t) *In bonis Harris*, L. R., 2 P. & D. 83; *In bonis Howden*, 43 L. J. P. 26; *In bonis Western*, 78 L. T. 49; *In bonis Green*, 79 L. T. 738.

(u) *Sheldon v. Sheldon*, 8 Jur. 877, and other cases cited ante, p. 135, n. (w). *In bonis Balme*, [1897] P. 261. Compare *In bonis Schenley*, 20 T. L. R. 127.

(v) Chap. XXIV.

(w) Post, p. 194.

(x) 8 T. L. R. 507.

CHAPTER VII.

REVOCATION AND ALTERATION OF WILLS.

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Effect of marriage alone under old law—in case of a woman ;

I.—By Marriage and Birth of Children, or Marriage alone, under the old Law.—Under the law which existed prior to the Act of 1 Vict. c. 26 (a), the marriage of a woman absolutely revoked her will (b), and that, too, though her testamentary capacity was subsequently restored by the event of her surviving her husband (c).

(a) For a full discussion of the old law as to revocation of wills, see the 4th Edition of this Work, Vol. I., pp. 122 et seq.

(b) It is hardly necessary to point out that in this chapter “will” is, as a general rule, used in the wide sense of “the aggregate contents” of

all the testator’s testamentary dispositions, and therefore includes codicils (ante, p. 26, and see *Evans v. Evans*, 17 Sim. 108, post, p. 184). Where necessary, will and codicil are distinguished.

(c) *Forse and Hembling’s Case*, 4 Rep. 61, And. 181 ; *Cotter v. Layer*, 2 P. W.

But a will made by a woman before marriage, and operating as an appointment under a power, was not necessarily revoked by her marriage (*d*); nor was a will so operating and made during the coverture necessarily revoked by the death of the husband (*e*).

The marriage of a man, however, had no such revoking effect upon his previous testamentary dispositions, in regard to either real or personal estate, on the ground, probably, that the law had made for the wife a provision independently of the act of the husband, by means of dower; nor did the birth of a child alone revoke a will made after marriage, since a married testator must be supposed to contemplate such event; and the circumstance that the testator left his wife enceinte without knowing it, was held not to impart to the posthumous birth any revoking effect (*f*).

—in case of a man.

Marriage and the birth of a child conjointly, however, revoked a man's will, whether of real or personal estate; these circumstances producing such a total change in the testator's situation, as to lead to a presumption, that he could not intend a disposition of property previously made, to continue unchanged (*g*).

Old rule as to revocation by marriage and birth of children.

Marriage and the birth of issue did not, however, produce revocation of a will made before 1838, where there was a provision made for the wife and children by the will itself (*h*), or, it is conceived, by settlement executed previously to the will.

It seems, also, that marriage and the birth of a child or children revoked a will which was subject to the old doctrine, only where the effect of throwing open the property to the disposition of the law, would have been to let in such after-born child or children;

Will not revoked in favour of a pre-existing child.

624; *Doe v. Staple*, 2 T. R. 695; see also *Hodsden v. Lloyd*, 2 Br. C. C. 533; *Long v. Aldred*, 3 Add. 48.

(*d*) *Logan v. Bell*, 1 C. B. 872; and compare *Douglas v. Cooper*, 3 My. & K. 378.

(*e*) *Morwan v. Thompson*, 3 Hagg. 239; *Clough v. Clough*, 3 My. & K. 296; *Du Hourmelin v. Sheldon*, 19 Beav. 389. But of course if the power be given to the wife "in case she dies in the lifetime of her husband," and in case of her surviving, the property is given to her absolutely, a will made during coverture is inoperative if the wife survives, as the power never arose, *Price v. Parker*, 16 Sim. 198; *Trimmell v. Fell*, 16 Beav. 537; *Willock v. Noble*, L. R., 7 H. L. 580; and will not even raise a case of election, *Blaklock v. Grindle*, L. R., 7 Eq. 215. See post, Chap. XXIII.

(*f*) *Doe v. Barford*, 4 M. & Sel. 10.

(*g*) This rule (which was borrowed from the civil law) was applied by the Ecclesiastical Courts to wills of personalty at an early period (see *Overbury v. Overbury*, 2 Show. 242; *Lugg v. Lugg*, 2 Salk. 592; *Brown v. Thompson*, 1 Eq. Ab. 413, pl. 15; *Eyre v. Eyre*, 1 P. W. 304, n.), and was more recently and reluctantly extended to devises of freehold estates, see *Christopher v. Christopher*, Dick. 445; *Sprague v. Stone*, Amb. 721; *Parsons v. Lanoie*, 1 Ves. sen. 192; *Gibbons v. Caunt*, 4 Ves. 848.

(*h*) *Kenebel v. Scrafton*, 2 East, 530. See also *Israell v. Rodon*, 2 Moo. P. C. 51; *Matson v. Magrath*, 13 Jur. 350; *Marston v. Roe d. Fox*, 8 Ad. & Ell. 14, and as to whether a revocation took place where the will disposed of less than the whole estate, see *Brady v. Cubitt*, Doug. 31; *Kenebel v. Scrafton*, supra; *Marston v. Roe d. Fox*, supra.

CHAPTER VII.

Privileged Wills.

Wills made since 1837 absolutely revoked by marriage under 1 Vict. c. 26.

Remarks upon the enactment.

Will in contemplation of marriage.

for, if it would have operated for the exclusive benefit of a pre-existing child, the ground for subverting the will failed (*i*).

These rules appear to apply to wills made by soldiers and seamen under the old law (*ii*).

II.—By Marriage, since the Wills Act.—No question of this nature can occur, under any will made since the year 1837, as the Act 1 Vict. c. 26, s. 18, has provided, “That every will made by a man or woman shall be revoked by his or her marriage (*j*) (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin under the Statute of Distributions)”; and (s. 19) that “no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.”

“These clauses,” says Mr. Jarman (*jj*), “suggest only two remarks :—

“1st, That, unless in the expressly excepted cases, marriage alone will produce absolute and complete revocation, as to both real and personal estate; and that no declaration, however explicit and earnest, of the testator’s wish that the will should continue in force after marriage, still less any inference of intention drawn from the contents of the will, and least of all evidence collected aliunde, will prevent the revocation (*k*).

“2nd, That merely the birth of a child, whether provided for by the will or not, will not revoke it; the legislature, while it invested with a revoking efficacy one of the several circumstances formerly requisite to produce revocation, having wholly disregarded the other.

“The new rule, though it may sometimes produce inconvenience, has at least the merit of simplicity, and will relieve this branch of testamentary law from the many perplexing distinctions, which grew out of the pre-existing doctrine.”

It was held, under the old law, that the revocation of a will by a subsequent marriage and birth of issue took place in consequence of a rule of law, independently of intention of the testator, and consequently that no evidence of intention was admissible (*l*). And

(*i*) *Sheath v. York*, 1 Ves. & B. 390.

(*ii*) *Ante*, p. 101.

(*j*) The marriage must, of course, be a valid marriage, see *Warter v. Warter*, 15 P. D. 152.

(*jj*) First edition, p. 114.

(*k*) Approved by Lindley, L. J., in *Re Martin*, [1900] P. 228.

(*l*) *Marston v. Roe d. Fox*, 8 A. & E. 14: see also *In bonis Cadywold*, 1 Sw. & Tr. 34; *Israell v. Rodon*, 2 Moo. P. C. 51.

it is clear that the same rule applies under the present law so as to revoke by a subsequent marriage a will expressly made in contemplation of such marriage.

CHAPTER VII.

The exception in the 18th section, of wills made in exercise of a power of appointment, where the property would not in default of appointment pass to the testator's heir, executor, &c., extends to the case of an appointment under a power, where the heirs executor or administrator, or statutory next of kin, would not take as such (*m*). Thus, where property was limited in default of appointment to the testator's children, who were his statutory next of kin, it was held that a will made by him in exercise of the power was not revoked by subsequent marriage (*n*). And as the words "next of kin" alone have a different meaning to "next of kin under the Statute of Distribution," a will under a power is not revoked by subsequent marriage where the gift in default of appointment is to the testator's "next of kin" (*o*). Where real estate is limited in default of appointment to the donee, his heirs or assigns, marriage will operate to revoke the will (*p*).

Exception as to testamentary appointments.

If a foreigner makes a will which is valid according to the law of his native country, and afterwards marries in accordance with the law of England, having at that time an English domicile, the marriage revokes the will (*q*). But it seems that sect. 18 of the Wills Act does not apply to the wills of foreigners domiciled abroad (*r*).

Will of foreigner.

III.—By Burning, Tearing, or Destroying.—The Statute of Frauds admitted of a will even of freehold estate, being revoked by burning, cancelling, tearing, or obliterating, by the testator himself, or in his presence and by his directions, and the transaction was not required to be attested by witnesses (*s*).

Old law.

The act 1 Vict. c. 26, provides (s. 20) that a will or codicil may be revoked "by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his

Wills Act. s. 20.

(*m*) The will is revoked as regards all the other dispositions contained in it: *In bonis Russell*, 15 P. D. 111.

(*n*) *In bonis Fitzroy*, 1 Sw. & T. 133; *In bonis Fenwick*, L. R., 1 P. & D. 319; *In bonis Worthington*, 20 W. R. 260.

(*o*) *In bonis McVicar*, L. R. 1 P. & D. 671; see *In bonis Fitzroy*, supra; *In bonis Russell*, 15 P. D. 111.

(*p*) *Vaughan v. Vanderstegen*, 2 Drew. 165, 168.

(*q*) *Re Martin*, [1900] P. 211.

(*r*) *Ibid*, per Lindley, L. J.

(*s*) As to the old law relating to re-

vocation by burning, &c., see the 4th edition of this work, Vol. I. pp. 129 et seq. The principal change is that under the Wills Act revocation by attempted cancellation or obliteration is not effectual unless executed in manner prescribed for the execution of a will. In other respects the decisions under the Statute of Frauds as to revocation of wills assist the construction of the Act 1 Vict. c. 26. *Swinton v. Bailey*, 4 App. Ca. 70, was a case of revocation by obliteration under the old law.

CHAPTER VII.

Tearing
includes
cutting, &c

When partial
tearing
effects total
revocation

direction, with the intention of revoking the same." Revocation by obliteration forms the subject of a separate section (*t*).

Under the act 1 Vict. c. 26, it has been decided that the word "tearing" includes "cutting" (*u*); for it would be absurd to say that a will torn into two pieces was revoked, but that if cut into twenty pieces it was not revoked. The tearing or cutting, to be effectual, need not be of the whole will; tearing or cutting out that part of the will which may be said to be the principal part (*v*), or that part which gives effect to the whole, as the signature of the testator (*w*), or, probably, of the witnesses (*x*), will cause a revocation of the whole will, but the presumption of revocation thus arising may be rebutted (*y*). So also where the signatures of a testatrix and of the witnesses were scratched out as with a pen-knife, the will was held to have been effectually revoked (*z*). And where the will is written on several sheets, each signed and witnessed, tearing off the last signature will revoke the whole will, although the prior signatures are left (*a*). It has also been decided by the Court of Exchequer (*b*) that tearing off, *animo revocandi*, the seal of a will (though no seal is necessary to the due execution of a will) constituted a revocation. They said the instrument purported by the attestation clause to be executed under seal, and was published and attested as a sealed instrument, and when the seal was torn off it ceased to be the instrument which the testator purposed to execute and publish. And this authority was followed by Wood, V.-C., in a case (*c*) where a testator made his will on five sheets of paper, signed the first four, and signed and sealed the fifth, with an attestation clause describing the mode of execution;

(*t*) *Infra*, p. 155.

(*u*) *Hobbs v. Knight*, 1 Curt. 768; *In bonis Cooke*, 5 N. of C. 390; and see *Clarke v. Scripps*, 16 Jur. 783.

(*v*) *Williams v. Jones*, 7 N. of C. 106.

(*w*) *Hobbs v. Knight*, 1 Curt. 768; *In bonis Gullan*, 27 L. J. P. 15; *In bonis Lewis*, *ib.* 31; *In bonis Simpson* 5 Jur. N. S. 1366; *Bell v. Fothergill*, L. R., 2 P. & D. 148. In the last two cases the piece cut off had been preserved with the will. In *In bonis White*, 3 L. R. Ir. 413, the portion torn off was all that remained. In *In bonis Simpson*, *supra*, and in *Magnesi (or Maynes) v. Hazelton*, 44 L. T. 586, both pieces were preserved. See *North v. North*, 25 T. L. R. 322.

(*x*) *Evans v. Dallow*, 31 L. J. P. 128. See also *Birkhead v. Bowdoin*, 2 N. of C. 66; *Hobbs v. Knight*, 1 Curt. 780, 781; *Abraham v. Joseph*, 5 Jur. N. S. 179. See *In bonis James*, 7 Jur. N. S. 52.

(*y*) *In bonis Wheeler*, 49 L. J. P. 29; *In bonis Taylor*, 63 L. T. 230.

(*z*) *In bonis Morton*, 12 P. D. 141.

A partial obliteration of the signatures would not be a revocation: *In bonis Godfrey*, 69 L. T. 22. Lord St. Leonards has expressed the opinion that a will written in pencil would be revoked by erasing the signature by india-rubber. *Handy Book*, 8th edition, p. 250, *sed qu.* As to the meaning of "erase" see *Wilkinson v. Schneider*, L. R., 9 Eq. 423, *post*, Chap. VIII.

(*a*) *In bonis Gullan*, 27 L. J. P. 15; *Gullan v. Grove*, 26 Beav. 64. Compare *Christmas v. Whynates*, 32 L. J. P. 73 (where the Court was satisfied that the tearing was intended to work a partial revocation only).

(*b*) *Price v. Powell*, 3 H. & N. 341. See also *Davies v. Davies*, 1 Lee Eccl. 444.

(*c*) *Williams v. Tyley*, Johns. 530.

he afterwards tore off the signature from each of the first four sheets and struck through with his pen the signature on the last, and, the animus revocandi being proved in evidence, it was held that the will was revoked by the tearing (*d*). But in *Clarke v. Scripps* (*e*), where the testator had cut off his signature from the first six pages of his will, leaving his signature with the attestation clause and signatures of the witnesses, on the last sheet, it was held that the will was not revoked.

Cutting out a particular clause, or the name of a legatee, is a revocation pro tanto only (*f*). Revocation pro tanto.

The words "otherwise destroying" are to be taken to mean a destruction ejusdem generis with the modes before mentioned; that is, destruction, in the proper sense of the word, of the substance or contents of the will, or, at least, complete effacement of the writing, as by pasting over it a blank paper (*g*); and not a "destroying" in a secondary sense (*h*), as by cancelling or incomplete obliteration. Meaning of words "otherwise destroying."

Part of a will may be revoked by destruction. Thus, if a testator cuts out the name of a legatee or executor wherever it appears in the will, this is a good partial revocation, and the will is entitled to probate in its mutilated state (*hh*). Partial revocation.

In *Re Coyte* (*i*), the destruction of a document referred to in the will was held to be a revocation not only of the document itself, but also of the clause in the will referring to it.

Destruction by a person other than the testator, in order to operate as a revocation, must be both in the presence and by the direction of the testator (*ii*): and therefore a testator cannot revoke his will by authorizing any person to destroy it after his death (*j*): and if in such case the will should be destroyed its contents might be proved aliunde (*k*). Destruction by third person.

(*a*) *Animus revocandi*.—Revocation by destruction is in every case a question of intention, and accordingly evidence is admissible Evidence of animus admitted.

(*d*) See the case of *Leonard v. Leonard*, below, p. 147, and *In bonis White*, 3 L. R. Ir. 413 supra.

(*e*) 2 Rob. 563.

(*f*) *In bonis Cooke*, supra; *In bonis Lambert*, 1 N. of Cas. 131; *In bonis Nelson*, Ir. R. 6 Eq. 569; *In bonis Woodward*, L. R., 2 P. & D. 206, where seven or eight lines at the beginning had been cut off; *In bonis Maley*, 12 P. D. 134, where the clause appointing executors had been cut out. See also *In bonis Leach*, 63 L. T. 111.

(*g*) *In bonis Horsford*, L. R., 3 P. & J.—VOL. I.

D. 211, S. C. sub. nom. *Ffinch v. Combe*, [1894] P. 191.

(*h*) *Stephens v. Taprell*, 2 Curt. 458; *Hobbs v. Knight*, 1 Curt. 779.

(*hh*) *In bonis Leach*, 63 L. T. 111; *In bonis Taylor* ib. 230.

(*i*) 56 L. T. 510.

(*ii*) *Margary v. Robinson*, 12 P. D. 12; *In bonis Dadds*, Deane, 290; *Clark v. Dixon*, 8 T. L. R. 11; *Gill v. Gill*, 25 T. L. R. 400.

(*j*) *Stockwell v. Ritherdon*, 12 Jur. 779.

(*k*) *In bonis North*, 6 Jur. 564.

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to show *quo animo* the act was done, which is a conclusion to be drawn by a court or jury from all the circumstances. The mere physical act of destruction is itself equivocal, and may be deprived of all revoking efficacy by explanatory evidence, indicating the *animus revocandi* to be wanting. Thus, if a testator destroys his will through inadvertence (*l*), or during a fit of insanity (*m*), or drunkenness (*n*), or tears it up under the mistaken impression that it is invalid (*o*), or useless (*p*), or that it has been already by other means effectually revoked (*q*), it will remain in full force, notwithstanding such accidental or involuntary or mistaken act. So, the destruction of the instrument by a third person in the lifetime, but without the permission or knowledge of the testator, would not affect its validity (*r*); *à fortiori*, if the destruction took place after his decease (*s*). Where a will is found torn after the death of the testator, and there is no direct evidence of intention, the question whether it was torn by him *animus revocandi* often depends on the appearance of the paper and other circumstances; the presumption seems to be that the tearing was done by him *animus revocandi* (*t*), but evidence is admissible to show that it is merely the effect of wear (*u*); for mere tearing or destruction, without intention to revoke, is no revocation, under the express terms of the act (*v*). Similarly, where a testator made a will which was revoked by his subsequent marriage but revived by a codicil made after the marriage, it was held that his destruction of the codicil did not

(*l*) Per Lord Mansfield, *Burtonshaw v. Gilbert*, Cowp. 52. So where a revocation *pro tanto* by cutting out part of the will was intended, and part of the attestation had been apparently cut out by mistake; see *In bonis Taylor*, 63 L. T. 230.

(*m*) *Scruby v. Fordham*, 1 Ad. 74; *Borlase v. Borlase*, 4 N. of C. 139; *In bonis Shaw*, 1 Curt. 905; *In bonis Downer*, 18 Jur. 66; *Brunt v. Brunt*, L. R., 3 P. & D. 37; *In bonis Hine*, [1893] P. 282. Where a testator becomes insane after the execution of his will, which is found to have been destroyed, the burden of proof that he destroyed it while he was of sound mind is cast on the person who sets up the revocation of the instrument: *Harris v. Berrall*, 1 Sw. & Tr. 153. Compare *Sprigge v. Sprigge*, post, p. 153.

(*n*) *In bonis Brassington*, [1902] P. 1. (*o*) *Giles v. Warren*, L. R., 2 P. & D. 401; *In bonis Thornton*, 14 P. D. 82.

(*p*) *Beardsley v. Lacey*, 78 L. T. 25. *In James v. Shrimpton* (1 P. D. 431) the testator made a will, married, and then

executed a codicil reviving his will, and containing provisions for the benefit of his wife, who predeceased him. On his death the codicil could not be found, and it was therefore presumed to have been destroyed by the testator under a mistaken belief that it was useless: the will and codicil were therefore admitted to probate. As to the case of *Stainford v. White*, [1901] P. 46, see the chapter on Powers of Appointment.

(*q*) *Scott v. Scott*, 1 Sw. & Tr. 258; *Clarkson v. Clarkson*, 31 L. J. P. 143.

(*r*) A mere refusal to make a fresh will does not amount to a ratification of the destruction by another person, *Mills v. Milward*, 15 P. D. 20.

(*s*) *Haines v. Haines*, 2 Vern. 441.

(*t*) *Hare v. Nasmyth*, 3 Hagg. 192, n.; *Lambell v. Lambell*, ib. 568; *Williams v. Jones*, 7 N. of C. 106; *In bonis Lewis*, 27 L. J. P. 31.

(*u*) *Bigge v. Bigge*, 9 Jur. 192, and see 1 Eq. Ca. Abr. 402, pl. 3 marg.

(*v*) *In bonis Tozer*, 7 Jur. 134; *In bonis Hannam*, 14 Jur. 558; *Clarke v. Scripps*, 16 Jur. 783.

render the will inoperative, the Court being satisfied on the evidence that there was no intention to revoke the will, but that the testator had acted under a misconception as to the effect of his act (*w*).

So, if a will is destroyed with the intention of making a fair copy of it, this will not effect a revocation (*x*).

Where a testator destroys part of his will, the mere fact that what remains is thereby made incomplete or difficult to understand, does not shew that he intended to revoke the whole will (*y*); but where he destroys a substantial part of his will, intending to substitute other provisions, and the substitution is not effectually made, the question arises whether the remaining part of the will is revoked, on the principle that the testator only intended it to remain in force if the substituted provisions took effect. Thus in *Treloar v. Lean* (*z*), the testator destroyed three of the middle sheets of his will, and substituted three new ones, which were signed by him but not attested: the Court pronounced against the will with the consent of all parties. In *Leonard v. Leonard* (*a*) the testator destroyed the first two sheets of his will and substituted two others, each of which was signed by him and the persons who had witnessed the execution of the will, and the document as thus constituted was a complete testamentary disposition. It was held by Gorell Barnes, J., that the destruction of the two sheets operated as a revocation of the whole will, and that the interpolated sheets were not executed in accordance with the statute. The result was an intestacy. It may be observed that the learned judge's answer to the argument, that the new sheets constituted an "alteration" within the meaning of the Wills Act, is not quite conclusive: alteration and total destruction are two different things (*b*). It is also submitted that the cases of *Clarke v. Scripps* and *In bonis Woodward*, on which the learned judge relied, do not support the decision, and that it is inconsistent with the doctrine laid down by Butt, J., in *Gardiner v. Courthope* (*bb*).

Can there be revocation without animus?

Declarations made by the testator are admissible as evidence of his intention (*c*), those made at the time of the act of destruction being of course of greater weight than those made subsequently (*d*).

Declarations of intention.

If a testator becomes insane after making his will, and it is

Insanity.

(*w*) *James v. Shrimpton*, 1 P. D. 431.
(*x*) *In bonis Tozer*, 7 Jur. 134; *In bonis Kennett*, 2 N. R. 461; *In bonis Appelbee*, 1 Hagg. 143.

(*y*) *Clarke v. Scripps*, 2 Rob. 563; *In bonis Woodward*, L. R. 2 P. & D. 206.
(*z*) 14 P. D. 49.

(*a*) [1902] P. 243.

(*b*) The case is referred to below, p. 158.

(*bb*) 12 P. D. 14.

(*c*) *Keen v. Keen*, L. R. 3 P. & D. 105.

(*d*) *Powell v. Powell*, L. R. 1 P. & D. 209; *In bonis Weston*, ib. 633.

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subsequently found to have been torn or mutilated, the burden of proving that the injury was done by the testator while of sound mind rests upon the party setting up revocation (e).

Effect where destruction is connected with a new disposition.

(b) *Dependent relative Revocation*.—Where the act of destruction is connected with the making of another will, so as fairly to raise the inference, that the testator meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted, such will be the legal effect of the transaction; and therefore, if the will intended to be substituted is inoperative from defect of attestation, or any other cause, the revocation fails also, and the original will remains in force (f). In one case a testator, having some time before executed a will, duly attested, to each sheet of which he had affixed a seal, instructed his solicitor to prepare another, and signed the draft prepared from those instructions, and then proceeded to tear off the seals of the old will; after all the seals but one had been thus removed, he was informed, that the new will would not be operative upon his lands, in its then state, which induced him to desist; and before the new will was complete, the testator died: it was held, that the original will remained unrevoked (g).

Will destroyed to make new will.

A fortiori, where it appears from the evidence that the will is destroyed for the purpose of substituting a fresh will, the old will is not revoked, if the new one be in fact not made (h).

Intention to revive revoked will.

The same rule generally applies where the later of two inconsistent wills is destroyed on the supposition that the earlier will is thereby revived; for if this supposition be (as by the existing law we shall presently see it is) erroneous, the later will remains unrevoked. In this case the act of destruction is referable, not to any absolute intention to revoke, but to an intention to validate another paper; and as the assumption that the revocation will have that operation is erroneous, no true *animus revocandi* is considered to exist (i).

(e) *Harris v. Berrall*, 1 Sw. & Tr. 153.

(f) *In bonis Middleton*, 10 Jur. N. S. 1109.

(g) *Hyde v. Hyde*, 1 Eq. Ab. 409; *Eccleston v. Speak*, 3 Mod. 258; *Ex parte Ilchester*, 7 Ves. 348; *Onions v. Tyrer*, 1 P. W. 343; *Burtonshaw v. Gilbert*, Cowp. 49; *Sutton v. Sutton*, Cowp. 812; *Winsor v. Pratt*, 5 J. B. Moo. 484; *Perrott v. Perrott*, 14 East, 440; *Dancer v. Crabb*, L. R., 3 P. & D. 98. See also *Jenner v. Finch*, 5 P. D. 106; *In re Fleetwood*, 15 Ch. D. 594, 609.

(h) *Dancer v. Crabb*, L. R., 3 P. & D. 98, 104; see *In bonis De Bode*, 5 N. of C. 189; *In bonis Eeles*, 2 Sw. & Tr. 600; *Dixon v. Solicitor to the Treasury*, [1905] P. 42; *In bonis Irvin*, 25 T. L. R. 41.

(i) *Powell v. Powell*, L. R., 1 P. & D. 209, overruling *Dickinson v. Swatman*, 30 L. J. P. 84. See also *Eckersley v. Platt*, L. R., 1 P. & D. 281; *In bonis Weston*, L. R., 1 P. & D. 633; *In bonis Andrews*, [1893] P. 14; *Cossey v. Cossey*, 69 L. J. P. 17; *Welch v. Gardner*, 51 J. P. 760.

But the mere intention to make at some indefinite future time a new will, is not enough to prevent revocation (*j*). CHAPTER VII.

(*c*) *Incomplete Destruction*.—It has been seen that the act of destruction, without the intention to revoke, is ineffectual (*k*). Where, however, there is an intention on the part of the testator to destroy the will, but the act is not completed, the authorities present more matter for consideration (*l*). Revocation by partial destruction.

The early case of *Bibb d. Mole v. Thomas* (*m*) has generally been considered to establish that a very slight act of tearing is sufficient to effect a revocation, if done with such intention; the facts were as follows:—The testator (who had frequently declared himself dissatisfied with his will), being one day in bed near the fire, ordered W., a person who attended him, to fetch his will, which she did, and delivered it to him, it being then whole, only somewhat creased; he opened and looked at it, then gave it a rip with his hands, so as almost to tear a bit off, then rumbled it together, and threw it on the fire; but it fell off. However, it must soon have been burnt, had not W. taken it up, and put it into her pocket. The testator did not see her do so, but, afterwards, upon his repeated inquiries, she falsely told him that she had destroyed it. The testator afterwards told a person that he had destroyed his will, and should make no other until he had seen his brother, to whom he wrote to the same effect, and desired him to come down, saying, “If I die intestate, it will cause uneasiness.” The testator, however, died without making another will. The jury thought this a sufficient revocation, and the Court of C. P. was of the same opinion, on a motion for a new trial; De Grey, C. J., observing, that this case fell within two of the specific acts described by the Statute of Frauds; it was both a burning and a tearing; and that throwing it on the fire, with an intent to burn, though it was only very slightly singed and fell off, was sufficient within the statute.

It is not, however, to be inferred from this case, that the mere intention, or even attempt, of a testator to burn, tear, or destroy his will, is sufficient to produce revocation, within the meaning of the Statute of Frauds, or the Wills Act; for, the legislature having pointed out certain modes by which a will may be revoked, it is not in the power of the judicature, under any circumstances, to dispense with part of its requisitions, and accept the mere Mere attempt to destroy is not necessarily revocation.

(*j*) *Williams v. Tyley*, John. 530; *In bonis Mitcheson*, 32 L. J. P. 202.

(*k*) Ante, p. 118.

(*l*) It will be remembered that des-

troying the principal or essential part of a will may cause a revocation of the whole: ante, p. 144.

(*m*) 2 W. Bl. 1043.

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intention or endeavour to perform the prescribed act, as a substitute or equivalent for the act itself, though the intention or endeavour may have been frustrated by the improper behaviour of a third person.

Thus, in the case of *Doe d. Reed v. Harris* (n), it appeared by the evidence of the testator's servant, that the testator had thrown the will on the fire, from which it was immediately snatched by a relative who lived with them, when the fire had merely singed the cover. The testator afterwards insisted upon her giving up the will to be burnt, which she promised to do; and, in order to satisfy the testator, threw something into the fire, which was not the will (as she represented it to be), of which the testator appears to have had some suspicion; for, upon the witness expressing her doubt whether the will had been destroyed, the testator said, "I do not care, I will go to L., if I am alive and well, and make another will." The Court of Q. B. held, that the will was not revoked, on the ground that there had been no actual burning of the instrument. "It is impossible," said Lord Denman, "to say that singeing a cover, is burning a will within the meaning of the statute." Patteson, J., said, "To hold that it was so, would be saying, that a strong intention to burn, was a burning. There must be, at all events, a partial burning of the instrument itself; I do not say that a quantity of words must be burnt; but there must be a burning of the paper on which the will is."

Effect where
a testator
suspends the
destroying
act before its
completion.

It is also clear, that if a testator is arrested in his design of destroying the will, by the remonstrance or interference of a third person, or by his own voluntary change of purpose, and thus leaves unfinished the work of destruction which he had commenced, the will is unrevoked; and the degree in which the attempt had been accomplished, would not, it should seem, be very closely scrutinised, if the testator himself had put his own construction upon his somewhat equivocal act, by subsequently treating the will as undestroyed.

Thus, in *Doe v. Perkes* (o), where a testator, upon a sudden provocation by one of the devisees, tore his will asunder; and, after being appeased, fitted the pieces together, and expressed his satisfaction that it was no worse, and that no material injury had been done; it was held that the will remained unrevoked. Here (to use the language of a distinguished judge) (p) the intention of revoking was itself revoked, before the act was complete. And in

(n) 6 Ad. & Ell. 209. See *Cheese v. Lovejoy*, 2 P. D. 251; *Andrew v. Molley*, 12 C. B. N. S. 514.

(o) 3 B. & Ald. 489; and compare *In bonis Colberg*, 2 Curt. 832.

(p) Vide 6 Ad. & Ell. 215.

Elms v. Elms (q), the testator had torn his will nearly through, but the evidence seemed to show that he intended to do more, and was stopped by the remonstrance of a person present, and it was held that the will was not revoked (r).

As to partial revocation by destruction, see above, p. 145.

(d) *Destruction of Duplicate Will*.—Sometimes a testator for greater security executes his will in duplicate, retaining one part and committing the other to the custody of another person (usually an executor or trustee); and questions have not unfrequently arisen as to the effect of his subsequently destroying one of such papers, leaving the duplicate entire. In these cases the presumption generally is, that the testator means by the destruction of one part to revoke the will, but the strength of the presumption depends much upon circumstances. Thus, where (s) he cancels that part which is in his own possession (the duplicate being in the custody of another), it is very strongly to be presumed, that he does not intend the duplicate to stand, he having destroyed all that was within his reach (t). So, if the testator have himself possession of both, the presumption of revocation holds, though weaker (u), and even if, having both in his possession, he alters one, and then destroys that which he had altered, there is also the presumption, but weaker still.

Effect of destroying one part of duplicate will.

These several gradations of presumption were stated by Lord Erskine in *Pemberton v. Pemberton* (v), the circumstances of which were as follows:—Two parts of a will were found in the possession of a testator at his death, the one cancelled, having various alterations in it, and the other not altered or cancelled; and the finding of the jury in three successive trials at law on these facts, and the evidence generally, was that the will was not revoked; and in that conclusion the L. C. finally concurred.

(q) 27 L. J. P. 96. And see *In bonis Cockayne*, 2 Jur. N. S. 454.

(r) "It occurs to remark," says Mr. Jarman, "that testators should be dissuaded from making or altering their wills (as they are often disposed to do), under the influence of any temporary excitement occasioned by the ill-conduct of a legatee; and, still more, from recording their resentment in their wills, which may have the effect of wounding the feelings of, and casting a stigma on, the offending party long after the transaction which gave occasion to the irritation has been effaced from recollection or is remembered only to be regretted."

The Probate Court will not readily omit from the probate any such record of displeasure: *In bonis Honeywood*, L. R., 2 P. & D. 251.

(s) See *Sir Edward Seymour's Case*, cited Comyns, 453; *Onions v. Tyrer*, 1 P. W. 346; and see *Colvin v. Fraser*, 2 Hagg. 266; *Rickards v. Mumford*, 2 Phillim. 23.

(t) *Burtonshaw v. Gilbert*, Cowp. 49; *Boughey v. Moreton*, 3 Hagg. 191, n.; *Jones v. Harding*, 58 L. T. 60; *Paige v. Brooks*, 75 L. T. 455.

(u) *In bonis Hains*, 5 N. of C. 621.

(v) 13 Ves. 310.

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Perhaps, in such a case, the presumption can hardly be said to lean in favour of the revocation at all; for the testator having made alterations in one part, and then cancelled the part so altered only, the conclusion would rather seem to be, that he merely intended, by the destruction of that part, to get rid of the alterations, and to restore the will to its original state. And it is observable, that, in *Roberts v. Round (w)*, where one of two duplicate wills was found partly mutilated, and the other carefully preserved, in the testator's own possession, it was held, that the will remained unrevoked.

The evidence in *Pemberton v. Pemberton*, as to the intent with which the act of cancellation was done, consisted partly of subsequent declarations of the testator, and these tended rather to favour the revocation than otherwise; but both Lord Eldon and Lord Erskine adverted to the very little weight due to expressions thrown out by testators in conversation with persons respecting their wills.

Declarations made by a testator after the date of his will are not admissible to prove that it was executed in duplicate (x).

Presumption
as to destruc-
tion of wills.

(e) *Lost Wills*.—If a will is traced into the testator's possession, and is not found at his death, the presumption is that he destroyed it for the purpose of revoking it (xx); but the presumption may be rebutted, and it will be more or less strong according to the character of the custody which the testator had over the will (y). It is difficult to lay down any general rule as to the nature of the evidence which is required to rebut the presumption of destruction: it depends to a considerable extent on the testator's property and his relations towards his family. Where the will makes a careful and detailed disposition of the testator's property, and nothing happens to make it probable that he wishes to revoke it, the presumption raised by the disappearance of the will may be rebutted by slight evidence, especially if it is shown that access to the box, or other place of deposit where the will was kept, could be obtained by persons whose

(w) 3 Hagg. 548.

(x) *Atkinson v. Morris*, [1897] P. 40.

(xx) So if a will is written on several sheets, and only some of them are found after his death, it is generally to be presumed that he destroyed the others with the intention of revoking them: *In bonis Gullan*, 27 L. J. P. 15. Whether this revokes the whole will is another question: see ante, p. 144.

(y) Per Cockburn, C. J., in *Sugden v. Lord St. Leonards*, 1 P. D. at p. 217;

Allan v. Morrison, [1900] A. C. 604; *Paige v. Brooks*, 75 L. T. 455; *In bonis Debac*, 77 L. T. 374. The earlier cases are *Davis v. Davis*, 2 Ad. 223; *Patten v. Paulton*, 4 Jur. N. S. 341; *In bonis Brown*, 4 Jur. N. S. 244; *Lillie v. Lillie*, 3 Hagg. 184; *Wargent v. Hollings*, 4 Hagg. 245; *Tagart v. Squire*, 1 Curt. 289; *Welch v. Phillips*, 1 Moo. P. C. C. 299; *Brown v. Brown*, 8 Ell. & Bl. 876; *In bonis Shaw*, 1 Sw. & Tr. 62.

interest it is to defeat the will. In fact, it may almost be said that in such a case the presumption is the other way, namely, that the testator did not intend to die intestate (z). Declarations made by the testator are admissible, not as evidence as to the fact of destruction, but as evidence of intention either to revoke or to adhere to the will (a).

The ordinary presumption does not apply to the case of a testator who becomes insane after the execution of the will, and continues insane until his death: in such a case the burden of shewing that the will was destroyed while the testator was of sound mind lies on the party setting up the revocation (b).

Insanity.

If the will is traced out of the testator's custody, it is incumbent on the party setting up the revocation to prove that the will came again into the testator's custody, or was destroyed by his directions (c).

Custody of will.

In *Flood v. Russell* (d), there was no direct evidence of the execution of the alleged will, but the fact of its execution and its contents were proved by oral evidence.

What evidence is sufficient to prove execution of will.

(f) *Secondary evidence of Contents of Lost or Destroyed Will*.—Where a will has been lost or destroyed, and the presumption of destruction animo revocandi is rebutted, or does not arise, the contents of the will may be proved by secondary evidence: such as a draft or copy, or oral testimony (e); and it seems that the oral testimony of a single witness who takes an interest under the alleged will is sufficient (f). Declarations, written or oral, made by the testator before the execution of the will, are admissible as secondary evidence of its contents (g). In some cases post-testamentary declarations

Secondary evidence of contents.

(z) *Sugden v. Lord St. Leonards*, 1 P. D. 154; see especially pp. 214-5; *Finch v. Finch*, L. R. 1 P. & D. 371. Other cases are *Saunders v. Saunders*, 6 N. of C. 518; *Battyl v. Lyles*, 4 Jur. N. S. 718; *In bonis Gardner*, 27 L. J. P. 55; *In bonis Ripley*, 4 Jur. N. S. 342; *In bonis Simpson*, 5 Jur. N. S. 1366; *In bonis Pechell*, 6 Jur. N. S. 406; *Eckersley v. Platt*, L. R., 1 P. & D. 281; *In bonis Berry*, 65 L. T. 763.

(a) *Whiteley v. King*, 17 C. B. N. S. 756; *Keen v. Keen*, L. R. 3 P. & D. 105; *Sugden v. Lord St. Leonards*, supra; *Re Sykes, Drake v. Sykes*, 22 T. L. R. 741, 23 T. L. R. 747; *In bonis Mitcheson*, 32 L. J. P. 202.

(b) *Sprigge v. Sprigge*, L. R., 1 P. & D. 608; *In bonis Crandon*, 84 L. T. 330.

(c) *Colvin v. Fraser*, 2 Hagg. 327; and see *Wynn v. Heveningham*, 1 Coll.

638, 639.

(d) 29 L. R. Ir. 91.

(e) See the cases above cited; also *Clarkson v. Clarkson*, 31 L. J. P. 143; *Podmore v. Whatton*, 33 L. J. P. 143; *In bonis Barber*, L. R., 1 P. & D. 267; *Burls v. Burls*, L. R., 1 P. & D. 472; *James v. Shrimpton*, 1 P. D. 431; *Harris v. Knight*, 15 P. D. 170; *In bonis Leigh*, [1892] P. 82; *Flood v. Russell*, 29 L. R. Ir. 91.

(f) *Sugden v. Lord St. Leonards*, supra. In that case the oral evidence was corroborated by codicils and other documents.

(g) See *Sugden v. Lord St. Leonards*, supra, and the cases there referred to, especially *Quick v. Quick*, 3 Sw. & Tr. 442; *Johnson v. Lyford*, L. R., 1 P. & D. 546.

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Probate of
part of will. It was laid down in *Sugden v. Lord St. Leonards* that it is not necessary that the whole of the contents of a lost or destroyed will should be proved, provided the Court is satisfied that the substantial parts have been proved. But the language of some of the judgments in that case goes beyond the principles laid down in other cases. For example, it seems clear that it is not sufficient to prove the residuary clause in the alleged will, at all events if there is reason to suppose that important legacies were also given by it (*j*).

Consent of
persons
interested. Where the property is small, the Court of Probate sometimes allows the contents of a lost will to be proved, without requiring the consent of all persons interested (*k*).

Effect of
testator de-
stroying will,
and leaving
codicil
undestroyed.

IV.—Whether a Codicil is revoked by Destruction of Will.—

Sometimes there is found, among the papers of a testator, a codicil without the will of which it professes to be part; in such cases the question arises, whether or not the destruction of the will (which it is to be presumed, in the absence of proof to the contrary, was the act of the testator) operates, impliedly, to revoke the codicil also. This question, of course, depends mainly upon the contents of the several testamentary documents. If the dispositions in the codicil are so complicated with, and dependent upon, those of the will, as to be incapable of a separate and independent existence, the destruction of the will necessarily revokes the codicil (*l*); and before the Wills Act, the general presumption in the Ecclesiastical Courts was rather in favour of the intention to involve a codicil in the revocation of the will of which it was a part, where a contrary intention could not be collected either from the contents of the codicil itself or from extrinsic evidence (*m*). But if the codicil was capable, from the nature of its contents, of subsisting independently of the will, its validity was not affected by the destruction of the will (*n*).

Effect under
Wills Act,
where will is
destroyed but
not the
codicil.

The balance of authority seems to support the view that the statute 1 Vict. c. 26, has done away with the presumption, made

(*h*) *Sugden v. Lord St. Leonards*,
supra; *Gould v. Lakes*, 6 P. D. 1.

(*i*) *Woodward v. Goulstone*, 11 App.
Ca. 469; *Atkinson v. Morris*, [1897]
P. 40.

(*j*) *Woodward v. Goulstone*, 11 App.
Ca. 469. Compare *Dickinson v. Stidolph*,
11 C. B. N. S. 341.

(*k*) *In bonis Apted*, [1899] P. 272;
In bonis Brassington, [1902] P. 1.

(*l*) *Usticke v. Bawden*, 2 Add. 116.

(*m*) *Medlycott v. Assheton*, 2 Add.
229; *Coppin v. Dillon*, 4 Hagg. 361,
369. See as to the Roman Law on this
point, *Falle v. Godfray*, 14 App. Ca. 70.

(*n*) *Tagart v. Hooper*, 1 Curt. 289;
In bonis Coulthard, 11 Jur. N. S. 184,
where the document was described as
“a codicil to any will and testament of
me,” but there was nothing to shew that
he had ever made a will.

by the old law, that the destruction of a will was an implied revocation of a codicil thereto (*o*). Lord Penzance repeatedly so held, on the ground that sect. 20, enacting that “no will or codicil shall be revoked otherwise than” by certain specified methods, plainly excludes the method in question (*p*). And these decisions were followed without dissent by Butt, J. (*q*). But in *Sugden v. Lord St. Leonards* (*r*) a demurrer to a plea, dependent for its validity on this view of the statute, was formally (though without argument) overruled by Sir J. Hannen. Perhaps, however, the point is not of much importance. The presumption already stated was never a strong one, even under the old law, and the question whether the codicil was revoked or not always depended, and (supposing the presumption to continue) will still depend, mainly upon the contents of the codicil (*s*), and the effect of the evidence adduced to rebut the presumption (*t*).

It seems that if the will and codicil are written on the same piece of paper, and the testator cuts off the signature to the will, slight evidence is sufficient to shew that he meant also thereby to revoke the codicil (*u*).

The question whether the revocation of a will by a codicil, impliedly revokes an intermediate codicil, is referred to later (*v*).

V.—Obliterations, Interlineations, Cancellations, &c.—The Wills Act enacts (sect. 21) “that no obliteration, interlineation, or other alteration (*w*), made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such

Obliterations, &c., in a will to be signed and attested.

(*o*) See per Sir H. Fust, *Clogstoun v. Walcott*, 12 Jur. 422; *In bonis Halliwell*, 9 Jur. 1042; followed by Sir C. Cresswell, *Grimwood v. Cozens*, 5 Jur. N. S. 497; *In bonis Dutton*, 32 L. J. P. 137. Whether under the old law the presumption existed with respect to codicils dealing with freehold land, appears never to have been decided. The Statute of Frauds, sect. 6, does not, for this purpose, differ materially from 1 Vict. c. 26, s. 20.

(*p*) *Black v. Jobling*, L. R., 1 P. & D. 685; *In bonis Savage*, L. R., 2 P. & D. 78; *In bonis Turner*, ib. 403; *Eyre v. Eyre*, [1903] P. 131.

(*q*) *Gardiner v. Courthope*, 12 P. D. 14. See also *Paige v. Brooks*, 75 L. T. 455.

(*r*) 1 P. D. 154, 206; the plea had already been pronounced to be not true in fact.

(*s*) So imperative did Lord Penzance

consider the Act to be, that even where the codicil was unintelligible without the will (the contents of which were unknown), he held himself bound to admit the codicil to probate and leave the question of its operation to the Court of Construction, *In bonis Turner*, L. R., 2 P. & D. 403.

(*t*) In *Clogstoun v. Walcott* and *In bonis Halliwell*, and in *In bonis Coulthard*, 11 Jur. N. S. 184, and *In bonis Clements*, [1892] P. 254, the codicils were held not to be revoked. See also *In bonis Ellice*, 33 L. J. P. 27.

(*u*) *In bonis Bleckley*, 8 P. D. 169.

(*v*) Post, p. 169.

(*w*) As to what is an “interlineation,” see *In bonis Birt*, L. R. 2 P. & D. 214; *In bonis Greenwood*, [1892] P. 7. In both these cases the grant was made by consent. See *Leonard v. Leonard*, [1902] P. at p. 244.

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alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot, or end of, or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will."

Distinction
as to acts
apparent and
acts not appa-
rent on the
face of a will.

With respect to a will executed before 1838, the question whether it is revoked or altered by any act apparent on the face of it, done on or after that date, as by erasure, obliteration or interlineation, must be determined by reference to the provisions of the Act 1 Vict. c. 26; but the question whether it is revoked by any act not apparent on the face of it, and done on or after that date, must be determined with reference to the law as it stood before the act (x).

Presumption
when altera-
tion is made.

Where obliterations and interlineations appear on the face of a will, and there is no evidence to show when they were made, the presumption is that they were made after the execution of the will (y); but it seems that slight evidence is sufficient to rebut the presumption, unless the alterations are of an important character (z).

Incorporation
by codicil.

If there be a codicil to the will, and the codicil refers to unattested alterations in the will, this incorporates them in the codicil (a). If

(x) *In bonis Livock*, 1 Curt. 906; *Hobbs v. Knight*, ib. 768; *Brooke v. Kent*, 3 Moo. P. C. C. 334; *Countess Ferraris v. Marquis of Hertford (Croker v. Marquis of Hertford)*, 3 Curt. 468, 4 Moo. P. C. C. 355; and see *Andrews v. Turner*, 3 Q. B. 177.

(y) *Cooper v. Bockett*, 4 Moo. P. C. 419; *Simmons v. Rudall*, 1 Sim. N. S. 115; *Burgoyne v. Showler*, 1 Rob. 5; *In bonis Thomson*, 3 N. of C. 441; *Greville v. Tylee*, 7 Moo. P. C. 320; *Gann v. Gregory*, 3 D. M. & G. 777; *Doe d. Shallcross v. Palmer*, 16 Q. B. 747; *In bonis James*, 1 Sw. & Tr. 238; *In bonis White*, 30 L. J. P. 55; *Williams v. Ashton*, 1 J. & H. 115; *Re Cruttenden*, 30 W. R. 57; infra, note (z). If the words cannot be ascertained, the probate may apparently be granted with blanks where the erasures occur, *Doherty v. Dwyer*, 25 L. R. Ir. 297. As to alterations where a will is dated before the Wills Act, see *In bonis Streaker*, 28 L. J. P. 50; *Banks v. Thornton*, 11 Hare, 180; *Benson v. Benson*, L. R., 2 P. & D. 172.

(z) *Keigwin v. Keigwin*, 3 Curt. 607;

In bonis Jacob, 1 N. of C. 401; *In bonis Hindmarch*, L. R., 1 P. & D. 307; *Tyler v. Merchant Taylors' Co.*, 15 P. D. 216; *In bonis Duffy*, Ir. R. 5 Eq. 506; *Moore v. Moore*, Ir. R. 6 Eq. 166; *In bonis Greenwood*, [1892] P. 7; *In bonis Tonge*, 66 L. T. 60. Generally declarations of the testator are admissible for this purpose, whether made before or at the time of the execution of his will, *Doe d. Shallcross v. Palmer*, 16 Q. B. 747; *In bonis Hardy*, 30 L. J. P. 142; *In bonis Sykes*, L. R., 3 P. & D. 26; *Dench v. Dench*, 2 P. D. 60. Whether those made afterwards are admissible does not seem to be settled: see cases cited above, p. 154. It is not enough that the alterations bear earlier date than the will: *In bonis Adamson*, L. R., 3 P. & D. 253. *In Re Cruttenden*, 30 W. R. 57, an interlineation affecting a devise of real estate was presumed to have been made before execution, on the ground that it had been included in the probate many years before.

(a) *In bonis Heath*, [1892] P. 253.

the codicil takes no notice of them, the presumption is, that they were made after the date of the codicil (b). And the same presumptions hold regarding mutilation (c). But evidence is admissible to shew that the alterations in the will were made before the execution of the codicil, and this is generally sufficient to incorporate them (d), unless the circumstances shew that the testator did not treat them as effectual alterations (e).

Where a will has been drawn with blanks left for the names of the legatees and the amount of the legacies, or the like, which blanks are afterwards filled up, but there is no evidence to show when, the presumption is that the blanks were filled in before execution. And although there may have been no blanks, but the names of the legatees are found interlined, yet if the interlineation only supplies a blank in the sense, and appears to have been written with the same ink and at the same time as the rest of the will, the Court will conclude that it was written before execution (f). In *Birch v. Birch* (g), where some blanks were filled in with black ink and others with red, it was presumed that the additions in black ink were made before execution, but that those in red ink were made after execution, the envelope in which the will was found appearing to have been sealed, opened and re-sealed.

Where alterations are necessary to supply blanks; or to make sense.

Pencil alterations made before execution, if the body of the will is in ink, are generally disregarded, being *primâ facie* merely deliberative (h). But if a blank is filled up in pencil before execution, the matter so inserted will be included in the probate (i). And if a clause which is inconsistent with the rest of the will is struck out in pencil, it may be treated as cancelled (j).

Pencil alterations.

Where an attestation clause referred to "a few erasures and interlineations" having been made before execution, it was inferred,

Alterations referred to generally.

(b) *Lushington v. Onslow*, 12 Jur. 465; *Rowley v. Merlin*, 6 Jur. N. S. 1165; and compare *In bonis Mills*, 11 Jur. 1070.

(c) *Christmas v. Whinyates*, 32 L. J. P. 73.

(d) See *In bonis Hall*, L. R., 2 P. & D., 256, where the alterations, being in pencil, were held to be merely deliberative. But in *Tyler v. Merchant Taylors' Co.* (15 P. D. 216), alterations made in a will (one in pencil) were held to be incorporated by a subsequent codicil.

(e) See *Re Hay*, [1904], 1 Ch. 317.

(f) *In bonis Cadge*, L. R., 1 P. & D. 543; *In bonis King*, 23 W. R. 552. In *In bonis Swindin*, 2 Rob. 192, an inter-

potation was included in the probate, although it interrupted the sense: sed quære.

(g) 6 N. of C. 581.

(h) *Gann v. Gregory*, 3 D. M. & G. 777; *In bonis Adams*, L. R., 2 P. & D. 367. See *In bonis Hall*, supra, n. (d). As to what alterations were deliberative under the old law, if made after execution, see *Dickinson v. Stidolph*, 11 C. B. N. S. 341; *Ibbott v. Bell*, 34 Bea. 395.

(i) *Kell v. Charmer*, 23 Bea. 195. It does not appear whether any difficulty was raised by the Court of Probate as to evidence.

(j) *In bonis Tonge*, 66 L. T. 60.

CHAPTER VII. from the appearance of the document, that all the alterations had been made before execution (*k*).

Alterations made after execution.

Alterations may be made after the execution of the will, and are effectual under sect. 21 of the Wills Act (*l*), if properly identified by the signature of the testator and two witnesses. Thus interlineations made in a will after execution, opposite which the testator and the two original attesting witnesses have written their names in the margin, will be included in the probate (*m*). But the signature of the witnesses alone is not sufficient, unless the will is re-executed (*n*). And where a testator made some alterations in his will, and he and the attesting witnesses traced over their former signatures with a dry pen, and the witnesses put their initials in the margin opposite to the several alterations, it was held that the alterations were not duly executed (*o*).

Where new sheets are interpolated.

In *Leonard v. Leonard* (*p*), the testator executed a will written on five sheets; he afterwards destroyed the first two sheets and substituted two others, each of which was signed by him and by the two witnesses who attested the original will. It was held by Gorell Barnes, J., that the two new sheets could not be considered as "alterations" within the meaning of sect. 21 of the Wills Act.

Memorandum as to alterations.

Where two alterations are made in a will after execution, and at the end of the will there is written a memorandum (duly executed and attested) referring expressly to only one of the alterations, it may be inferred from the nature of the alterations that both were intended to be referred to (*q*).

Confirmation by codicil.

As already mentioned, where a testator alters his will by unattested alterations, and afterwards makes a codicil to it, this confirms the alterations (*r*), unless it appears from the codicil or otherwise that the alterations were merely deliberative (*s*).

Pencil alterations.

Under the old law, which allowed alterations to be made in a

(*k*) *Doherty v. Dwyer*, 25 L. R. Ir. 297. Compare *In bonis Treeby*, post, note (*g*).

(*l*) Ante, p. 155.

(*m*) *In bonis Wingrove*, 15 Jur. 91. The initials of the testator and witnesses are sufficient: *In bonis Hinds*, 16 Jur. 1161; *In bonis Blewitt*, 5 P. D. 116. And if alterations are made in the same sentence, partly on one page and partly on another, it may be sufficient for the testator and witnesses to sign their names on the first page only: *In bonis Wilkinson*, 6 P. D. 100. Probably alterations made after execution can be validly identified by the

initials of two witnesses different from those who originally attested the will, but the point has not been decided. (See Sol. Journal, Vol. 52, p. 386.)

(*n*) *In bonis Shearn*, 50 L. J. P. 15.

(*o*) *In bonis Cunningham*, 29 L. J. P. 71; *In bonis Martin*, 6 N. of C. 694.

(*p*) [1902] P. 243. See the remarks on this case, above, p. 147.

(*q*) *In bonis Treeby*, L. R., 3 P. & D. 242.

(*r*) *In bonis Heath*, [1892] P. 253; *Tyler v. Merchant Taylors' Co.*, 15 P. D. 216.

(*s*) *Re Hay*, [1904] 1 Ch. 317.

will of personalty without formality (*t*), the question often arose whether alterations made in pencil were final or merely deliberative, the presumption being that they were not intended as final (*u*). The question can still arise where an altered will is confirmed by a codicil, and the presumption is the same as under the old law (*v*). But the presumption is not always acted on (*w*).

In *Oldroyd v. Harvey* (*x*), a testator duly executed a will and codicil; he afterwards added some words to the codicil, and proceeded to write, on the same piece of paper, below the codicil, some further dispositions commencing thus: "I, the within named H. L., hereby declare this to be a codicil to my within-written will (*y*). I revoke, &c." This second codicil was duly executed and attested. The second codicil and the addition to the first codicil were written by the testator at one sitting. It was held that the addition to the first codicil formed part of the second codicil and must be admitted to probate.

Addition
to first
codicil.

The doctrine of dependent relative revocation applies to partial revocation by obliteration or cancellation (*z*). Thus, if a testator bequeaths "to A. B. a legacy of one hundred pounds," and erases the amount, leaving words of bequest and the name of the legatee, this is taken to shew an intention to substitute some other amount, and that intention having failed, the amount of the original bequest can be supplied by parol evidence (*a*). So if a testator erases the amount and writes some other amount over it (*b*). But if the bequest is "to A. B., one hundred and fifty pounds," and the testator erases the words "one hundred and," without substituting any other amount, it is inferred that the testator's intention was simply to revoke the bequest pro tanto, and the bequest of the one hundred pounds being illegible, the legacy stands at fifty pounds (*c*).

Dependent
relative
revocation.

It follows from the terms of the statute that no cancellation or

Effect of
obliteration.

(*t*) *Ravenscroft v. Hunter*, 2 Hagg. 65.

(*u*) *Hawkes v. Hawkes*, 1 Hagg. 322; *Edwards v. Astley*, ib. 490; *Parkin v. Bainbridge*, 3 Phillim. 321; *Lavender v. Adams*, 1 Add. 406; *Francis v. Grover*, 5 Ha. 39. As to wills originally written partly in pencil, see ante, p. 106.

(*v*) *In bonis Hall*, L. R., 2 P. & D. 256.

(*w*) *Tyler v. Merchant Taylors' Co.*, 15 P. D. 216.

(*x*) [1907] P. 326.

(*y*) The will was written on one side of several sheets of brief paper, and the two codicils were written on the back

of the sheets.

(*z*) Cases under the old law are: *Winsor v. Pratt*, 5 J. B. Moo. 484; *Dickinson v. Stidolph*, 11 C. B. N. S. 341; *Ibbott v. Bell*, 34 Bea. 395; *Limbery v. Mason*, Com. 451; s.c., s.n. *Hide (Hyde) v. Mason*, 8 Vin. Abr. 140; *Kirke v. Kirke*, 4 Russ. 435; *Locke v. James*, 11 M. & W. 901.

(*a*) See *In bonis Horsford*, L. R., 3 P. & D. 211, cited infra.

(*b*) *In bonis Nelson*, Ir. R., 6 Eq. 569.

(*c*) *In bonis Nelson*, supra; *In bonis Ibbetson*, 2 Curt. 337.

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obliteration (unless attested in manner required by the act, or confirmed by a codicil, or unless it prevents the words, as originally written, from being apparent), can operate as a revocation of a testamentary disposition, however clearly the testator may have expressed his intention (*d*). In some cases the name of a legatee, which has been completely obliterated by the testator, has been supplied by inference from the context (*e*). Even if the testator partially erases his own signature and those of the attesting witnesses, this is no revocation (*f*). Glasses (*g*), and special arrangements of light (*h*), have been used for discovering what the words obliterated originally were; but parol evidence is inadmissible (*i*), except in those cases where the obliteration was made for the purpose merely of altering the amount of the gift and not of revoking it; in which case, there being no intention to revoke except for the purpose of substituting a gift of a different amount, if the latter cannot take place by reason of the substituted words not being properly attested, the former gift will now (as under the Statute of Frauds) remain good, and evidence must be admitted to show what the original words were (*j*). The same rule applies, where the necessary evidence is forthcoming, to an erasure of the name of a legatee (*k*); and to an erasure of the name of an executor (*l*).

Parol evidence admissible in cases of conditional revocation.

Obliteration by pasting paper over words

Where the obliteration has been effected by pasting a piece of paper over a complete clause in the will, the Court will not order it to be removed, but will endeavour to ascertain what the words of the clause are; if this can be done they are "apparent" within the meaning of the section (*m*). But where the testator has only covered up the amount of the legacy, leaving the legatee's name untouched, the Court will consider it a case of dependent relative revocation, and will endeavour to discover the amount of the

(*d*) *In bonis Dyer*, 5 Jur. 1016; *In bonis Fary*, 15 Jur. 1114; *Stephens v. Taprell*, 2 Curt. 458; *In bonis Beavan*, ib. 369; *In bonis Rose*, 4 N. of. C. 101; *In bonis Brewster*, 29 L. J. P. 69; *Sturton v. Whellock*, 52 L. J. P. 29.

(*e*) *Furniss v. Phear*, 36 W. R. 521.

(*f*) *In bonis Godfrey*, 69 L. T. 22.

(*g*) *In bonis Ibbetson*, 2 Curt. 337; *Lushington v. Onslow*, 12 Jur. 465; *In bonis Brasier*, [1899] P. 36.

(*h*) *Finch v. Combe*, [1894] P. 191.

(*i*) *Townley v. Watson*, 3 Curt. 761.

(*j*) *Soar v. Dolman*, 3 Curt. 121; *Brooke v. Kent*, 3 Moo. P. C. C. 334; *In bonis Ibbetson*, 2 Curt. 337; *In bonis Reeve*, 13 Jur. 370. See *In bonis Nelson*, Ir. R., 6 Eq. 569; *In bonis Hors-*

ford, post; *Jeffery v. Cancer Hospital*, 57 L. T. 600. If there is no evidence what the words were, probate is decreed in blank, *In bonis James*, 1 Sw. & Tr. 238; *Doherty v. Dwyer*, 25 L. R. Ir. 297.

(*k*) *In bonis McCabe*, L. R., 3 P. & D. 94. See *Short v. Smith*, 4 East, 419.

(*l*) *In bonis Parr*, 29 L. J. P. 70; *In bonis Harris*, 29 L. J. P. 79; *In bonis Greenwood*, [1892] P. 7. See also per Sir W. Grant, 7 Ves. 379; and *Hale v. Tokelove*, 2 Rob. 318, noticed post; *In bonis McCabe*, L. R., 3 P. & D. 94. *In bonis Bedford*, 5 N. of. C. 188, is contra. Sed qu.

(*m*) *In bonis Horsford*, L. R., 3 P. & D. 211; *Finch v. Combe*, [1894] P. 191.

legacy originally bequeathed by removing the piece of paper (n). And it seems that where the testator has written words on the back of a testamentary paper and afterwards pasted a piece of paper over them, the Court can direct the removal of it in order to ascertain whether the words amount to a revocation (o). CHAPTER VII.

Striking a pen through the gift to a legatee, though not now a sufficient revocation of a legacy, and not to be noticed in the probate, may nevertheless not be altogether without use; for where the testator has paid a sum in his lifetime to the legatee, it seems that the fact of the gift being struck out in the original will, would be received as evidence that the payment was intended to be in satisfaction of the legacy (p); and the Court of Probate has sometimes granted fac-simile probate of a will, shewing interlineations, or parts of the will struck through (q). Satisfaction proved by obliteration.

VI.—Revocation by Alteration of Estate under old Law.—Under the old law. “Under the old law, it was essential to the validity of a devise of freehold lands, that the testator should be seised thereof at the making of the will, and that he should continue so seised without interruption until his decease (r). If, therefore, a testator, subsequently to his will, by deed aliened lands, which he had disposed of by such will, and afterwards acquired a new freehold estate in the same lands, such newly-acquired estate did not pass by the devise, which was necessarily void” (s). And a devise of land which the testator had contracted to purchase was revoked by his afterwards having it conveyed to him to uses to bar dower (t).

As equity follows the law, the same general principles which governed the revocation of devises of legal estates, were held to apply to devises of equitable interests. The devise of such an interest, therefore, was liable to be revoked by a conveyance similar to that which would have revoked a devise at law (u).

(n) Ibid.

(o) *In bonis Gilbert*, [1893] P. 183.

(p) *Twining v. Powell*, 2 Coll. 262.

(q) *Gann v. Gregory*, 3 D. M. & G. 777; *Shea v. Boschetti*, 23 L. J. Ch. 652.

(r) So in the case of a devise of a freehold lease renewed subsequently to the will, *Marwood v. Turner*, 3 P. W. 163. Secus in the case of the alteration of a contingent remainder or contingent executory interest into a vested remainder, *Jackson v. Hurlock*, 2 Ed. 263.

(s) This statement of the law is by Mr. Jarman, first edition, p. 130. As to the effect of a purchase of an equity of redemption in revoking a

devise of mortgaged lands, see *Strode v. Lady Falkland*, 2 Vern. 621; *Yardley v. Holland*, L. R., 20 Eq. 428.

(t) *Jacob v. Jacob*, 78 L. T. 825, 82 L. T. 270; *Rawlins v. Burgis*, 2 V. & B. 382; *Plowden v. Hyde*, 2 D. M. & G. 684.

(u) As to revocation of a will under the old law by conveyance of the entire estate of freehold, though made for a partial purpose, e.g., to secure a jointure rentcharge, see *Goodtitle v. Otway*, 2 H. Bl. 516, 1 B. & P. 576, 7 T. R. 399; *Cave v. Holford*, 3 Ves. 650, 7 Br. P. C. Toml. 593; see also *Parsons v. Freeman*, 3 Atk. 741, 2 Ves. jun.

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VII.—Revocation by Alteration of Estate under present Law.—

Devises not to be revoked as to testator's disposable interest at decease, by conveyance or like act.

The revocation of devises by an alteration of estate was placed on an entirely new footing by the statute 1 Vict. c. 26, which provides (sect. 23), that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate, as the testator shall have power to dispose of by will at the time of his death (*v*).

Sale or conveyance of devised land.

In regard to wills which are within this section, a subsequent conveyance of the devised property will not produce revocation, except so far as it substantially alienates the estate, and withdraws it from the operation of the devise by vesting the property in another. If a testator, after devising an estate, sells and conveys it to a third person, of course the devise is still (as formerly) rendered inoperative, and the devisee can have no claim to the proceeds of the sale, even though the will should have directed the conversion of the property, and the proceeds can be traced into an investment (*w*). If the testator sells a specifically devised piece of land, and afterwards buys another piece of land answering the same description, the question whether that passes by the devise is governed, not by sect. 23, but by sect. 24, the effect of which is considered in Chapter XII.

Devise is revoked by contract to sell.

Where the testator contracts to sell the devised estate, and dies without having executed a conveyance to the purchaser, the devise remains in force as to the legal estate and no further, this being all

431; *Vawser v. Jeffrey*, 16 Ves. 519, 2 Sw. 268; *Briggs v. Watt*, 2 Jur. N. S. 1041; *Walker v. Armstrong*, 21 Beav. 284, 8 D. M. & G. 531; *Power v. Power*, 9 Ir. Ch. Rep. 178. The rule stated in the text admitted of two exceptions:—1st, both at law and in equity, in the case of a partition merely assuring to the testator an estate in severalty corresponding to his former undivided share, *Luther v. Kirby*, 3 P. W. 169, n., 8 Vin. Ab. 148, pl. 30; *Risley v. Balinglass*, T. Raym. 240; *Webb v. Temple*, 1 Freem. 542; *Barton v. Croxall*, Tam. 164. But the manner of partition might cause revocation, see *Knollys v. Alcock*, 5 Ves. 648, 7 ib. 558; cf. *Phillips v. Turner*, 17 Beav. 194. In *Grant v. Bridger*, L. R., 3 Eq. 347, it was attempted to bring within these authorities a case where commoners, after devise, joined with the owners of

the soil in conveying the land to trustees, and took back shares of the land in severalty, but, of course, unsuccessfully. 2ndly, in equity, a will was only partially revoked by a subsequent mortgage of the devised land, *Hall v. Dench*, 1 Vern. 329, 342, but see 2 Ch. Rep. 54; *Perkins v. Walker*, 1 Vern. 97. See further as to revocation of wills by alteration of estate under the old law, the 4th edition of this work, Vol. I. pp. 147 et seq.

(*v*) As to the meaning of the section, see *Blake v. Blake*, 15 Ch. D. at p. 487.

(*w*) See *Arnald v. Arnald*, 1 Br. C. C. 401; *Manton v. Tabois*, 30 Ch. D. 92. Even if the testator takes a mortgage from the purchaser to secure the purchase-money, the benefit of the mortgage debt does not pass to the devisee: *Re Clowes*, [1893] 1 Ch. 214.

the interest which the testator has power to dispose of at his decease, and the conversion, as between the real and personal representatives, being completely effected, and the estate of the vendor being in contemplation of equity, "disposed of" by the contract (supposing it to be a binding one (*x*),) the devisee takes only the legal estate (*y*), and the purchase-money constitutes part of the testator's personal estate (*z*).

A devise is also, as a general rule, revoked or adeemed if the land is converted, during the testator's lifetime, by some person other than the testator, or by operation of law; as, by act of parliament (*a*), or by an order for sale pronounced by a Court of competent jurisdiction (*b*), or by compulsory sale under the Lands Clauses Acts, or similar acts (*c*), or by sale under a power given by the testator to a mortgagee (*d*). And although the converting effect of a sale under an act of parliament or under an order of Court is neutralised, if the statute (*e*) or order (*f*) directs a re-investment in land to be settled to the same uses, yet it seems clear that this would not cause the will to operate on the substituted land (*g*). For the same principle seems to apply as that which governs the case of land being appointed under a power, and afterwards sold under a power of sale containing a direction for re-investment in land (*h*).

Effect of compulsory conversion.

A sale by the Court in lunacy formerly operated as a conversion for all purposes (*i*), but this rule was altered by the Lunacy

Sale in lunacy.

(*x*) As to which see *infra*, Chap. XXIII., where the effect of rescinding the contract after the testator's death is considered.

(*y*) As to the operation of a devise of trust estates, see *Lysaght v. Edwards*, 2 Ch. D. 499. The provisions of the Conveyancing Act, 1881 (ss. 4, 30), and of the Land Transfer Act (Part I.) must be borne in mind.

(*z*) *Farrar v. Earl of Winterton*, 5 Beav. 1; *Moor v. Raisbeck*, 12 Sim. 123. These decisions confirmed the author's previous opinion; see 1st ed. p. 148, where he cites *Knollys v. Shepherd* (post, Chap. XXII.) to shew that, even under the old law, a devise of land which the testator had previously contracted to sell, passed the legal estate only. But the devisee is entitled to the rent until completion: *Watts v. Watts*, L. R., 17 Eq. 217.

(*a*) *Frewen v. Frewen*, L. R., 10 Ch. 610; *Richards v. Att.-Gen.*, 6 Moo. P. C. C. 381; *Cadman v. Cadman*, L. R., 13 Eq. 470.

(*b*) *Steed v. Preece*, L. R., 18 Eq. 192; and the other cases cited *infra*, Chap.

XXIII. The order operates a conversion as from its date, and before any sale has taken place, *Hyett v. Mekin*, 25 Ch. D. 735.

(*c*) See Chap. XXIII.

(*d*) *Wright v. Rose*, 2 S. & St. 323; *Bourne v. Bourne*, 2 Hare, 35. In both these cases no sale was made until after the testator's death, and therefore it was held there was no conversion, quoad the surplus. Compare *Jones v. Davies*, 8 Ch. D. 216. An unauthorised sale by a third person would not, it is conceived, defeat the claim of the devisee to the proceeds of sale. See *Taylor v. Taylor*, 10 Hare, 478, 479; *Re Tugwell*, 27 Ch. D. 309.

(*e*) See cases cited *infra*, Chap. XXIII.

(*f*) *Fellow v. Jermyn*, W. N. 1877. p. 95.

(*g*) The proceeds of sale would go to the heir or residuary devisee: *Re Bagot's Settlement*, 31 L. J. Ch. 772.

(*h*) *Gale v. Gale*, 21 Beav. 349; *Beddington v. Baumann*, [1903] A. C. 13, and the other cases cited in Chap. XXII.

(*i*) *Oxenden v. Lord Compton*, 2 Ves. jun. 69.

- CHAPTER VII. Regulation Act 1853, sect. 119 of which enacted that the surplus proceeds of sale of the land of a lunatic should belong to his heirs, devisees, &c., in the same way as the land would have devolved if it had not been sold (*j*). And a similar, but somewhat wider, provision is contained in the Lunacy Act, 1890 (*k*).
- Purchase of land in lunacy. If the money of a lunatic is invested by his committee by order of the Court, in the purchase of land, and the land is conveyed to the committee subject to a declaration that it shall be considered as part of the lunatic's personal estate, and the lunatic dies before 1894, probate duty is payable on the value of the land (*l*).
- Settlement. It is hardly necessary to say that a conveyance by way of settlement revokes a devise of the same property (*m*).
- Personalty. Where personal property is specifically bequeathed and afterwards sold, the effect is generally to adeem the bequest (*n*). And a valid contract of sale will have the same effect (*o*). But an unauthorised sale of personal property (as by persons assuming to act for an insane person), does not affect the rights of legatees (*p*). A sale of personal property of a lunatic by order of the Court adeems a specific bequest of it if the proceedings are taken under the Lunacy Regulation Act, 1853 (*q*), but not, it seems, if they are taken under the Act of 1890, and the proceeds of sale can be identified (*r*).
- Surrender of lease. Where a testator disposes of a house which he holds on lease, and afterwards surrenders it and acquires another lease of the same house, the question whether the dispositions of the will apply to the new lease seems to be one of construction. In *Wedgwood v. Denton* (*s*), the question was answered by Bacon, V.-C., in the affirmative, although there the duration of the trusts declared by the will depended on the term of the original lease, which was different from that of the new lease.
- Bequest of term how affected by purchase of the fee. How a specific bequest of leaseholds is affected, under sect. 23 of the Wills Act, by the subsequent acquisition of the fee, was considered in *Cox v. Bennett* (*t*), where a testator having bequeathed
- (*j*) *Re Freer*, 22 Ch. D. 622; *Re Matson*, [1897] 2 Ch. 509. See also s. 135.
 (*k*) Sect. 123.
 (*l*) *Att.-Gen. v. Ailesbury*, 12 A. C. 672, post, Chap. XXII.
 (*m*) *Lowndes v. Norton*, 33 L. J. Ch. 583.
 (*n*) See Chap. XXX.
 (*o*) *Watts v. Watts*, L. R., 17 Eq. 217.
 (*p*) *Taylor v. Taylor*, 10 Ha. 478.
 (*q*) *Re Freer*, 22 Ch. D. 622; *Jones v. Green*, L. R., 5 Eq. 555.
 (*r*) Lunacy Act, 1890, s. 123. Compare Chap. XXII.
 (*s*) L. R., 12 Eq. 290. See post, Chap. XII.
 (*t*) L. R., 6 Eq. 422. See also *Struthers v. Struthers*, 5 W. R. 809. Both these cases appear to require the further support of s. 3, which enables a testator to dispose of all real estate to which he may be entitled at the time of his death, and of s. 24, which enacts that every will shall be construed with

"his houses at T., held on lease from B.," to X., and the residue of his real and personal estate to Y., afterwards purchased and took a conveyance to himself of the reversion in fee. It was held by Sir G. Giffard, V.-C., that the entire interest in the houses passed by the specific gift to X. He said, "the clause in the statute (*i.e.* sect. 23) says that the will is to pass such estate or interest in such real or personal estate as the testator shall have power to dispose of at his death; and there is nothing in the will to confine its operation to the interest which the testator had at the date of the will." This question is further considered in Chapter XII.

"A revocation by alienation," as Mr. Jarman points out (*tt*), "may be either partial or total. A simple case of partial revocation occurs where a testator, having devised lands in fee, demises the same lands to a lessee for lives or for years, either at a rent or not, in which case the lease revokes or subverts the devise *pro tanto*, by subtracting or withdrawing the demised interest from its operation (*u*), but the devise is no further disturbed; and, consequently, the devisee would, even under the old law, still take the inheritance, subject to the term, and, as incidental thereto, the rent, if any, reserved by the lease (*v*). So, if a testator, after devising lands in fee, conveys them by deed to the use of himself for life, with remainder to the use of his wife for life, as a jointure, without disposing of or in any manner assuming to convey the inheritance, the conveyance would revoke the devise *pro tanto*, and the reversion in fee, expectant on the decease of the testator's wife, would pass under it to the devisee. In both the preceding examples, it will be perceived, that the conveyance is not only partial in its object, but in its operation; it does not for a moment disturb the testator's seisin of the inheritance, and, therefore, can have no revoking effect, beyond the estate which it substantially alienates and vests in another person. Consistently with this principle, it is clear, that (*w*) where a testator by his will charges

Partial revocation by alienation.

reference to the real and personal estate comprised in it to take effect as if it had been executed immediately before the testator's death: for s. 23 says only that no subsequent act shall *prevent* the will operating, implying that but for the subsequent act the will would have operated on the interest in question; which it would not have done without the aid of ss. 3, 24. See as to this, post, Chap. XII.

(*tt*) First edition, p. 130.

(*u*) *Hodgkinson v. Wood*, Cro. Car. 23; *Lamb v. Parker* (*Parker v. Lamb*),

2 Vern. 495, 3 Br. P. C. 12.

(*v*) *A fortiori*, since 1 Vict. c. 26, *Barrs v. Lea*, 33 L. J. Ch. 437, where on a mining lease it was unsuccessfully argued that certain sums payable half yearly were not rent but purchase-money for the minerals, though payable by instalments: as to which, see further, *Brook v. Badley*, L. R., 4 Eq. 106; and compare *Re Mary Smith*, L. R., 10 Ch. 79.

(*w*) *Parker v. Lamb*, 3 Br. P. C. 12.

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his lands with an annuity, and afterwards demises them for a term of years at rack rent, the devise is revoked so far as to deprive the devisee of his legal power of distress, while the tenancy lasts (*x*), but no further; and the annuitant would be entitled in equity, during the suspension of his power of distress, to have the rent, or an adequate portion of it, applied in satisfaction of the annuity."

Attempt to convey revokes a devise, where.

VIII.—By void Conveyances under old Law.—Under the old law, an instrument purporting to be a conveyance, but incapable of taking effect as such, might, nevertheless, operate to revoke a previous devise, on the principle, as it should seem, that the attempted act of conveyance was inconsistent with the testamentary disposition, and, therefore, though ineffectual to vest the property in the alienee, it produced a revocation of the devise. The rule obtained wherever the failure of the conveyance arose either from the incapacity of the grantee, or from the want of some ceremony which was essential to the efficacy of the instrument (*y*).

Rule as to wills since 1837.

A question of this nature, however, cannot arise in regard to wills made since 1837, for as, under the Wills Act, even an actual conveyance does not produce revocation, except so far as it may, by alienating the testator's interest, leave the devise nothing to operate upon, it is obvious that a void or attempted conveyance cannot, under any circumstances, have, as such, a revoking effect (*z*).

Old law.

IX.—Express Revocation by a subsequent Will, Codicil or Writing.—Under the old law, a devise of freehold land could not be revoked by a subsequent will or codicil, unless the latter was signed in the presence of three witnesses, while a will of personal estate could be revoked by an informal writing, not signed by the testator (*a*).

Question how affected by Wills Act.

In regard to wills made since the year 1837, however, it can never be a question, whether an informal or apparently unfinished

(*x*) "This shews the advantage of limiting a term to trustees for securing the annuity, which would entitle them, as the immediate reversioners, to the rent." (Note by Mr. Jarman.)

(*y*) See *Beard v. Beard*, 3 Atk. 72. See *Mountague v. Jeffereys*, Moor. 429, pl. 599; see also *Shove v. Pincke* (appointment extra vires), 5 T. R. 124, 310; *Matthews v. Venables* (void conveyance to charitable uses), 9 J. B. Moo. 286, 2 Bing. 136; *Vawser v. Jeffery* (attempt to convey copyholds by deed), 2 Sw. 274; *Eilbeck v. Wood* (attempt to convey by feme covert), 1 Russ. 564; and (as to conveyance void

for fraud or covin) *Simpson v. Walker*, 5 Sim. 1; *Hick v. Mors*, Amb. 215; *Hawes v. Wyatt*, 3 Br. C. C. 156; *Att.-Gen. v. Vigor*, 8 Ves. at p. 283. See further on this subject, the 4th edition of this work, Vol. I. pp. 165 et seq.

(*z*) *Ford v. De Pontès*, 30 Beav. 572, acc. And distinguish between a void conveyance inoperative as such to produce revocation, and a writing duly executed and "declaring an intention to revoke," which takes effect under 1 Vict. c. 26, s. 20. See *infra*, p. 167 n. (*b*).

(*a*) Statute of Frauds, s. 22. The cases are referred to in the 4th and earlier editions of this work.

will or writing has a revoking operation, for the statute 1 Vict. c. 26, s. 20, has placed a revoking will or writing (*b*) upon precisely the same footing, in regard to the ceremonial of execution, as a disposing will; and when that ceremonial has been observed, it can never be said that the will is informal or unfinished.

A will or codicil may operate as a revocation of a prior testamentary instrument, by the effect either of an express clause of revocation, or of an inconsistent disposition of the previously devised property (*c*).

Express revocation may, it seems, be produced in two different modes, having different effects. Thus, if there be a bequest by will to several persons as tenants in common, and by codicil the testator revoke the bequest to one of them, his share, as a general rule (*d*), will not accrue to the others (*e*). This is the ordinary mode. But if the testator revoke "so much of my will" as contains the gift to one of such persons, here, if the words that remain are sensible per se, and amount without further alteration to a gift of the whole subject to the others, these will take the whole, the will being read as if the revoked words had never been in it. *Harris v. Davis* (*f*), affords an example of the latter mode. In that case there was first a gift to A. and B. in common; then, in a subsequent part of the will a direction that C. should take a share with A. and B.; and afterwards a codicil revoking "that part written in my will which leaves" the share to C.: and it was held that A. and B. took the whole. The frame of the will was peculiar, and lent itself easily to this construction. If the words that are left require (as they generally would) some further alteration or addition to make them sensible, the construction will not be made (*g*).

Distinction between revocation of a gift and of so much of will as contains the gift.

If a codicil expressly revokes part of a will, its operation is not,

(*b*) The writing must "declare an intention to revoke," but need not be testamentary. And unless testamentary it will not be admitted to probate: *In bonis Fraser*, L. R., 2 P. & D. 40; *In bonis Eyre*, [1905] 2 Ir. R. 540; *Toomer v. Sobinska*, [1907] P. 106. See also *In b. Hicks*, L. R., 1 P. & D. 683; *In b. Durance*, L. R., 2 P. & D. 406. Such a writing may be executed by a married woman, *Hawksley v. Barrow*, L. R., 1 P. & D. 147. As to what amounts to a declaration of intention to revoke, see *In b. Gosling*, 11 P. D. 79.

(*c*) A revocation by reference is, of course, equivalent to an express revocation. The question arose in *Re Cour-*

tauld's Estate, [1882] W. N. 185: it was held that there was no revocation, but a substitution.

(*d*) For an exception to the rule, see *Re Radcliffe*, *infra*, p. 171.

(*e*) *Cresswell v. Cheslyn*, 2 Ed. 123; *Ramsay v. Sheldermine*, L. R., 1 Eq. 129. Compare *Humble v. Shore*, 7 Hare, 247; *Skrymsher v. Northcote*, 1 Sw. 566; and *Shaw v. M'Mahon*, 4 D. & War. 431; as to which see post, Chap. XIII., Chap. XXIX.

(*f*) 1 Coll. 416.

(*g*) *Sykes v. Sykes*, L. R., 4 Eq. 200, 3 Ch. 301; *Re Hodgkinson*, [1893] W. N. 9.

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Intention to
revoke,
whether pre-
sent or future.

it seems, restrained by a recital in the codicil shewing that the testator did not intend the revocation to be absolute (*h*).

In order that an express clause of revocation may be effectual, it must indicate an actual and present intention to revoke the will; and if the testator's expressions are declaratory only of a future design, they will not be sufficient (*i*); and in an early case, before the Statute of Frauds, a distinction is taken between the effect of a testator saying "I will revoke my will made at P.," which refers to a future act, and when he says "my will made at P. shall not stand," which is a present resolution, the latter being, it was considered, an actual revocation, and the former not (*j*).

Mere inten-
tion to revoke
by a future
act inopera-
tive.

Of course, a mere intimation by a testator of his intention to make by a future act a new disposition, does not effect an actual present revocation. Thus, where A. (*k*) made a will, disposing of his real and personal property, and afterwards, the residuary legatee of the personalty being dead, and A. having acquired other real property, he made another will whereby he devised the newly-acquired property, and then wrote as follows:—"As to the rest of my real and personal estate I intend to dispose of the same by a codicil to this my will hereafter to be made:" it was held that this clause was not a revocation of the prior will. But the operation of an express revocation of a will is not affected by the testator adding that he intends to make a new will (*l*).

Express
clause of
revocation
restrained by
construction.

And even an express clause of absolute and present revocation of all former wills may be reduced to total or partial silence, by showing that the clause was inserted by mistake (*m*). There are also decisions to the effect that a clause of revocation will be disregarded where it is unreasonable to give unrestrained effect to the words; as in cases where, by one testamentary paper, a person exercises a power of appointment, and then by subsequent instruments containing a general clause of revocation, either exercises another and distinct power (*n*), or deals with his own property, and not with the subject of the former power (*nn*). But these decisions are now of doubtful authority (*o*). And even before the modern doctrine

(*h*) See *Holder v. Howell*, 8 Ves. 97; *Viscount Holmesdale v. West*, L. R., 3 Eq. 486, 4 H. L. 543.

(*i*) *Cleobury v. Beckett*, 14 Beav. 588.

(*j*) *Burton v. Gowell*, Cro. El. 306.

(*k*) *Thomas v. Evans*, 2 East, 488. See also *Griffin v. Griffin*, 4 Ves. 197, n.

(*l*) *Toomer v. Sobinska*, [1907] P. 106.

(*m*) *Powell v. Mouchett*, 6 Madd. 216; *In bonis Oswald*, L. R., 3 P. & D. 162; and cases cited ante, p. 30.

(*n*) *In bonis Meredith*, 29 L. J., P. 155.

The parol evidence read at the bar in this case of course formed no ingredient in its decision. See also *In bonis Merritt*, 4 Jur. N. S. 1192; *In bonis Joys*, 30 L. J. P. 169.

(*nn*) *Hughes v. Turner*, 4 Hagg. Eccl. 52; *Denny v. Barton*, 2 Phillim. 575.

(*o*) See *Re Kingdon*, 32 Ch. D. 604; *Cadell v. Wilcocks*, [1898] P. 21; *D'Este's Settlement Trusts*, [1903] 1 Ch. 900, and post, Chap. XXIII.

was established, the rule supposed to be laid down in the earlier cases was not applied, if the testator in the latter will again referred to the power exercised by the former will (oo).

If a testator makes a will and one or more codicils, and then makes a codicil revoking the will, this does not necessarily revoke the intermediate codicils: the question is whether the testator distinguishes between the will and the codicils (p).

Intermediate
codicils.

Questions of dependent relative revocation arise most commonly in cases where a will is destroyed or revoked by some physical act (pp), and although the question can arise where a will purports to be revoked by a subsequent testamentary instrument, it would seem that there is greater difficulty in applying the general principle to such cases, because revocation by a written instrument is more deliberate and unambiguous than revocation by destruction.

Dependent
relative
revocation.

Mr. Jarman states the law thus (q): "Though the Statute of Frauds required that a will which revoked a devise of freehold lands should be attested by the same number of witnesses, as a will devising such lands, yet, in some particulars, the prescribed ceremonial differed in the respective instances. Thus, a devising will was required to be subscribed by the witnesses in the testator's presence, which a revoking will was not, and a revoking will was required to be signed by the testator in the presence of the witnesses, while a devising will needed not to be signed in their presence; each therefore had a circumstance not common to both. This difference, however (which probably occurred without design), has been attended with little practical effect, for it seldom happens that a testamentary instrument is executed for the mere purpose of revoking a previous will, and if it contain a new disposition, any revoking clause therein will be a nullity, whether the substituted devise takes effect or not, though for widely different reasons in the respective cases. If the devise with which the clause in question is associated be effective, it reduces the latter to silence by rendering it unnecessary, the new devise itself producing the revocation, so that the efficacy of the will as a revoking instrument cannot, in such a case, become a subject of consideration. If, on the other hand,

Difference
between
devising and
revoking
clauses of
Statute of
Frauds.

Revocation
connected
with new
disposition.

(oo) *In bonis Eustace*, L. R., 3 P. & D. 183, citing *Richardson v. Barry*, 3 Hagg. 249.

(p) *Farrer v. St. Catharine's College*, L. R., 16 Eq. 19, following *Bunny v. Bunny*, 3 Bea. 109, and *Pratt v. Pratt*,

14 Sim. 129.

(pp) *Ante*, p. 148.

(q) First edition, p. 153. This paragraph appeared in the third edition, by Messrs. Wolstenholme and Vincent, and in the fourth edition, by Mr. Vincent.

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Revocation,
where devise
intended to be
substituted
fails.

the new devise be ineffectual, on account of the attestation being insufficient for a devising, though sufficient for a revoking will, the revoking clause becomes inoperative on another principle, namely, that the revocation is conditional and dependent on the efficacy of the attempted new disposition, and that failing, the revocation also fails; the purpose to revoke being considered to be, not a distinct independent intention, but subservient to the purpose of making a new disposition of the property; the testator meaning to do the one so far only as he succeeds in effecting the same (*qq*). But it seems that, if the second devise fails, not from the infirmity of the instrument, but from the incapacity of the devisee, the prior devise is revoked" (*r*).

The second rule stated by Mr. Jarman is frequently acted on at the present day. Thus in *Tupper v. Tupper* (*rr*), the testator by his will bequeathed valid legacies to various persons: by a codicil he revoked them, "and in lieu thereof" bequeathed a legacy which failed under the Mortmain Acts: it was held that the revocation took effect.

Whether the
distinction
taken by Mr.
Jarman is
sound.

The cases of *Eggleston* (or *Eccleston*) *v. Speke* and *Onions v. Tyrer* (*s*), which Mr. Jarman cites in support of the first rule stated by him, could not now occur, because, since the Wills Act, a will which is valid for purposes of revocation, is also valid, so far as execution goes, for purposes of disposition. But it is still possible for a case to occur in which the second or substituted gift fails "from the infirmity of the instrument," so as to bring the case within the rule laid down by Mr. Jarman, though the tendency of the Courts seems to be to treat every express revocation as effective, unless it is made conditional on the substituted gift taking effect.

Thus in *In bonis Gentry* (*t*), a testator executed a testamentary document in which he expressed a desire to cancel a will made in 1866, "and that the will that I made on the 17th of October, 1855, with the codicil dated February 21st, 1871, should stand as my last will and testament." The instrument of 17th October,

(*qq*) *Eccleston* [*Eggleston*, or *Edlestone*] *v. Speke*, Carth. 79, 1 Show. 89, 3 Mod. 258; *Onions v. Tyrer*, 2 Vern. 741; s. c. 1 P. W. 343. See also *Ex parte Earl of Ilchester*, 7 Ves. 348; *Kirke v. Kirke*, 4 Russ. 435. But see *Richardson v. Barry*, 3 Hagg. 249. [With all respect for Mr. Jarman, *Richardson v. Barry* has nothing to do with the point, as the revocation produced the result which the testator desired. The word "same" in the text appears to be a misprint for "other." [C. S.]

(*r*) *Frenche's case*, 1 Roll. Ab. 614 (*o*),

pl. 4; *Rooper v. Constable*, 2 Eq. Ca. Ab. 359, pl. 9; s. c. nom. *Rooper v. Radcliffe*, 5 Bro. P. C. 360.

(*rr*) 1 K. & J. 665. Compare *Nevill v. Boddam*, 28 Bea. 554. The case of *Quinn v. Butler*, L. R. 6 Eq. 225, is referred to in Chap. XXIII. It was argued in *Baker v. Story*, 23 W. R. 147, that the rule had been altered by the Wills Act, but Jessel, M.R., rejected the suggestion.

(*s*) As to this case, see *Re Carey* [1901], 1 Ir. R. at p. 94.

(*t*) L. R., 3 P. & D. 80.

1855, was not a will, but a settlement, which only included certain property then belonging to the testator; it was held that the revocation of the will of 1866 was absolute. Sir James Hannen said it seemed to him "in the highest degree unnatural" that the testator intended the revocation of the will of 1866 to be contingent on the settlement operating as a will, and he held that the revocation was absolute. But it is submitted that the application of the doctrine of dependent relative revocation, in cases where the testator wishes to give effect to a prior testamentary disposition, is not based on the supposition that the revocation is conditional: it depends on mistake (*tt*). In *In bonis Gentry* the testator erroneously supposed that the settlement was testamentary in character; this was shewn by his describing it as "the will" that he had made; in other words, he supposed that it would operate on all the property belonging to him at his death, and under this mistaken belief he revoked the will of 1866; the revocation was therefore, it is submitted, inoperative, under the doctrine laid down by Mr. Jarman.

Notwithstanding the general rule, that the revocation of a gift to one of several tenants in common does not enure for the benefit of the others, it may do so if that is the testator's intention. Thus in *Re Radcliffe (u)*, the testatrix left her residuary estate to A. B. C. and D. as tenants in common; D. predeceased the testatrix; by a codicil referring to his death she revoked whatever interest D. had in her will: it was held that this took the name of D. out of the will, and that A., B. and C. took the whole residue.

Revocation of gift to deceased legatee.

In *Cottrell v. Cottrell (v)*, a testator made a will in England disposing of all his property, real and personal; fifteen years later, being then domiciled in Italy, he made a will there by which he disposed of his personal property, and declared that he revoked every other will which he might have made: it was held that this revoked the English will so far only as related to the personalty and the appointment of executor.

Revocation general in terms may be partial in effect.

An attestation clause is no part of a codicil, and consequently if words purporting to revoke an earlier testamentary instrument are inserted in the attestation clause of a codicil, they have no revoking effect (*w*).

Words of revocation inserted in attestation clause.

(*tt*) See the cases on dependent relative revocation by destruction, ante, p. 148.

(*u*) 51 W. R. 409.

(*v*) L. R., 2 P. & D. 397.

(*w*) *In bonis Atkinson*, 8 P. D. 165.

CHAPTER VII.

Revocation
by incon-
sistency of
disposition.

Where two
wills are
partially
inconsistent.

Contents of
later will
must be
proved.

Parol
evidence.

"Last" or
"last and
only" will.

X.—Implied Revocation by inconsistent Will or Codicil (x)—

The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together; for though it be a maxim that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary) may be admitted to probate as together containing the last will of the deceased. And if a subsequent testamentary paper be partially inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent (z).

Accordingly, where a testator made a will in 1823, and a few years later made another will, not referring to the former, and not containing any clause of revocation, both wills were admitted to probate, the two documents being only partially inconsistent (a). On the other hand, even if the earlier will disposes of all the testator's property, and the later will does not contain a clause of revocation or any residuary gift, it may appear from a comparison of the two documents that the later was intended to revoke the earlier (b). But on the whole it seems that there is a presumption against revocation by equivocal words (c).

It follows from the general principle above stated, that if a testator makes two wills, and the later one is lost or destroyed, and there is no evidence to shew that it expressly or impliedly revoked the earlier will, the earlier will is entitled to probate (d).

If the second will is lost or destroyed, parol evidence is admissible to prove its contents (e).

An instrument stating itself to be the testator's "last will," or his "last and only will" (f), does not necessarily operate to revoke

(x) It is hardly necessary to point out that the term "revocation" is not strictly applicable where mutually inconsistent provisions are found in the same testamentary instrument. This subject is considered in Chap. XVII.

(z) This statement of the law, which is taken from Williams on Executors, 7th ed. i. 162, has been judicially approved: *Lemage v. Goodban*, L. R., 1 P. & D. 57; *In bonis Petchell*, L. R., 3 P. & D. 153; *Townsend v. Moore*, [1905] P. 66; *Simpson v. Foxon*, [1907] P. 54; See also *Seymour v. Nosworthy* (Northwotly), Hard. 374, Show. P. C. 146; *Goodright v. Harwood*, 2 W. Bl. 937, 7 Br. P. C. 489; *In bonis Summers*, 84 L.T. 271.

(a) *Lemage v. Goodban*, L. R., 1 P. & D.

57; *In bonis Fenwick*, ib. 319; *In bonis Griffith*, 2 ib. 457; *Leslie v. Leslie*, Ir. R., 6 Eq. 332; *In bonis Budd*, 3 Sw. & T. 196; *Birks v. Birks*, 34 L. J. P. 90; *In bonis Hartley*, 50 L. J. P. 1; and other cases cited post.

(b) *In Estate of Bryan*, [1907] P. 125, referred to, post, p. 176.

(c) *Stoddart v. Grant*, 1 Macq. 163.

(d) *Hellier v. Hellier*, 9 P. D. 237. See *Hitchins v. Basset*, 2 Salk. 592; *Hungerford v. Nosworthy*, Show. P. C. 146; *Dickinson v. Stidolph*, 11 C. B. N. S. 341.

(e) *Brown v. Brown*, 8 Ell. & B. 876, supra, p. 152; *M'Ara v. M'Cay*, 23 L. R. Ir. 138, post, p. 176, n. (a).

(f) *Simpson v. Foxon*, [1907] P. 54.

a prior will, as regards either real (*g*) or personal (*h*) estate (*i*), although the circumstance is one to be considered (*j*). CHAPTER VII.

If a testator makes two codicils to his will, and then makes a third by which he confirms his will and the first codicil, without referring to the second, this does not necessarily operate as a revocation of the second codicil (*k*).

“The most simple and obvious case of revocation by inconsistency of disposition,” as Mr. Jarman points out (*l*), “is that of a testator having devised lands to a person in fee, and then, by a subsequent will, devising the same lands to another in fee; in such case the latter devise would operate as a complete revocation or the former (*m*). And here, the learned reader cannot fail to perceive in the difference of construction which has obtained, where two devises in fee of the same land are found in one and the same will, and where they are found in several distinct wills, the greater anxiety evinced to reconcile the several parts of the same testamentary paper, than to reconcile several distinct papers of different dates, though constituting, in the whole, one will. In the former case, the devisees (as hereafter shewn) take concurrently in order to avoid making one part of the will contradict and subvert another; and in the latter case, no hesitation seems to have been felt in holding the second devise to be revocatory of the first. And the distinction seems to be reasonable; for though it may be very unlikely that a testator should wholly change the object of the devise in the short interval between his passing from one part of the will to the other, there is no such improbability, that, in the longer lapse of time between the execution of two testamentary papers of different dates, such a change of purpose should have occurred.”

So if the residue of personal estate be given by will to A., and by codicil to B., the former gift is revoked (*n*). And this was so

Gift of residue by will revoked by similar gift in codicil.

(*g*) *Freeman v. Freeman*, 5 D. M. & G. 704.

(*h*) *Cutto v. Gilbert*, 9 Moo. P. C. C. 131; *Richards v. Queen's Proctor*, 18 Jur. 540; *Lemage v. Goodban*, L. R., 1 P. & D. 57; *In bonis De la Saussaye*, L. R., 3 P. & D. 42; *In bonis Petchell*, ib. 153; *Leslie v. Leslie*, Ir. R., 6 Eq. 332; *In bonis O'Connor*, 13 L. R. Ir. 406.

(*i*) See the cases cited *infra*, p. 176, note (*b*), in some of which the revoking will was declared to be the “last will.” And see *Loftus v. Stoney*, 17 Ir. Ch. 178, post, p. 177, n. (*i*).

(*j*) See *In Estate of Bryan*, [1907] P. 125, and the cases on additional and substituted legacies cited in Chap. XXX.

(*k*) *Follett v. Pettman*, 23 Ch. D. 337.

(*l*) First edition, p. 157.

(*m*) 3 Mod. 206, Litt. s. 168; *Re Hough's Estate*, 20 L. J. Ch. 422; *Evans v. Evans*, 17 Sim. 107; *Wallace v. Seymour*, Ir. R. 6 C. L. 343; *Baker v. Story*, 23 W. R. 147; *In bonis Hodgkinson*, [1893] P. 339.

(*n*) *Fownes-Luttrell v. Clarke*, [1876] W. N. 168, 249. See *Beamish v. Beamish*, 1 L. R. Ir. 501. In *Thorn v. Dickens*, [1906] W. N. 54, a will and

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held in *Earl of Hardwicke v. Douglas* (o), though the gift by codicil was of personal estate "not hereinbefore or by my will or any other codicil disposed of." The words were construed to mean "not hereinbefore or by my will disposed of by way of particular legacies," thus leaving something for the gift to operate upon: literally construed they left nothing. Again, in *Kermode v. Macdonald* (p), a testatrix by her will bequeathed specific and pecuniary legacies, and directed that in case her personal estate proved insufficient for the payment of the legacies, the deficiency should be made up out of her real estate, and gave the residue of her personal estate to A.; by a codicil she gave "all my personal estate" to B.; it was held, that "all my personal estate" meant the whole of the personal estate which by her will the testatrix had divided into two portions, the legacies and the residue, and that the specific legacies were therefore wholly revoked, but that the charge of the pecuniary legacies on the real estate was not revoked, and that they were payable out of it accordingly.

A testamentary instrument may be impliedly revoked by a later one which is substantially or in great part a repetition of it (q).

Legacy to executor.

If a testator appoints A. his executor, and bequeaths him a legacy on condition that he proves the will, and by codicil revokes the appointment of A. as executor, this carries with it the revocation of the legacy (r). But this result would not follow if the legacy were given to A. independently of the office of executor (s).

Gift of particular residue not revoked by codicil giving the general residue.

But where a testator bequeathed portions of "his money in the funds" to several legatees, and "the surplus of his money in the funds" to be distributed by his executors among the legatees, and then by codicil, after bequeathing some specific chattels, gave "the surplus remaining after the aforesaid legacies are paid" to the children of A.; Sir J. K. Bruce, V.-C., held that the gift of surplus money in the funds was not revoked by the residuary gift contained in the codicil, which was so expressed as to embrace other property (t).

As to contradictory wills of uncertain date.

"If," says Mr. Jarman (u), "from the absence of date and of

codicil were held to be revoked by a duly attested document containing only the words, "All for mother."

(o) 7 Cl. & Fin. 795, West, H. L. 555, per Lords Brougham and Lyndhurst, reversing *Douglas v. Leake*, 5 L. J. N. S. Ch. 25, coram Lord Cottenham, who in D. P. retained his opinion. Compare *Lee v. Delane*, 4 De G. & S. 1.

(p) L. R., 1 Eq. 457, 3 Ch. 584.

(q) *Chichester v. Quatrefores*, [1895] P. 186.

(r) *Walne v. Hill*, [1883] W. N. 171.

(s) See *Burgess v. Burgess*, 1 Coll. 367, and other cases, post, Chap. XLI.

(t) *Inglefield v. Coghlan*, 2 Coll. 247.

(u) First edition, p. 159.

every other kind of evidence, it is impossible to ascertain the relative chronological position of two conflicting wills, both are necessarily held to be void, and the heir as to the realty, and the next of kin as to the personalty, are let in ; but this unsatisfactory expedient is never resorted to until all attempts to educe from the several papers a scheme of disposition consistent with both, have been tried in vain (*v*). And even where the times of the actual execution of the respective papers are known, so that if they are inconsistent, there can be no difficulty in determining which is to be preferred, the Courts will, if possible, adopt such a construction as will give effect to both, sacrificing the earlier so far only as it is clearly irreconcilable with the latter paper (*w*) ; supposing, of course, that such latter paper contains no express clause of revocation.

Inconsistent wills always to be reconciled if possible,

“ As where a testator made a will devising his lands to trustees, for two hundred years, to pay his debts, and afterwards, by another will, devised the same lands to other trustees for three hundred years, to discharge some particular specialty debts mentioned in a deed executed after the first will, and all incumbrances affecting the property ; Lord Talbot held, that the first term of two hundred years was not revoked, as the two terms were not inconsistent, the testator’s intention in creating the term of three hundred years being merely for the purpose of giving priority in payment to the specialty debts, and the charges affecting the estate (*x*).

“ The inclination to such a construction as would preserve, either wholly or in part, the contents of the prior document, however, exists only, either when the subsequent document is inadequate to the disposition of the entire property, so that the consequence of rejecting the prior document would be to produce partial intestacy (*y*) ; or else where the posterior paper is styled a codicil (*z*) ; for the office of a codicil being to vary or add to and not wholly supplant a previous will, such a designation of the instrument

—provided that the subsequent document is a codicil, or an incomplete will.

(*v*) See *Phipps v. Earl of Anglesey*, 7 Br. P. C. 443. In *Loftus v. Stoney*, 17 Ir. Ch. 178, and *Townsend v. Moore*, [1905] P. 66, it appeared from the evidence that the two papers were executed at the same time, post, p. 177.

(*w*) *Richards v. Queen’s Proctor*, 18 Jur. 540 ; *In bonis Hartley*, 50 L. J. P. 1 ; *Lemage v. Goodban*, L. R., 1 P. & D. 57 ; *Simpson v. Foxon*, [1907] P. 54.

(*x*) *Weld v. Acton*, 2 Eq. Ca. Ab. 777, pl. 26. The word “ deed,” occurring four times in this report, seems a mistake for “ will,” though the report might be made consistent by reading

“ demise ” for “ devise ; ” and see *Coward v. Marshal*, Cro. El. 721.

(*y*) See *Freeman v. Freeman*, Kay, 479, 5 D. M. & G. 704 ; *In bonis Hartley*, 50 L. J. P. 1 ; in *Plenty v. West*, 9 Jur. 458, Sir H. J. Fust would not even in such cases, recognise the existence of the inclination as regards personalty ; but see *Cookson v. Hancock*, 1 Kee. 817, 2 My. & Cr. 606 ; *Lemage v. Goodban*, L. R., 1 P. & D. 57 ; *Birks v. Birks*, 34 L. J. P. 90.

(*z*) *In bonis Howard*, L. R., 1 P. & D. 636 ; *Robertson v. Powell*, 2 H. & C. 762 ; *Re Wood*, 83 L. T. 157.

CHAPTER VII. seems to demand that some part, at least, of the will, whose existence it supposes and recognises, should, if possible, be sustained."

Where it is not.

If the subsequent instrument does not profess to be a codicil, and is adequate to the disposition of the entire property, there is no such *à priori* improbability that it was intended wholly to supplant the prior instrument. The case then rests on the true construction of the contents of the two instruments, and the complete disposition contained in the second must, unless controlled by the context, wholly revoke the first. Thus, in *Henfrey v. Henfrey* (a), where a testator by will gave his household effects and other benefits to his wife, and all the residue of his estate and effects to A., and appointed him executor, and then by subsequent will left all he possessed "containing furniture, books, &c." to his wife, but did not appoint an executor, the first will, including the appointment of the executor, was held to be wholly revoked. "Containing" was read "inclusive of."

Tenour of later will shewing intention to revoke.

And a will may revoke an earlier testamentary document, disposing of the whole of the testator's property, even although the latter will does not contain an express clause of revocation, and does not dispose of all the testator's property. It is a question of construction on the terms of the two documents (b).

Extrinsic evidence.

If the intention remain in doubt on the face of the documents themselves, extrinsic evidence of the surrounding circumstances and of the testator's intention to revoke the earlier will is admissible (c).

Appointment under power.

A testamentary appointment under a power, and a subsequent will not referring to it, may be taken as together containing the last will of the deceased (d). The question of the revocation of

(a) 2 Curt. 468, Moo. P. C. C. 29, 6 Jur. 355. And see *Cottrell v. Cottrell*, L. R., 2 P. & D. 397; *In bonis Tenney*, 45 L. T. 78; *In bonis Turnour*, 56 L. T. 671; *In bonis Palmer*, 58 L. J. P. 44; *Pepper v. Pepper*, Ir. R., 5 Eq. 85; *O'Leary v. Douglass*, 3 L. R. Ir. 323; *In bonis Macfarlane*, 13 L. R. Ir. 264; *M'Ara v. McCay*, 23 L. R. Ir. 138. In the last case the second will could not be found, and parol evidence of its contents was admitted. By the civil law the appointment of an executor was a complete disposition of the personal estate; and in some early cases in the Ecclesiastical Courts the mere appointment of a different executor in a subsequent paper, purporting to be a distinct will, was held to be a revoca-

tion of a prior will and appointment, *Whitehead v. Jennings and Burt v. Burt*, cit. 1 Phillim. 412. But such new appointment was afterwards decided not to be conclusive: *Richards v. Queen's Proctor*, 18 Jur. 540; *Birks v. Birks*, 34 L. J. P. 90.

(b) *Plenty v. West*, 6 C. B. 201, 16 Beav. 173; *Dempsey v. Lawson*, 2 P. D. 98; *In Estate of Bryan*, [1907] P. 125.

(c) *Jenner v. Ffinch*, 5 P. D. 106 (citing *Thorne v. Rooke*, 2 Curt. 799, and *Methuen v. Methuen*, 2 Phillim. 416, cases before the Wills Act); *In bonis Bryan*, [1907] P. 125.

(d) *In bonis Fenwick*, L. R., 1 P. & D. 319. See *Re Gibbs* 37 Ch. D. 143; *Cadell v. Wilcocks*, [1898] P. 21; *Kent v. Kent*, [1902] P. 108.

appointments under powers is considered more in detail in another chapter (e). CHAPTER VII.

The general principle above stated applies to codicils which are inconsistent inter se. Instances occur where a codicil is impliedly revoked by a later codicil, the latter being clearly intended by the testator to take the place of the earlier codicil (f). Inconsistent codicils.

The case of *Townsend v. Moore* (g), is an instance of the reluctance of the Court to refuse probate to two inconsistent testamentary papers (h). There the testatrix executed, on the same day and practically simultaneously, two codicils, the terms of which were in some respects identical, and in other respects inconsistent: it was held (by Vaughan Williams and Romer, L. JJ., Cozens-Hardy, L. J., doubting) that the two codicils were not so inconsistent that they could not stand together, and that both ought to be admitted to probate (i).

In *Baker v. Story* (j) at estator made two wills disposing of his real estate, which were so inconsistent that the second operated as a total revocation of the first, but the ultimate devise in the second will failed, being void under the Mortmain Acts; it was contended that the devise in the first will took effect, but Jessel, M.R., decided against this contention. But if a codicil does not operate as a total revocation of the will, it seems that the will stands, except so far as the dispositions contained in the codicil are effective (k). Where second will is inoperative.

The question, whether the re-execution of a will revokes a codicil to that will, is discussed in the next chapter (l). Whether re-execution of will revokes codicil.

XI.—Will not Disturbed further than is Necessary.—

"Numerous are the questions," as Mr. Jarman points out (m), "which have arisen in regard to the extent to which a codicil affects the disposition of a will or antecedent codicil, and which are commonly occasioned by the person framing the codicil not having an accurate knowledge or recollection of the contents of the prior testamentary paper.

"In dealing with such cases it is an established rule not to disturb Codicil not to disturb will more than absolutely necessary.

(e) Chap. XXIII.

(f) *Chichester v. Quatrefages*, [1895] P. 186.

(g) [1905] P. 66.

(h) *Supra*, p. 175.

(i) See *Lofus v. Stoney*, 17 Ir. Ch. 178, where both wills were proved, but the Court of Construction held that one will was the real will, because it was described as the "last" will, while the

other was marked "duplicate."

(j) 23 W. R. 147.

(k) See *Re Fleetwood*, 15 Ch. D. 594 (at p. 609), where however Hall, V.-C., misapprehended the decision in *Onions v. Tyrer* (ante, p. 170). See also *Morley v. Rennoldson*, [1895] 1 Ch. 449; post, p. 180.

(l) Page 196.

(m) First edition, p. 160.

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the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil, as will appear from the following adjudications, which have been selected from a large mass of cases (l), that might be cited in illustration of the principle.

"Thus, where a testator by his will devises lands to A. in fee, and by a codicil devises the same lands in fee to the first son of B. who shall attain the age of twenty-one years and shall assume the testator's name, the first devise will be revoked only quoad the interest comprised in the executory devise in the codicil; so that, until B. has a son who attains his majority and assumes the testator's name, the property will pass to A. under the devise in the will" (m).

So, where a testator devises lands to A. subject to a charge in favour of B., and then by a codicil revokes the devise to A. of the land, which he gives to another, without noticing the charge, the land remains subject to the charge in the hands of the substituted devisee (n). Again, if a testator bequeaths a legacy payable out of two funds, and by codicil there is an absolute gift of one of the funds, but no express revocation of the legacy, it remains payable out of the other fund; and this is so, even if the fund thus taken away is the general personal estate (o).

A codicil revoking a will does not necessarily revoke a prior codicil (p).

(l) Cases as to the combined effect of a will and several codicils are frequently not only very long, but are too special to be of much use as general authorities: *Doe d. Hearle v. Hicks*, 8 Bing. 475, 1 Cl. & Fin. 20; *Hicks v. Doe*, 1 You. & J. 470; *Alexander v. Alexander*, 2 Jur. N. S. 898, 6 D. M. & G. 593; *Agnew v. Pope*, 1 De G. & J. 49; *Patch v. Graves*, 3 Drew. 348; *Barclay v. Maskelyne*, Johns. 124; *Farrer v. St. Catharine's Coll.*, Cambridge, L. R., 16 Eq. 19. The question, whether a codicil was wholly or partially revocatory, was much discussed in *Cookson v. Hancock*, 1 Kee. 817, 2 My. & C. 606; see also *Schofield v. Cahuac*, 4 De G. & S. 533; *Lord Lovat v. Duchess of Leeds*, 2 Dr. & Sm. 62; *Re Margitson*, 30 W. R. 920; 31 W. R. 257; *Wallace v. Seymour*, Ir. R. 6 C. L. 343; *Beamish v. Beamish*, 1 L. R. Ir. 501; *Re Howell-Shepherd*, [1894], 3 Ch. 649. Where the residue was given to executors by will, and a codicil directed that A. should also be executor, and that the will should take effect as if his name had been inserted therein as executor, A. was held not entitled to

a share of residue, *Hillersdon v. Grove*, 21 Beav. 518; and see *Gibson's Trusts*, 2 J. & H. 656, stated post, p. 185.

(m) *Duffield v. Duffield*, 3 Bli. N. S. 261, 1 D. & Cl. 268, 395, Sug. Law of Prop. 216; and see *Doe d. Evers v. Ward*, 16 Jur. 709, 21 L. J. Q. B. 145; *Re Colshead*, 2 De G. & J. 690; *Norman v. Kynaston*, 29 Beav. 96, 3 D. F. & J. 29, with which compare *Nevill v. Boddam*, 28 Beav. 554, where there was an express clause of revocation.

(n) *Beckett v. Harden*, 4 M. & Sel. 1; *Young v. Hassard*, 1 Dr. & War. 638; *Fry v. Fry*, 9 Jur. 894; and compare *Ravens v. Taylor*, 4 Beav. 425.

(o) *Buckridge v. Ingram*, 2 Ves. jun. 652; *Sheddon v. Goodrich*, 8 Ves. 481; *Tatlock v. Jenkins*, Kay, 654; *Kermode v. Macdonald*, L. R. 3 Ch. 584, stated ante, p. 174. *Leese v. Knight*, 12 W. R. 1097, seems to be to the same effect. The original gift may of course be so expressed that the codicil operates as an implied revocation of the legacy: *Grice v. Funnell*, 1 Sm. & G. 130.

(p) *Farrer v. St. Catharine's College*, L. R., 16 Eq. 19.

Examples of
non-revoca-
tion by
codicil.

Charge not
revoked.

Where a testator by his will specifically devised certain real estate, and by a codicil directed that it should be sold, this was held not to deprive the devisees of their beneficial interests (*g*).

CHAPTER VII.

Gift not
revoked by
direction
to sell,

—or let.

So where a testator by his will devised his estates to C. B. for life without impeachment of waste, and by a codicil directed his trustees to let, until the tenant for life married, the lessees to be impeachable of waste, and the rents to be accumulated and laid out in lands to be settled to the same uses; it was contended that this was inconsistent with, and therefore revoked, the devise for life without impeachment of waste; but Sir W. Grant, M.R., held, that there was no inconsistency, and nothing to take the timber from the tenant for life (*r*).

Again, where a testator by his will bequeathed as follows: "As to my leasehold house in S., and my household goods and furniture there and at S., and as to all my plate, linen, china-ware, pictures, live and dead stock, and all the rest and residue of my goods, chattels, and personal estate," he gave the same to A. By a codicil he revoked the bequest of the residue of his personal estate to A., and gave the same to B. It was held, that the revocation was confined to the "residue," and did not extend to either the leasehold house and furniture, or the other enumerated articles, namely, the plate, &c. (*s*). So the operation of a codicil which revokes a legacy or devise in favour of a certain person, may be restrained by a recital in the codicil (*t*). And where by his will a testator devised tithes, and then devised all his real estates of what nature or kind soever, and by codicil devised in a different manner all his real estates of what nature or kind soever, Sir L. Shadwell, V.-C., held that the second gift in the will did not, but that the gift in the codicil did, include the tithes; the Court of Q. B., however, differed from him on the last point, holding that the words "real estates" in the codicil were to be interpreted in the same manner as in the will (*u*).

General
expression in
codicil con-
fined to its
meaning in
the will.

Again, in *Doe d. Murch v. Marchant* (*v*), where by will an estate was devised to A. in fee, and by codicil "instead of" that devise the estate was given to A. for life, with alternative contingent

Gift in codicil
"instead of"
gift in will.

(*g*) *Re Chifferiel*, 73 L. T. 53.

(*r*) *Lushington v. Boldero*, G. Coop. 216. See also *Green v. Britten*, 1 D. J. & S. 649; *Re Wood*, 83 L. T. 157.

(*s*) *Clarke v. Butler*, 1 Mer. 304. See also *Barclay v. Maskelyne*, 5 Jur. N. S. 12; *Hinchcliffe v. Hinchcliffe*, 2 Dr. & Sm. 96; *Beamish v. Beamish*, 1 L. R. Ir. 501.

(*t*) *Re Percival*, 59 L. T. 21; *Hinchcliffe v. Hinchcliffe*, 2 Dr. & Sm. 96.

(*u*) *Evans v. Evans*, 17 Sim. 86; *Williams v. Evans*, 1 Ell. & Bl. 727.

(*v*) 6 M. & Gr. 813, 7 Scott, N. R. 644. See the case more fully stated in Chap. VIII. on the question of republication. It was followed in *Re Wilcock*, [1898] 1 Ch. 95.

CHAPTER VII. remainders to her children and her collateral relations, which failed; A. was held entitled to the fee: "instead of the devise in the will" being read "instead of so much of it only as was incompatible with the codicil," and the codicil not disposing of the ultimate fee. And where a trust fund, which by will was given to the children of A. living at a stated period, with a power of advancement in the trustees, was by codicil, "in lieu of such disposition," given to the children of A. living at a different period, and in other respects the will was confirmed; it was held that the power of advancement was not revoked (*t*). But though the expression "instead of" need not mean total substitution, it naturally implies some substitution; as was held—still in favour of non-revocation—in *Barclay v. Maskelyne* (*u*), where the will gave legacies to the six children of A., naming them, and the codicil revoked the legacies "to the children of A., and in lieu thereof" gave a sum amongst "the children of A., to wit" (naming five of them); and it was held that the legacy to the sixth was not revoked, because nothing was substituted for her.

Specific gift
in will not
revoked by
general gift
in codicil.

Again, in *Re Arrowsmith's Trust* (*v*), where by will a testator bequeathed a specific fund to his nephews and nieces, and after the death of his wife gave them all his remaining property; he then by codicil bequeathed certain legacies (one of them to be paid at his wife's death), and gave "all his real and personal estate" to his wife for her life: it was held that the specific gift to the nephews and nieces was not disturbed, and that the codicil was meant only to remove the doubt which might arise on the will whether the wife was to take the residue for life.

Intention of
testator.

The presumption against implied revocation is strengthened if the testator uses words shewing an intention not to alter his testamentary dispositions except in certain specific respects (*w*).

Ineffectual
gift in codicil.

It sometimes happens that the provisions of the codicil are contrary to law, with the result that the provisions of the will take effect. Thus in *Morley v. Rennoldson* (*x*), a testator gave property in trust for his daughter A. for life with remainder to her children; by a codicil he expressed his will to be that A. should not marry, and in case of her marriage or death he gave the property over; she married and died, leaving children: it was held that the will

(*t*) *Hill v. Walker*, 4 K. & J. 168.
See also *Buller v. Greenwood*, 22 Beav. 303.

(*u*) 5 Jur. N. S. 12.

(*v*) 2 D. F. & J. 474. Compare

Kermode v. Macdonald, ante, p. 174.

(*w*) See *Alt v. Gregory*, 8 D. M. & G. 221; *Follett v. Pettman*, 23 Ch. D. 337.

(*x*) [1895] 1 Ch. 449.

and codicil must be construed together, and that as the condition against her marrying was void, the children were entitled. CHAPTER VII.

The provisions of a codicil may have the effect of removing an ambiguity which appears on the face of the will (*y*).

Sometimes the express revocation of one gift operates to revoke another, if the two are so closely connected as practically to constitute one gift (*yy*). A testator gave an annuity of 300*l.* to A., and after her death to her children as she should appoint, and in default of appointment among her children equally; by a codicil reciting that he had devised to A. an annuity of 300*l.*, he revoked the devise of the said annuity and "instead thereof" he devised to A. an annuity of 150*l.*, to be payable and charged in the same manner as the said annuity of 300*l.*: it was held that the annuity to the children of A. was also reduced to 150*l.* (*z*).

Revocation of part of gift may revoke whole.

It frequently happens that a testator by his will gives property to persons in succession, and by a codicil revokes the gift in such a way as to make it doubtful whether he means to revoke it altogether, or only in part (*a*). Thus in *Sanford v. Sanford* (*b*), a testatrix bequeathed 3000*l.* in trust for C. for life, and after her death for her children, and in case there should be no such children in trust for P.; by a codicil, stating that C. had been largely provided for from other sources, the testatrix deducted the sum of 2900*l.* from the legacy of 3000*l.*, and revoked so much of the legacy accordingly, "leaving her the sum of 100*l.* only, as a remembrance of my affection and regard for her": it was held that the legacy of 3000*l.* was revoked in toto, and that in lieu of it, C. took 100*l.* absolutely. So if there is a gift to A. with a gift over to B., in the event of A. dying under a certain age, or the like, a revocation by codicil of all gifts in the will to A. is *primâ facie* a revocation also of the gift over to B. (*c*). On the other hand, if the language of the codicil is restricted, its effect may be to revoke only part of the limitations, and leave the rest in force. As where the gift is revoked "so far as relates to" one of the persons to whom the

Series of limitations whether revoked wholly—

—or only partially.

(*y*) *Re Venn*, [1904] W. N. 94.

(*yy*) See *Grice v. Funnell*, 1 Sm. & G. 130, ante, n. (o).

(*z*) *Re Freme's Contract*, [1895] 2 Ch. 778. Rigby, L. J., dissented.

(*a*) *Philipp's v. Allen*, 7 Sim. 446, was a clear case of revocation in toto. Compare *Murray v. Johnston*, 3 Dr. & W. 143; *Fry v. Fry*, 9 Jur. 894. In many cases the construction is assisted or controlled by the fact that the codicil contains a complete substituted gift:

Daly v. Daly, 2 J. & Lat. 753; *Wells v. Wells*, 17 Jur. 1020. As to whether a substituted legacy is subject to the same qualifications as the original legacy, see Chap. XXX.

(*b*) 1 De G. & S. 67.

(*c*) *Boulcott v. Boulcott*, 2 Dr. 25. In *M'Kay v. M'Kay*, [1901] 1 Ir. R. 109, the question did not arise, as the gift over would not have taken effect even if the gift to A. had not been revoked.

CHAPTER VII. property is given in succession (*d*). In *Re Whitehorne* (*e*) a testator gave a share of real estate to G. for life, and after his death to his children in fee simple; by a codicil he revoked every gift in his will to or for the benefit of G., and directed that his will should take effect as if the name of G. had never appeared therein: it was held by Buckley, J. (following *Alt v. Gregory* (*f*), and *Green v. Tribe* (*g*), and distinguishing *Tabor v. Prentice* (*h*),) that the revocation extended only to the benefits given to G., and that the interests of his children were accelerated.

Case where held change of trustee merely and no revocation of trusts.

Where a testator directed his trustees, to whom he had given all his property, to carry on his business for ten years, and then to sell and hold the proceeds upon trust, as to one moiety for his daughter and her children, and as to the other moiety for the children of his son, and by a codicil revoked that part of his will which empowered his trustees to sell, and instead thereof authorised his daughter to take possession of his property and to dispose thereof at her discretion: it was held, that this was not an absolute gift to the daughter, but only constituted her a trustee in place of the trustee named in the will (*i*).

Legacy to executor.

Where a testator by his will appoints an executor, and bequeaths to him a legacy in such a way that it is annexed to the office (*j*), and by a codicil revokes the appointment of executor, the legacy is also revoked (*k*). But if the testator shews that the bequest of the legacy is independent of the office—as where he bequeaths it as a “mark of respect” (*l*), or “as a remembrance” (*m*),—the legacy is not revoked by the revocation of the office.

Appointment of executor, when revoked.

Where there are several testamentary papers not inconsistent with one another, each of which appoints different executors, probate will be granted to all (*n*), and this may be done even if the executor appointed by the last paper is described as “sole executor” (*o*). And a reappointment by codicil of some of the executors appointed by the will together with new executors, does not revoke the appointment of executors contained in the will (*p*). But if a

(*d*) *Ives v. Ives*, 4 Y. & C. 34.

(*e*) [1906] 2 Ch. 121.

(*f*) 8 D. M. & G. 221.

(*g*) 27 W. R. 39.

(*h*) 32 W. R. 872.

(*i*) *Newman v. Lade*, 1 Y. & C. C. C. 680; and see *Barry v. Crundall*, 7 Sim. 430; *Froggatt v. Wardell*, 3 De G. & S. 685; and compare *Schofield v. Cahuac*, 4 De G. & S. 533.

(*j*) As it is generally presumed to be: *Re Appleton*, 29 Ch. D. 893.

(*k*) See *Walne v. Hill*, [1883] W. N.

171, where the testator expressly revoked a legacy bequeathed to the executor independently of the office and did not expressly revoke another legacy bequeathed to him as executor.

(*l*) *Burgess v. Burgess*, 1 Coll. 367.

(*m*) *Bubb v. Yelverton*, L. R., 13 Eq. 131.

(*n*) *In bonis Graham*, 32 L. J. P. 113.

(*o*) *In bonis Morgan*, L. R., 1 P. & D. 323; *Geaves v. Price*, 32 L. J. P. 113.

(*p*) *In bonis Leese*, 31 L. J. P. 169; *In bonis Lloyd, Ir.*, 6 Eq. 348.

testator by his will appoints A. and B. his executors, and by a codicil to his "said will" appoints X. "sole executor of this my said will," it seems that this is an implied revocation of the appointment of A. and B. (q).

CHAPTER VII.

If a testator by his will appoints a person trustee and devises land to him upon trust, and by codicil appoints another person to be trustee in his place, this is a revocation of the devise as well of the appointment (r).

Revocation of devise to trustee.

Where a person is appointed to more than one of the offices of guardian, executor, and trustee, a revocation by codicil of his appointment to one of the offices is not a revocation of the appointment to any other office (s); unless the context shews, as by directing "trustees" to pay debts and legacies, that the several offices (of trustee and executor) are to be filled by the same persons (t).

Revocation as to one office does not extend to other offices.

"It may be observed," says Mr. Jarman (tt), "that where a testator, in order to avoid repetition, has by his will declared his intention respecting a property (say Whiteacre), then being devised by him, to be similar to what he had before expressed concerning another property (say Blackacre) antecedently given, and he afterwards by a codicil, or by obliteration, or otherwise, revokes the devise of Blackacre, such revocation does not affect the devise of Whiteacre. Thus, in the case of *Darley v. Langworthy* (u), where a testator by his will devised a certain estate to certain limitations, and then proceeded to annex thereto another estate, declaring that the same should go unto and be enjoyed by the possessor of the other estate, and not be separated therefrom, and subsequently, by an act in his lifetime, he revoked the devise of the principal estate, the property so annexed was held not to be affected, but went according to the uses declared of the principal estate by the will."

Revocation of devise by reference.

In *Martineau v. Briggs* (v), a testator devised freehold estates to certain uses, and gave his copyhold and leasehold estates upon trusts to correspond with the uses of the freeholds. By a codicil he devised the freeholds to other uses, but made no mention of

Copyholds and leaseholds.

(q) *In bonis Lowe*, 33 L. J. P. 155; *In bonis Bailey*, L. R., 1 P. & D. 628.

(r) *Re Hough's Will*, 4 De G. & S. 371; *Re Turner*, 2 D. F. & J. 527.

(s) *Re Park*, 14 Sim. 89; *Fry v. Fry*, 9 Jur. 894; *Graham v. Graham*, 16 Beav. 550; *Cartwright v. Shephard*, 17 Beav. 301; *Worley v. Worley*, 18 Beav. 58; and see *Hare v. Hare*, 5 Beav. 629.

(t) *Barrett v. Wilkins*, 5 Jur. N. S. 687.

(tt) First edition, p. 162.

(u) 3 Br. P. C. 359, reversing Lord Camden's decree in *Darley v. Darley*, Amb. 653; see also *Lord Sidney Beauchlerk v. Mead*, 2 Atk. 167; *Salter v. Farey*, 12 L. J. Ch. 411.

(v) 23 W. R. 889.

CHAPTER VII. the copyholds and leaseholds : it was held by the House of Lords that the copyholds and leaseholds passed according to the trusts declared by the will.

Money to be applied in purchase of lands. In *Bridges v. Strachan* (*w*), the testator devised freeholds to certain uses and bequeathed 3000*l.* to trustees to purchase lands to be settled to the same uses. By a codicil he revoked the devise of the freeholds and devised them to other uses, without referring to the 3000*l.* : it was held by Malins, V.-C., that the 3000*l.* passed under the will in the same way as if the codicil had not been made.

Bequest by reference. So, where a testator by his will bequeathed a specific fund to his residuary legatee after named, and then bequeathed the residue to A., and by a codicil revoked the bequest of the residue, it was held that this was no revocation of the specific bequest (*x*). And where a testator bequeathed several pecuniary legacies, including one to A., and the residue to his before-mentioned legatees in proportion to their pecuniary legacies ; and by codicil executed after A.'s death gave A.'s pecuniary legacy to B., but was silent as to the residue : it was held that B. was not entitled to A.'s share of residue (*y*).

Mixed fund. Again, where a testator by his will devised certain freehold property (on failure of the objects of a preceding devise) to trustees to be sold, and directed the produce to be applied upon the trusts thereafter expressed concerning his residuary personal estate ; he then bequeathed his residuary personal estate upon certain trusts, and afterwards by a codicil duly attested for devising freehold estates, revoked the residuary bequest, and disposed of the personalty in a different manner : Sir J. Leach, M.R., held, that by this alteration in the disposition of the personal estate, the devise of the realty was not affected ; the effect being the same as if the testator had in terms applied the trusts in question to the produce of the freehold estate, in which case it is obvious that the revocation by the codicil of the residuary gift of the personal estate by the will, would have been no revocation of the disposition of the produce of the freehold estate ; and his Honor observed, it could make no difference in principle that the testator saves himself the trouble of repeating those trusts, intents, and purposes, by compendious words of reference (*z*).

Where rule does not apply.

This construction, however, does not apply where personalty is given as an incident or accessory to real estate (*a*).

(*w*) 8 Ch. D. 558.

(*x*) *Roach v. Haynes*, 6 Ves. 153.

(*y*) *Re Gibson's Trusts*, 2 J. & H. 656.

(*z*) *Francis v. Collier*, 4 Russ. 331.

(*a*) *Evans v. Evans*, 17 Sim. 108 (chattels directed to be enjoyed by persons entitled to real estate "under or by virtue of the limitations of this

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Distinction,
where the
first devise is
modified only.

Mr. Jarman continues (a): "If the devise of the principal estate is not simply revoked, but is modified only, it is not too hastily to be concluded that the construction adopted in the class of cases just stated would apply, however forcibly the reasoning in some of them, and especially that of the Master of the Rolls in [*Francis v. Collier*] might seem to conduct to such a conclusion; for a different construction prevailed in the case of *Lord Carrington v. Payne* (b), where a testator devised his real estate to trustees to be conveyed to certain uses, and bequeathed personal estate to be laid out in land to be settled to such uses and upon such trusts, &c., as he had declared concerning his real estate. By a codicil he revoked so much of his will as directed the settlement of his real estate to those limitations, and devised it to other limitations, the effect being merely to change the order in which some of the devisees were to take. Sir R. P. Arden, M.R., held, that the bequest of the personalty was not revoked. He considered that though the deviser had used the expression 'revoke,' yet the codicil was not a revocation as to the union of the estates, but merely an alteration in the order of the limitations to be inserted in the settlement (of both properties); and that it was no more than if the deviser had with his own hand inserted the name of one devisee before another, and then republished his will."

The case of *Lord Carrington v. Payne* was referred to by Lord Hatherley in *Re Gibson's Trusts* (c), where his lordship pointed out that the ground of the decision was that if there is on the face of the will a sufficient indication of intention to unite two sets of estates, one only of which is referred to in the limitations contained in the will, and altered by the codicil, the intention to unite not being altered or revoked, that intention must be carried into effect as far as possible, though in terms the codicil only refers to one set of estates, and not to the other. And in a recent case the decision in *Lord Carrington v. Payne* was referred to the same principle, and followed by the Court of Appeal (d). In that case the testator devised his H. Lodge estate to certain persons in succession and then gave some heirlooms and a sum of money upon trust "for the person or persons for the time being entitled to the H. Lodge estate under the devise thereof, hereinbefore contained." There was a

my will," held to pass to persons entitled to the real estate under a codicil). See also *Whiteway v. Fisher*, 9 W. R. 433, where a fund was given for the benefit of the devisees of certain real estate, which was sold by the testatrix

during her lifetime; the case therefore fell within the principle of ademption.

(a) First edition, p. 163.

(b) 5 Ves. 404.

(c) 2 J. & H. 646.

(d) *Re Towry*, 41 Ch. D. 64.

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power to lease H. Lodge with the heirlooms. By a codicil the testator altered the devolution of the H. Lodge estate. It was held by the Court of Appeal (reversing Stirling, J.), that it appeared from the language of the will, and especially from the power of leasing, that the testator intended to unite the possession of the estate with the enjoyment of the personalty.

In *Liddell v. Liddell* (e), the testator devised real estate upon trust for his nephews and their issue male in succession according to seniority, and directed his personal estate to be held upon such trusts as would best correspond with the trusts of the real estate, By a codicil the testator gave his wife power to alter the order of succession between the nephews, which she did. It was held by the House of Lords that the personal estate devolved in the order of succession as altered by the wife.

The case of *Holder v. Howell* (f), which is referred to by Mr. Jarman in connection with the case of *Lord Carrington v. Payne*, is stated elsewhere (g).

Clear gift in will not revoked by doubtful expressions in codicil.

XII.—Ambiguous and informal Expressions will not revoke a clear Gift.—Another principle of construction is, that where the will contains a clear and unambiguous disposition of property, real or personal, such a gift is not allowed to be revoked by doubtful expressions in a codicil. “The principle is perfectly clear, that where you have a distinct disposition made by a will, that disposition cannot be revoked by a codicil except through the medium and use of words equally distinct” (h).

The principle is illustrated by numerous cases.

Thus, in *Goblet v. Beechey* (i), a testator by his will gave a specific chattel to A.; afterwards by a codicil he gave a number of articles of a different kind, and of much less value, to B., and in enumerating those articles introduced an imperfectly written word, which might be supposed to designate the chattel previously given to A.: it was held, that the bequest to A. was not thereby revoked.

In *Bunny v. Bunny* (j), a testatrix by her will gave to the seven children of J. B. a legacy of 200*l.* each, and other interests; by a first codicil she revoked the legacies of 200*l.* each to the children

(e) 74 L. T. 105.

(f) 8 Ves. 97.

(g) Chap. XVIII.

(h) Per Cairns, L. C., in *Kellett v. Kellett*, L. R., 3 H. L. at p. 167. See also *Doe v. Hicks*, 1 Cl. & F. 20. The case of *Randfield v. Randfield*, 2 De G. & J. 57; 8 H. L. C. 225, does not belong here, but to the principle discussed

in Chap. XVII.

(i) 3 Sim. 24, 2 R. & My. 624; compare *Baldwin v. Baldwin*, 22 Beav. 413.

(j) 3 Beav. 109; and see *Farrer v. St. Catharine's College*, L. R., 16 Eq. 19; *Pratt v. Pratt*, 14 Sim. 129; *Sawrey v. Rumney*, 5 De G. & S. 698; *Stokes v. Heron*, 12 Cl. & Fin. 161.

of J. B. and all other benefits given them by her will, and in lieu thereof gave only the legacy of 200*l.* each to A., B., C., D., and E., five of the children of J. B. By a second codicil she revoked all the legacies she had left in her will to J. B.'s children; and by a third codicil she revoked the legacy of 200*l.* by a previous codicil to her said will given to A. The question was, whether the legacies given by the first codicil to the plaintiffs B., C., D., and E. were revoked by the second codicil; which depended on what the testatrix meant by the word "will" in the second codicil. The word might mean all the previous unrevoked testamentary papers (*k*); but if that was what the testatrix meant, it was not easy to account for the subsequent revocation (by the third codicil) of a supposed existing gift to A. in the first codicil. It was true that if she meant the will only without the codicil, then she was doing what was unnecessary, as the legacies in the will had already been revoked by the first codicil; nevertheless it was held, that the former interpretation best answered the apparent meaning of the testatrix, and that the legacies to B., C., D., and E. were not revoked. And this construction was aided by the third codicil, which revoked the legacy given to A. by a previous codicil, showing that the testatrix considered that A., and consequently the plaintiffs also, had at that time legacies left by the previous testamentary papers. And in *Cleoburey v. Beckett* (*l*), where legacies were given in a codicil to a class of persons "except A., who is not intended to take any benefit under my will or this codicil"; it was held by Sir J. Romilly, M.R., that these words did not operate as a revocation of an express gift by the will to A. He observed that the words were extremely ambiguous, and did not seem to him to import a distinct and present revocation of the devise in the will.

And where (*m*) a testatrix having a testamentary power to appoint a sum of 4000*l.* among her husband and children, by her will, after making certain bequests, gave the residue of her property, including the 4000*l.*, over which she had a disposing power, to her husband and children equally; and afterwards, a son having died leaving two children, she by codicil bequeathed the share of her residue which would have gone to him if he had survived her in trust for his children: it was held by Sir E. Kay, J., that the invalid appointment by the codicil did not operate as a revocation pro tanto of the gift of the 4000*l.* made by the will.

Invalid appointment by codicil no revocation of valid appointment by will.

(*k*) See above, p. 129, and below, p. 199.

Pope, 1 De G. & J. 49.

(*m*) *Duguid v. Fraser*, 31 Ch. D. 449;

(*l*) 14 Beav. 583; see also *Agnew v.*

Re Walker, [1908] 1 Ch. 560.

CHAPTER VII.

Erroneous
recital, &c.,
in codicil.

Intention to
revoke may
be indicated
by informal
expressions.

Revocation
founded on
mistake.

An erroneous recital or unintelligible provision in a codicil, does not, as a general rule, operate as a revocation of a clear gift in the will (*n*). But an erroneous recital does not prevent a codicil from operating as a revocation, wholly or partially, of an absolute gift in the will, if the substantive dispositions in the codicil shew that intention (*nn*).

An intention to revoke, though expressed in loose and untechnical language, or in terms capable per se of a limited interpretation, must nevertheless prevail, if it can be clearly collected from the whole will (*o*). On this principle, it is not necessary that the gift to be revoked should be accurately referred to (*p*), or that the legatee by the will should be actually named in the codicil (*q*).

XII.—Revocation under an erroneous Assumption of Fact.—Mr. Jarman lays it down as a general principle (*r*), that “Where a testator by a codicil revokes a devise or bequest in his will, or in a previous codicil, expressly grounding such revocation on the assumption of a fact, which turns out to be false, the revocation does not take effect; being, it is considered, conditional, and dependent on a contingency which fails.

“Thus, in *Campbell v. French* (*s*), where a testator, having by will bequeathed to the two grandchildren of his late sister 500*l.* each, by a codicil declared that he revoked the legacies bequeathed by his will to such grandchildren, ‘they being all dead,’ and the fact appearing to be that they were living, Lord Loughborough held, that the legacies were not revoked.

“So, in *Doe d. Evans v. Evans* (*t*), where a testatrix by her will, dated July, 1819, devised lands to A. for life, with remainder to his first and other sons in tail, with remainder to his daughters in tail; and by a codicil, dated in 1829, after reciting the above devise, *and that A. had died without leaving issue*, she devised the lands to B. The fact was that A. died in 1827, leaving a posthumous child, whose birth was not known to the testatrix when she made her codicil, but she afterwards became acquainted with it. The Court considered that this was a conditional revocation; and the

(*n*) *Vaughan v. Foakes*, 1 Kee. 58, stated post, Chap. XIX.: *Gordon v. Hoffmann*, 7 Sim. 29 (erroneous recital of amount of legacy); *Van Grutten v. Foxwell*, [1897] A.C. 658.

(*nn*) *Re Margitson*, 30 W. R. 920; 31 W. R. 257.

(*o*) *Read v. Backhouse*, 2 R. & My. 546.

(*p*) *Filcher v. Hole*, 7 Sim. 208; *Carrington v. Payne*, 5 Ves. 423; and see the case of *Re Freme's Contract*, [1895] 2 Ch. 778, stated ante, p. 181.

(*q*) *Ellis v. Bartrum*, 25 Beav. 107; *Re Freme's Contract*, supra.

(*r*) First ed. p. 165.

(*s*) 3 Ves. 321.

(*t*) 2 Per. & D. 378, 10 Ad. & Ell. 228.

fact being contrary to what the testatrix supposed, the devise in the will remained in force. CHAPTER VII.

“ Had the testator in the preceding cases, instead of making the death of the devisee or legatee under the circumstances described the ground or reason of the revocation, founded such revocation on his advice or belief only of the fact, it is conceived that the result would have been different. A distinction of this nature seems to be warranted by *Att.-Gen. v. Lloyd (u)*, where a testator having by a will made before the passing of the statute of 9 Geo. 2, c. 36 (v), devised lands and bequeathed personalty to be laid out in lands for charitable uses, made a codicil posterior to the act by which, after reciting that *being advised* the devise of his lands would be void, and it being his intention that the charity should be continued, and being advised his personal estate could be given, he did by such codicil give his personal estate to the charitable uses before mentioned; and he did thereby give his real estate to B. Though the testator’s notion as to the invalidity of the devise in the will was erroneous (w), it was held that the devise to B. took effect.”

Distinction where the fact itself, and where the advice or belief of the fact, is the ground of revocation.

In *Thomas v. Howell (x)*, a testator by will bequeathed certain charity legacies, and by codicil, “ presuming and believing that the rental of his estate would produce from 16,000*l.* to 18,000*l.*,” he doubled those legacies. The income of his whole estate fell short of 16,000*l.*, and Malins, V.-C., held that the additional bequest failed, as being founded on a mistake.

Where a testatrix by her will bequeathed 300*l.* among such of the children as should be living of E., and by a codicil proceeded as follows: “ I give to my brother’s son C. the 300*l.* designed for E.’s children, as I know not whether any of them are aliye, and if they are well provided for:” Sir R. P. Arden, M.R., held that the original bequest was revoked, and that C. was entitled, though the children of E. were living (y).

The real question in all these cases is, as Mr. Jarman points out in the passage above quoted, whether the revocation is absolute or conditional. If it is absolute it takes effect, although founded on a mistake on the part of the testator.

In *Barclay v. Maskelyne (z)*, where a gift by will to A. was referred to in a codicil as a gift to B., and as lapsed by the death

(u) 3 Atk. 552, 1 Ves. 32; and see the observations of Lord Eldon, 1 Mer. 148, 149.

(v) See Chap. IX., post.

(w) *Willet v. Sandford*, 1 Ves. 178, 186.

(x) L. R., 18 Eq. 198.

(y) *Att.-Gen. v. Ward*, 3 Ves. 327.

(z) Johns. 124.

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of B., whereupon the subject of gift was otherwise disposed of by the codicil, it was held that the gift to A. was not revoked.

In *Allen v. Bewsey* (a), a testator devised an estate as copyhold ; by codicil reciting that he had since discovered that the estate was freehold, he confirmed the devise. It turned out that the estate was copyhold, and it appears to have been argued that the confirmation was conditional,—that the devise was meant to stand because (and not unless) the estate was freehold and was in effect revoked : but it was held without difficulty that the intention was to confirm the devise whether the estate was freehold or copyhold, and that there was no revocation.

Implied revocation by the effect of a codicil reviving an earlier will.

XIV.—Revocation of later Will by Codicil reviving earlier Will.—Sometimes a codicil has the effect of impliedly revoking the later of two wills, by expressly referring to and recognising the prior one as the actual and subsisting will of the testator. The difficulty, in most of these cases, is to determine whether the codicil shews an intention to revive the earlier will ; this question is discussed in the next Chapter. If the earlier will is revived, and it is inconsistent with the later will, the result generally is that the later one is impliedly revoked (b). Cases have, however, occurred in which all three documents have been admitted to probate (c).

Even if the earlier will has been destroyed, and therefore cannot be revived, the effect of the codicil may be to revoke the second will (d).

Whether confirmation of will revokes intermediate codicil.

Sometimes a testator makes a will and one or more codicils, and then makes a codicil expressly confirming the will, but not referring to the previous codicils : the question whether in such a case the previous codicils are revoked is considered in the next Chapter (e).

Wills Act, s. 19.

XV.—Revocation by Alteration in Circumstances.—Sec. 19 of the Wills Act enacts that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. The Real Property Commissioners remarked (f) that under the old law a will of real or personal estate could be revoked “ by an alteration in the circumstances of the testator,”

(a) 7 Ch. D. 453.

(b) *Lord Walpole v. Lord Orford*, 3 Ves. 402 ; *Payne v. Trappes*, 1 Rob. 583 ; *In bonis Reynolds*, L. R., 3 P. & D. 35 ; and other cases cited in next Chapter.

(c) *In bonis Stedham*, 6 P. D. 205 ; *In bonis Dyke*, ib. 207 ; *In bonis Edge*,

9 L. R. Ir. 516 ; *In bonis Chilcott*, [1897] P. 223.

(d) See *Hale v. Tokelove*, 2 Rob. 318, post, p. 197.

(e) Post, p. 198.

(f) Fourth Report, 28, 30. See Mr. Jarman's remarks on sections 18 and 19, ante. p. 142.

but the only examples which they give are marriage, or marriage and the birth of a child. Having regard to the sweeping language of sec. 20, which enacts that no will shall be revoked except in certain specified ways, it is not easy to see the object of sec. 19. In *Re Wells's Trusts* (g) Stirling, J. relied on the section as negating any presumption of an intention on the part of the testator to revoke his will.

(g) 42 Ch. D. 646, stated post, Chap. XXIII.

CHAPTER VIII.

REVIVAL AND REPUBLICATION OF WILLS.

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I.—Revival of Revoked Will or Codicil.—Revival is where a testamentary instrument or disposition, which has been revoked or become invalid, is restored or set up by re-execution, or by incorporation in a valid testamentary instrument (a).

Old law. Under the old law, there was another way in which a revoked will or codicil could be revived, for if a testator executed two wills, the latter of which revoked the former, and then revoked the second will, the effect was to revive the first will (b), but this rule was abolished by the Wills Act (c).

Wills Act. The manner in which a revoked disposition can be revived under the present law is set forth in the Wills Act, sect. 22 of which enacts : “ That no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same ; and when any will or codicil which shall be partly revoked and afterwards wholly revoked shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shewn.”

The section applies not only where the prior will is revoked by an express clause of revocation, but also where it is revoked by inconsistent dispositions contained in the later will (d).

If the later will is lost, or has been destroyed, its contents may be proved by parol evidence (e).

(a) *Skinner v. Ogle*, 9 Jur. 432.

(b) *Harwood v. Goodright*, Cowp. 92 ;
Usticke v. Bawden, 2 Add. 116. Unless
the first will was destroyed, *Burtonshaw*
v. Gilbert, Cowp. 49.

(c) Sect. 22.

(d) *Brown v. Brown*, 8 Ell. & Bl. 876 ;
Boulcott v. Boulcott, 2 Drew. 25.

(e) *Brown v. Brown*, supra ; *Wood v.*

Wood, L. R., 1 P. & D. 309 ; *Newton v. Newton*, infra. The remarks contra in *Wharram v. Wharram*, 3 Sw. & Tr. 301, are unfounded : *Sugden v. Lord St. Leonards*, 1 P. D. 239. But such evidence must shew clearly that the contents of the second will were such as to revoke the first. It is not enough to prove that the lost will contained the

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If a testator makes two wills, the second of which revokes the first, and then destroys the second will for the express purpose of setting up the first, he fails in his object; for parol evidence of his intention is not admissible in order to give effect to that object (*f*); though it is admissible to prove that the destruction was effected for the sole purpose of reviving the first will; in that case the doctrine of dependent relative revocation (see above, p. 148) prevents the revocation of the destroyed will (*g*). Otherwise there is an intestacy (*h*).

Parol evidence inadmissible to show intention to revive.

The same rule applies where the second will is only a partial revocation of the former, or where a codicil partly revokes a will. In such a case, if the testator revokes the second will or the codicil, this does not revive the revoked portion of the first will, and probate is limited to the portions of the first will which were unaffected by the second will or the codicil. The result may be a partial intestacy (*i*).

Revival of partially revoked will.

By sect. 34, it is provided that the act "shall not extend to any will made before 1838." Now if the first of two inconsistent wills be made before 1838, and the second be destroyed after that date, does sect. 22 extend to the case so as to prevent revival of the first will? Though revived, it would not be republished (*j*). It would therefore take effect wholly under the old law, and derive no virtue from the new. However, in *Dickinson v. Swatman* (*k*), the argument for revival was considered untenable.

Where prior will made before 1838.

Where a will was found with the signature cut off, but gummed on again, it was held that it was not duly re-executed (*l*).

What is re-execution.

A person who had duly executed his will, married, and subsequently executed another will in favour of his wife and children. In this second will the testator provided that if there were no issue of the marriage living at the death of his wife, he revived and brought into force again his former will, and directed that its provisions should be complied with as though it formed part of his second will. At the time of his death the wife and one child were living. It was held that the first will should be included in the probate (*m*).

Conditional revival.

words "this is the last will and testament," *Cutto v. Gilbert*, 9 Moo. P. C. C. 131, cited again with others to the same effect, ante, p. 172.

(*f*) *Major v. Williams*, 3 Curt. 432; s. o. nom. *Major v. Iles*, 7 Jur. 219; *Newton v. Newton*, 12 Ir. Ch. R. 118.

(*g*) *Powell v. Powell*, L. R., 1 P. & D. 209.

(*h*) *In bonis Brown*, 4 Jur. N. S. 244.

(*i*) *In bonis Hodgkinson*, [1893] P. 339; *In bonis Debac*, 77 L. T. 374.

(*j*) R. P. C. Fourth Report, p. 33.

(*k*) 4 Sw. & Tr. 205.

(*l*) *Bell v. Fothergill*, L. R., 2 P. & D. 148.

(*m*) *In bonis Bangham*, 1 P. D. 429.

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Meaning of
"erase."

In *Wilkinson v. Schneider* (n), a testatrix by her will bequeathed certain chattels to her niece, Maria Dyer, then unmarried, absolutely; the niece married a man named Wilkinson, and six years afterwards the testatrix, by a codicil, revoked the bequest, and bequeathed the chattels to Maria Wilkinson and Sarah Butler (another niece), equally. In the following year Sarah Butler died, and a year later the testatrix made another codicil as follows: "My wish is, that in the event of the name of Maria Wilkinson having been erased from my will, it be reinstated as previously there placed." It was held by James, V.-C., that the codicil was inoperative. "I can only say the name of Maria Wilkinson is not erased, and that is all." The construction seems somewhat narrow.

Intention to
revive.

Where a testator makes two wills, by the second of which he revokes the first, and then makes a codicil which he describes as a codicil to the first will, without referring to the second will, this may have the effect of reviving the first will and revoking the second (o). But this result does not always follow. In the first place, if the first will was revoked by destruction, it is incapable of being revived (p), although a copy of it may be incorporated in the codicil (q). And in the second place, assuming that the first will is still in existence, the codicil must shew an intention to revive it. According to some cases, it is sufficient that the codicil should be described as a codicil to the first will (r). And if there is no ambiguity (s), parol evidence is inadmissible to shew that the reference to the first will was a mistake, and that the testator really meant to refer to the second will (t). Other cases have been

(n) L. R., 9 Eq. 423.

(o) Ante, p. 190. In *In bonis Courtenay*, 27 L. R. Ir. 507, the testator revoked his first will by a second will, then revived the first and revoked the second, and finally revived the second.

(p) *Hale v. Tokelove*, 2 Rob. 318; *Newton v. Newton*, 12 Ir. Ch. R. 118; *Rogers v. Goodenough*, 2 Sw. & Tr. 342; *In bonis Reade*, [1902] P. 75. "I limit this, in my judgment, to cases where the will has been destroyed by the testator or by some person in his presence and by his authority. I say nothing as to what would be the effect if the instrument had been destroyed without his knowledge; that question may arise another day." Per Cresswell, J., in *Rogers v. Goodenough*.

(q) *In bonis Lindsay*, ante, p. 139.

(r) *Payne v. Trappes*, 1 Rob. 583; *In bonis Chapman*, 1 Rob. 1; *In bonis Reynolds*, L. R., 3 P. & D. 35. In *In*

bonis M'Cabe, 31 L. J. Prob. 190, *In bonis Stedham*, 6 P. D. 205, and *In bonis Dyke*, 6 P. D. 207, there were other indications of an intention to revive the first will. The cases of *Lord Walpole v. Earl of Orford*, 3 Ves. 402 (s. c. nom. *Lord Walpole v. Earl Cholmondeley*, 7 T. R. 138), and *Rogers v. Pittis*, 1 Ad. 30, were before the Wills Act.

(s) There is a latent ambiguity if a will of a certain date is referred to and there is no will of that date, *Jansen v. Jansen*, cited 1 Ad. 39. And there is a patent ambiguity if the testator makes a fourth codicil revoking three preceding codicils, and then makes a fifth codicil confirming the will and the four codicils, *In bonis Thomson*, L. R., 1 P. & D. 8.

(t) *In bonis Chapman and Payne v. Trappes*, supra; *Walpole v. Cholmondeley*, 7 T. R. 138.

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decided on the principle that a mere reference to the revoked will is not sufficient, and that the Court must satisfy itself by a careful examination of the language of the codicil that the testator intends by it to revive his first will (*u*). Evidence of the surrounding circumstances is always admissible (*v*).

If a testator makes a codicil referring to a revoked will by date, but goes on to refer to testamentary dispositions which are not contained in it but in his later will, this is generally sufficient to shew that the reference to the earlier will was a mistake, and that he had no intention of reviving it (*w*).

Mistaken
reference.

In a case (*x*) where a testator made two wills, the second of which revoked the first, and then executed a codicil which he declared to be a codicil to "my last will" and by which he confirmed "my said will in all respects," and went on to refer to certain provisions contained in the first will and not in the second, it was held that this revived the first will and revoked the second.

Ambiguous
reference.

Where a codicil to a second will contains a recital referring to a previous codicil which was revoked by the second will, this is not sufficient to revive the revoked codicil (*y*).

Where a codicil expressly confirms the first will, this is sufficient evidence of an intention to revive it (*z*).

Effect of
word "con-
firm."
Physical
annexation.

A codicil does not shew an intention (within the meaning of the section) to revive the earlier of two wills by being physically annexed to it (e.g., by a piece of tape): the intention must appear from the contents of the codicil (*a*). But it seems that if a memorandum in the nature of a codicil is written upon the will and duly executed, it operates to revive the will, although it does not in direct terms refer to the will (*b*).

Where a testator makes two wills, the latter of which revokes the former, and then makes a codicil reviving the first will, but not expressly revoking the second will, the Court of Probate generally

Intermediate
will not re-
voked.

(*u*) *In bonis Steele*, L. R., 1 P. & D. 575; *In bonis May*, ib. 581. In these cases and also in *In bonis Ince*, 2 P. D. 111, it is submitted that the Court attached too much importance to the use of the expression "last will." See also *In bonis Anderson*, 39 L. J. P. 55.

(*v*) *Ibid.* *In bonis Brown*; *Quincey v. Quincey*, 11 Jur. 111; *In bonis Snowden*, 75 L. T. 279.

(*w*) *In bonis Wilson*, L. R., 1 P. & D. 582; *In bonis Anderson*, 39 L. J. P. 55.

(*x*) *In bonis Van Cutsem*, 63 L. T. 252; see *In bonis M'Cabe*, 31 L. J. P. 190.

(*y*) *In bonis Dennis*, [1891] P. 326.

(*z*) *McLeod v. McNab*, [1891] A. C. 471; *In bonis Chilcott*, [1897] P. 223. In this case as in *In bonis Stedham*, 6 P. D. 205, it was clear that the person who prepared the codicil was not aware of the existence of the second will, and therefore could not be taken to have intended to refer to it.

(*a*) *Marsh v. Marsh*, 1 Sw. & Tr. 528; *In bonis Steele*, L. R., 1 P. & D. 575; *McLeod v. McNab*, [1891] A. C. 471.

(*b*) *In bonis Terrible*, 1 Sw. & Tr. 140.

CHAPTER VIII. allows all three documents to be proved, their effect being left to a Court of Construction to determine (c).

Confirmation of will partly revoked. In *McLeod v. McNab* (d), the testator revoked by codicil a bequest contained in his will, and afterwards made another codicil which did not refer to the first codicil, but referred to the will as if the first codicil had never been executed: it was held that this revived the revoked bequest. This construction was aided by the fact that the second codicil confirmed the will in every other particular than as altered by that codicil (e).

Confirmation of codicil. Where a testator made four codicils, the third of which revoked the first and second, and the fourth confirmed the will and former codicils, it was held that the first and second codicils remained revoked (f).

Codicil partly revoking revived will. The latter part of sect. 22 provides, that "when any will or codicil which shall be partly revoked and afterwards wholly revoked shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shewn." Now if partial revocation of a will—as of a devise of Blackacre to A. in fee—has been caused by a codicil devising Blackacre to B. in fee; and if this codicil has itself been afterwards included in the final revocation of the will, and the "will" is then revived, the devise of Blackacre remains revoked unless a contrary intention is shewn. The will is restored as modified by the codicil, but by a short statutory method, without having recourse to the codicil, concerning which the statute is silent; and it may still be a question what becomes of the codicil. In *Neate v. Pickard* (g) a will and codicil were revoked by marriage, and afterwards by another codicil the testator confirmed his "last will" without referring to the date; and it was held that both were revived. At the date of the second codicil there were several alterations (unexecuted, it would seem) on the face of the will, and it was further held that the will was revived in its altered condition.

In *In bonis M'Cabe* (h), the testator made a will and two codicils, all of which he revoked by a later will; he afterwards revived the first will, and it was held that the two codicils were also entitled to probate.

(c) *In bonis Stedham*, 6 P. D. 205; *In bonis Chilcott*, [1897] P. 223. This is not done if the revoked will was destroyed, ante, p. 194.

(d) [1891] A. C. 471.

(e) Confirmation of an existing will does not in general operate to revoke a

codicil altering its dispositions. See *Crosbie v. Macdowal*, post, p. 199.

(f) *In bonis Carritt*, 66 L. T. 379. Compare *French v. Hoey*, [1899] 2 Ir. R. 472.

(g) 2 N. of C. 406.

(h) 31 L. J. Prob. 190.

On the other hand, in *In bonis Reynolds* (i), the testator executed a will and codicil, and then made a second will revoking all previous testamentary papers; he afterwards executed a testamentary paper described as a codicil to the first will, and it was held that this operated to revive the first will, but not the codicil to it. The Court seems to have considered that "an intention to the contrary" was shewn by the contents of the last testamentary paper.

CHAPTER VIII.

Where codicil expressly revoked.

If a testator makes two wills, the second of which revokes the first, and then destroys the first will, and subsequently executes a codicil professing to revive the first will, this intention being incapable of being carried into effect, the question arises whether the second will is revoked by the codicil. In *Hale v. Tokelove* (j), it was held that the codicil revoked the second will, while in *Rogers v. Goodenough* (k) probate was granted of the second will, and the codicil. The matter seems to depend on whether the second will and the codicil are or are not too inconsistent with one another to stand together. (l)

Where revival is ineffectual.

II.—Republication.—Republication is sometimes used in the same sense as "revival," but more frequently it is applied to those cases where a valid will or codicil is re-executed or confirmed in such a way as to acquire some force or efficacy which it did not previously possess (m).

Republication is of two kinds, express and constructive (n). Express republication (more properly called re-execution) occurs

Express republication.

(i) L. R., 3 P. & D. 35; *French v. Hoey*, [1899] 2 Ir. R. 472.

(j) 2 Rob. 318.

(k) 2 Sw. & Tr. 342; followed in *In bonis Reade*, [1902] P. 75. See also *In bonis Brown* (*Quincey v. Quincey*), 11 Jur. 111.

(l) See *In bonis Steele*, L. R., 1 P. & D. at p. 577, where *Newton v. Newton*, 12 Ir. Ch. Rep. 118, is also referred to.

(m) See *Skinner v. Ogle*, 9 Jur. 432. The question of republication was important under the old law, because it had the effect of bringing land acquired since the execution of the will within the operation of a residuary devise contained in the will. It was with reference to this question that Mr. Jarman remarked (1st ed. p. 176): "The operation of a codicil to extend the devise in a will made before 1838 to intermediately-acquired lands, may be negatived by the contents of the codicil itself, indicating a contrary intention; for though the republication takes place

without positive intention, yet it can never operate in spite of such intention." See *Bowes v. Bowes*, 2 B. & P. 500; s. c. nom. *Countess of Strathmore v. Bowes*, 7 T. R. 482; *Parker v. Biscoe*, 3 J. B. Moc. 24; *Monypenny v. Bristow*, 2 R. & My. 117; *Ashley v. Waugh*, 4 Jur. 572; *Hughes v. Turner*, 3 My. & K. 666; *Doe d. York v. Walker*, 12 Mee. & W. 591; *Re Earl's Trusts*, 4 K. & J. 673.

(n) See generally as to republication under the old law the 4th edition of this work, Vol. I. pp. 193 seq.; 1 Wms. Saund., notes to *Druppa v. Mayo*. Under the Statute of Frauds to republish a devise of freehold estate required an attestation by three witnesses; while, on the other hand, a will might have been republished with respect to copyholds and personality without any attestation: *Long v. Aldred*, 3 Ad. 48; *Miller v. Brown*, 2 Hagg. 209; *Alford v. Earle*, 2 Vern. 209; *Abney v. Miller*, 2 Atk. 599.

CHAPTER VIII. where a testator repeats those ceremonies which are essential to constitute a valid execution, with the avowed design of republishing the will.

What is not re-execution. It will be remembered that where a will has been properly executed, and the testator and witnesses trace over their former signatures with a dry pen, with the intention of re-executing the will, this is not a valid re-execution (*o*).

In a case where a will had been properly executed, and some years afterwards the testator and the witnesses wrote their names on the will again, it was inferred from the circumstances that this was not done with the intention of re-executing it (*p*).

Constructive republication. Republication in the ordinary sense of the term (sometimes called constructive republication) takes place where a testator makes a codicil to his will, or executes some testamentary instrument from which the inference can be drawn that he wishes it to be read as part of his will. Thus if the instrument is described as a "codicil to my will," (*q*), or if it is written on the same piece of paper as the will, and contains a reference to "my executors above named" (*r*) it operates as a republication of the will. A codicil has this effect even if it is expressed to be conditional on an event which does not happen (*s*). But if the testator, after making his will, executes another testamentary instrument containing nothing from which the inference above referred to can be drawn (as where the instrument is not described as a codicil and does not refer to the will in any way), its execution will not effect a republication of the will (*t*).

When republication of will includes codicil. Where a testator makes a will and alters it by one or more codicils, and then makes a codicil confirming the will but not referring to the previous codicils, the question arises whether he thereby confirms

(*o*) *In bonis Cunningham*, 29 L. J. P. 71. See above, p. 115. The point was not taken in *Wade v. Nazer*, 6 No. of C. 46.

(*p*) *Dunn v. Dunn*, L. R., 1 P. & D. 277.

(*q*) *Acherley v. Vernon*, 3 Br. P. C. 85; *Potter v. Potter*, 1 Ves. sen. 437; *Pigott v. Waller*, 7 Ves. 98; *Goodtitle v. Meredith*, 2 M. & Sel. 5; *Barnes v. Crowe*, 1 Ves. jun. 486; *Skinner v. Ogle*, 9 Jur. 432; *Hughes v. Turner*, 3 My. & K. 666; *Rowley v. Eyton*, 2 Mer. 128 (as corrected 45 Ch. D. 637); *Re Taylor*, 57 L. J. Ch. 430. See also *Doe v. Davy*, Cowper, 158; *Gibson v. Montfort*, 1 Ves. sen. 485.

(*r*) *Serocold v. Hemming*, 2 Lee Eccl. R. 490. In *In bonis Terrible*, 1 Sw. & Tr. 140, even slighter evidence than this was held sufficient to connect the memorandum with the will.

(*s*) *In bonis Da Silva*, 30 L. J. P. 171.

(*t*) *Re Smith*, 45 Ch. D. 632. The statement contained in the earlier editions of this work that under the old law the mere execution of a codicil operated as a republication of the will (cited with approval by Sir H. J. Fust in *Skinner v. Ogle*, 9 Jur. 432) must be read in connection with the rule that the effect of republication was to pass after acquired lands, unless a contrary intention appeared.

them also. Mr. Jarman points out (*u*) that “it is necessary to bear in mind that every codicil is a constituent part of the will to which it belongs; for in a general and comprehensive sense, a will consists of the aggregate contents of all the papers through which it is dispersed; and, therefore, where a testator in a codicil refers to and confirms a revoked will, it is not necessarily to be inferred that he means to set up the will (using the word in its special and more restricted sense) in contradistinction to, and in exclusion of, any intermediate codicil or codicils which he may have engrafted on it. He is rather to be considered as confirming the will with every codicil which may belong to it; and accordingly, in a case (*v*) where a person made his will, and afterwards executed several codicils thereto, containing partial alterations of and additions to the will; and by a further codicil, referring to the will by date, he changed one of the trustees and executors, and in all other respects expressly confirmed the will, this confirmation of the will was held not to revive the parts of it which were altered or revoked by the preceding codicils: Sir R. P. Arden, M.R., observing that if a man ratifies and confirms his last will, he ratifies and confirms it with every codicil that has been added to it.”

So in *Green v. Tribe* (*w*), where the testatrix made a codicil by which she revoked certain gifts contained in her will, and afterwards made a second codicil confirming her will, but not referring to the first codicil, it was held that the second codicil confirmed the will as modified by the first codicil.

In *Follett v. Pettman* (*x*), the testator made two codicils, each confirming the will, and then made a third codicil, by which he confirmed his will “except as altered by” the first codicil: it was held by Kay, J., that no intention to revoke the second codicil was shewn.

On the other hand, in *McLeod v. McNab* (*y*), where the confirmation of the will was expressly made subject to the alterations contained in a second codicil, this, combined with various indications that the testator considered the first codicil as superseded, was held to shew an intention on the part of the testator to revoke the first codicil.

In one case in the Ecclesiastical Court it was held, that the mere

(*u*) First ed. p. 172.

(*v*) *Crosbie v. Macdowal*, 4 Ves. 610; see also *Gordon v. Lord Reay*, 5 Sim. 274, stated ante, p. 129; *Wade v. Nazer*, 12 Jur. 188; *In bonis De la Saussaye*, L. R., 3 P. & D. 42; *Follett v. Petman*,

23 Ch. D. 337; *Re Vyvyan*, [1883] W. N. 47.

(*w*) 9 Ch. D. 231.

(*x*) 23 Ch. D. 337.

(*y*) [1891] A. C. 471.

CHAPTER VIII. fact of the testator ratifying his will and certain specified codicils, did not of itself amount to an implied revocation of other codicils not so specified (z). But, in another case, the Court arrived at a different conclusion, on the comparison of the contents of all the instruments, and looking at the conduct of the testatrix in relation to them (a).

Burton v. Newbery.

The question whether a codicil confirming the testator's will also confirms an intermediate codicil, was discussed by Jessel, M. R., in *Burton v. Newbery* (b). But the question in that case was simply whether the second codicil gave validity to a gift in the first codicil which was void by reason of the legatee being an attesting witness. It is submitted that the decision was erroneous, because the first codicil was clearly part of the will, and that the cases on the incorporation of unattested or otherwise invalid testamentary papers had nothing to do with the point. It is clear from *Crosbie v. Macdoul* and *Green v. Tribe*, that the mere fact that the testator describes his will by a reference to its original date, does not exclude the inference that the will thus referred to is the will as modified by a previous codicil (c). In *Burton v. Newbery* the effect of the second codicil was either to republish the will and the first codicil, or to republish the will and revoke the first codicil. To hold that it had the latter effect would be to run counter to *Crosbie v. Macdoul* and other undoubted authorities.

Where evidence of animus admissible.

Where a testator makes a will and codicil, and afterwards re-executes the will without referring to the codicil, the question arises whether this revokes the codicil. It seems that in such a case parol evidence is admissible to shew quo animo the will was republished, and thus to shew that the testator could not have intended to revoke the codicil (d) : as for example if his object in re-executing the will is to give effect to some alterations in it (e).

III.—Effect of Republication.—The effect of republication, as a general rule, is to make the will bear the date of republication. Thus in *Doe v. Walker* (f), where the testator, in February, 1838, executed a codicil confirming his will, executed in February, 1837, Parke, B., said : “ It is clear that the will, so republished by the codicil, and altered by it, together with that codicil, constituted a new will of the date of the codicil.” Consequently the provisions of

(z) *Smith v. Cunningham*, 1 Ad. 448.

(a) *Greenough v. Martin*, 2 Ad. 239.

(b) 1 Ch. D. 234, stated above, p. 129.

(c) The decision in *Burton v. Newbery* seems to be approved of in *French v.*

Hoey, [1899] 2 Ir. R. 472.

(d) *Upfill v. Marshall*, 3 Curt. 636 ;

Wade v. Nazer, 1 Rob. 627.

(e) *In bonis Rawlins*, 48 L. J. P. 64.

(f) 12 M. & W. 591.

the Wills Act applied to it. So in *Re Fraser (g)*, where there were several codicils, it was said by the C. A. : "The effect of this is to bring the will down to the date of the [last] codicil, and effect the same disposition of the testator's estate as if the testator had at that date made a new will, containing the same dispositions as the original will, but with the alterations introduced by the various codicils."

The doctrine of republication under the old law was of considerable importance, because by means of it, lands of inheritance acquired by a testator since the execution of his will, were often brought within the operation of any general or residuary devise contained in the will.

Effect on
residuary
devise.

For this purpose the operation of the devise was brought down to the date of the codicil (*h*). And the same principle applied to a devise of estates within a certain locality : thus if a testator devised all his lands in the county of Kent, and after the execution of his will purchased other lands in that county, and then made a codicil attested by three witnesses, the intermediately-acquired lands (not being otherwise disposed of by such codicil) passed under the will (*i*).

But of course the operation of a codicil to extend the devise in a will, made before 1838, to intermediately-acquired lands, might be negated by the contents of the codicil itself indicating a contrary intention (*j*).

Contrary
intention.

"In regard to specific devises," Mr. Jarman remarks (*k*), "the principle that the will speaks from the date of the republication, is to be received with more caution and reserve. It is clear, however, that the devise of a particular property republished by the re-execution of the will, or the execution of a codicil, will, even under the old law, comprise a new estate in that property intermediately-acquired by the testator, and falling within the terms of

Effect on
specific de-
vise.

(*g*) [1904] 1 Ch. 726; *Re Taylor*, [1909] W. N. 59.

(*h*) See above, p. 200; *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Hulme v. Heygate*, 1 Mer. 285; *Williams v. Goodtitle*, 10 B. & C. 895. If, however, the codicil referred to the land devised by the will in such a way as to shew that the testator did not have the after-acquired land in his mind, the republication did not operate to pass it: *Bowes v. Bowes*, 2 Bos. & P. 500; *Monypenny v. Bristow*, 2 R. & My. 117; *Hughes v. Turner*, 3 My. & K. 666. Compare *Re Taylor*, post. The doctrine was not of so much

importance with respect to wills of personal estate, inasmuch as a residuary bequest, even under the old law, embraced all property of that kind of which the testator died possessed.

(*i*) *Beckford v. Parnecott*, Cro. El. 493; *Barnes v. Crowe*, 1 Ves. jun. 486; 4 Br. C. C. 2; *Yarnold v. Wallis*, 4 Y. & C. 160; *Doe d. York v. Walker*, 12 M. & Wels. 591; and see 1 Wms. Saund. 278, n.

(*j*) See the passage quoted from Mr. Jarman and the cases cited supra, p. 197, n. (*m*), and the comments thereon in the 4th edition of this work.

(*k*) First edition, p. 180.

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the republished devise. As where a testator, by a will made before 1838, devised a leasehold estate, afterwards renewed the lease, and then republished the will, it was held that the renewed lease passed under the devise" (*l*).

According to some modern cases, however, there is little or no difference between a general and a specific devise, so far as the effect of republication is concerned. Thus in *Re Champion* (*m*), the testator specifically devised his freehold cottage and the land thereto belonging, which he described as being "now in my own occupation"; he afterwards purchased two fields adjoining the cottage, and occupied the whole until some years later, when he made a codicil confirming his will: it was held that the two fields passed by the devise.

When subject
of gift is
changed.

Mr. Jarman continues (*n*): "Republication by codicil or otherwise, however, did not under the old law extend a specific gift in the will to property which that gift was not originally intended to embrace, though answering to the same description. Thus, if a testator by a will made before the year 1838, devised his estate called Blackacre, or bequeathed his horse called Bob, and afterwards sold the estate or horse and bought another of the same name, a subsequent codicil made before the year 1838, did not by its republishing force make the devise or bequest extend to the new purchase."

Whether the same rule applies since the Wills Act, does not seem to have been decided (*o*); the question as to the disposition of after-acquired property has generally arisen in connection with sect. 24 of the Wills Act (*p*).

Revoked or
adeemed
legacy.

Mr. Jarman continues (*q*): "So it has been repeatedly held that a legacy to a child, which has been adeemed or satisfied by a subsequent advancement to the legatee, is not revived by a constructive republication of the will by means of a codicil, such codicil not

(*l*) *Coppin v. Fernyhough*, 2 Bro. C. C. 292. See also *Carte v. Carte*, 3 Atk. 180; *Alford v. Earle*, 2 Vern. 209; *Jackson v. Hurlock*, 2 Ed. 263. It is not clear whether the decision of Bacon, V.-C., in *Wedgwood v. Denton*, L. R., 12 Eq. 290, went on the effect of the republication or of s. 24 of the Wills Act. The case is referred to ante, p. 164.

(*m*) [1893] 1 Ch. 101. The principle of this decision was followed in *Re Rayer*, [1903] 1 Ch. 685. Without questioning the correctness of either decision, it may be pointed out that the authorities cited by North, J., in *Re Champion*, relate to the effect of republication on a general devise. In the

case of a specific devise its effect seems to have been more restricted. *Re Champion* is also referred to in connection with the effect of words of description, in Chap. XXXV.

(*n*) First edition, p. 180.

(*o*) In *Macdonald v. Irvine*, 8 Ch. D. 101, the newly-purchased property did not answer the description of the property sold. In *Re Pilkington's Trusts*, 6 N. R. 246, the decision does not seem to have turned on the question of republication: Chap. XXX. The question in all cases seems to be one of intention: see *Re Champion*.

(*p*) Post, Chap. XII.

(*q*) First edition, p. 181.

indicating an intention to revive the legacy, though containing an express confirmation of the will in the usual general terms" (r). This doctrine is clearly settled:—"It is very true that a codicil republishing a will makes the will speak as from its own date for the purpose of passing after-purchased lands, but not for the purpose of reviving a legacy revoked, adeemed or satisfied. The codicil can only act upon the will as it existed at the time; and, at the time, the legacy revoked, adeemed, or satisfied formed no part of it" (s).

Mr. Jarman continues (t): "The same principle, or course, applies to the objects of gift: it is clear, therefore, that a codicil does not, by its republishing operation, revive a devise or bequest, the object of which has previously died in the testator's lifetime. Thus, if a testator devises lands to his nephew John, who dies in the testator's lifetime, and he afterwards has another nephew of the same names the republication of the will would be inoperative to carry the property to the second nephew John" (u).

Object of gift.

The fact that the bequest was to "A., his executors, administrators and assigns" makes no difference (v).

"The effect of republication," says Mr. Jarman (w), "can never extend further than to give the words of the will the same force and operation as they would have had if the will had been executed at the time of republication: it cannot invest with a devising efficacy expressions which originally had none" (x). And although it is true that a codicil confirming a will makes the will for many purposes to bear the date of the codicil, yet this rule is subject to the limitation that the intention of the testator be not defeated thereby. If, therefore, the testator, in making his will, obviously means its provisions to apply to a state of circumstances existing at its date, republication will not make its provisions apply to the state of

Republication does not cure defect of expression in will.

(r) *Izard (Irod) v. Hurst*, Freem. 224; *Monck v. Lord Monck*, 1 Ba. & Be. 298; *Booker v. Allen*, 2 R. & My. 270; *Powys v. Mansfield*, 3 My. & Cr. 376; *Montague v. Montague*, 15 Bea. 565; *Hopwood v. Hopwood*, 7 H. L. C. 728; *Sidney v. Sidney*, L. R., 17 Eq. 65. See also *Drinkwater v. Falconer*, 2 Ves. sen. 623; *Crosbie v. Macdoul*, 4 Ves. 610; *Cowper v. Mantell*, 22 Bea. 223.

(s) Per Lord Cottenham, *Powys v. Mansfield*, 3 Myl. & Cr. at p. 376; cited with approval in *Hopwood v. Hopwood*, 7 H. L. C. 728. It was somewhat doubtful under the old law whether lands of which a specific devise in fee had lapsed by the decease of the devisee

in the testator's lifetime, passed by a residuary devise in the republished will. See *Doe v. Sheffield*, 13 East, 526, and *Williams v. Goodtitle*, 10 Barn. & Cres. 895, and the comments on those cases in the 4th edition of this work.

(t) First edition, p. 182.

(u) See *Drinkwater v. Falconer*, 2 Ves. sen. 626; *Doe v. Kett*, 4 T. R. 601. The case of *Perkins v. Micklethwaite*, 1 P. W. 275, must be referred to the express terms of the codicil.

(v) *Hutcheson v. Hammond*, 3 Br. C. C. 128.

(w) First edition, p. 182.

(x) *Lane v. Wilkins*, 10 East, 241.

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circumstances existing at the date of the codicil (y). To this principle may be referred the decision in *Re Taylor* (z). There the testatrix, a married woman, made a will in general terms which was obviously intended to be merely an exercise of a power of appointment over property comprised in her marriage settlement; on the death of her husband she became entitled to real and personal estate, and made a codicil disposing of the real estate: it was held that although this operated as a confirmation of the will, it did not alter its construction or scope; it followed that the personalty was undisposed of.

It seems that if a testator executes a codicil republishing his will, its effect is the same whether he expressly confirms his will or not (a).

Lapse of residuary devise or bequest.

"If the residuary devise contained in a will has itself lapsed, of course the republication of the will is inoperative to impart new efficacy to the devise, as well where the lapse affects an aliquot share only of the residue, as where it embraces the entirety. Thus, a testator devise the residue of his lands to A., B., and C., as tenants in common in fee, and A. dies, and then the testator makes a codicil to his will, by the effect of which the will is republished, he would nevertheless die intestate as to one-third, since the subsisting devise, which originally embraced two-thirds only, could never, by the mere effect of the republication, be expanded into a gift of the entirety" (aa).

And the rule is the same in the case of a residuary bequest of personalty (b).

Where a will, made since the act, is so worded as to exclude after-acquired lands from a general devise, a codicil republishing the will has no more effect in altering the effect of the general devise, than it would have had if both instruments had been subject to the old law (c).

Where exception from residuary gift.

When property is excepted from a residuary bequest, and specifically disposed of, and the specific bequest fails by lapse or otherwise, the property, as a general rule, falls into the residue under the doctrine of *Blight v. Hartnoll* (d). But if the specific bequest fails

(y) See *Bowes v. Bowes* and other cases cited ante, p. 201; *Doe d. Bid-dulph v. Hole*, 15 Q. B. 848; *Stilwell v. Mellersh*, 20 L. J. Ch. 356; *Mount-cashell v. Smyth*, [1895] 1 Ir. R. 346; *Re Moore*, [1907] 1 Ch. 315.

(z) 57 L. J. Ch. 430; *Du Houmeline v. Sheldon*, 19 Bea. 389, was a similar case.

(a) See per Wigram, V.-C., in *Humble v. Shore*, 1 H. & M. 551, n.; *Re Taylor*, 57 L. J. Ch. 430. As to the effect of an express confirmation when the question

of implied revocation arises, see ante, p. 190.

(aa) Mr. Jarman, 1st edition, p. 185. (b) See *Skrymsker v. Northcote*, 1 Sw. 566; *Re Wood's Will*, 29 Bea. 236. As to the effect of directing that a share which has lapsed, or the gift of which has been revoked, shall fall into residue, see Chap. XXIX.

(c) *Re Farrer's Estate*, 8 Ir. C. L. 370. (d) 23 Ch. D. 218.

by the death of the legatee, and the testator afterwards republishes the will, the effect of this is to exclude the doctrine, because the will is then read as if the testator had excepted the property from the residuary bequest without making any disposition of it (*e*).

It will be remembered that a will executed before January 1, 1838, is subject to the provisions of the Wills Act if it has been republished since that day (*f*).

Application of Wills Act to will made before 1838.

The doctrine of republication was formerly of importance in the case of wills made by married women, because under the old law a married woman had no general testamentary capacity; but the law has been recently altered in this respect (*g*).

The effect of republication in giving validity to a legacy which was originally void by reason of the legatee being an attesting witness to the will, has been already referred to (*h*).

The application of the doctrine of republication to appointments under powers is considered elsewhere (*i*).

It sometimes happens that after a will has been made, a statute is passed which affects the dispositions of the testator, and that he afterwards executes a codicil so as to republish the will. The question then arises whether the will is to be deemed to have been made since the passing of the statute. In *Re Elcom* (*j*), the will was made before, and the codicil after, the passing of Malins's Act, and it was held that the will was not an instrument "made after 31st December, 1857," within the meaning of the act.

Where statutory alteration has been made after execution of will.

In *Re Rayer* (*k*), the will was made before, and the codicil after, the passing of the Customs, &c., Act, 1888, by which legacy duty was abolished in respect of annuities charged on land and other duties substituted; by his will the testator had directed certain annuities charged on land to be paid without any deduction except for legacy duty and income tax: it was held that by republishing his will the testator must be taken to have intended the annuitants to pay the substituted duties.

"The doctrine of republication," as Mr. Jarman remarks, "has lost much of its interest under the statute 1 Vict. c. 26, not, indeed, by the effect of the provision which dispenses with publication as part of the ceremonial of execution (though this may seem to render

Republication how far affected by the Wills Act.

(*e*) *Re Fraser*, [1904] 1 Ch. 726.

(*f*) Wills Act, s. 34. *Doe v. Walker*, ante, p. 200; *Lady Langdale v. Briggs*, 8 D. M. & G. 391.

(*g*) Ante, p. 58.

(*h*) Ante, p. 94.

(*i*) Chap. XXXIII.

(*j*) [1894] 1 Ch. 303.

(*k*) [1903] 1 Ch. 685.

CHAPTER VIII. the term *re*-publication scarcely appropriate (*l*)), but by the operation of the enactment, which makes the will speak, in regard to the subjects of disposition, from the death of the testator : and more especially of the provision, which extends a general or residuary devise to all the real estate to which the testator may happen to be entitled at his decease. . . . It is to be remembered, however, that with respect to the *objects* of gift, the statute leaves the pre-existing law untouched ; though, considering how slight an effect is produced by a republishing codicil in this respect (for we have seen that it does not revive a lapsed gift), this forms no very large exception to the remark, as to the diminished practical interest of the doctrine of republication, in connection with the new law " (*m*).

At the present day, however, the tendency of the Courts seems to be to give greater effect to republication than Mr. Jarman thought warranted by the old authorities.

Republica-
tion cannot
invalidate a
valid gift.

It would seem, on general principles, that if a testamentary gift is valid at the date of the will, it cannot be invalidated by mere republication of the will. In *Re Moore* (*n*) a testator gave property to a charity ; as the will was executed more than three months before his death, the gift took effect under the Charitable Donations and Bequests (Ireland) Act, 1844. The will was republished by a codicil made less than three months before the testator's death. It was held that the charitable gift was not invalidated.

(*l*) But see s. 34.

(*m*) First edition, p. 186. See as to the effect of republication of a will made under the old law by a codicil made since 1837 ; *Winter v. Winter*, 5 Hare,

306 ; *Doe d. York v. Walker*, 12 M. & Wels. 591 ; *Andrews v. Turner*, 3 Q. B. 177 ; *Skinner v. Ogle*, 9 Jur. 432 ; *Brooke v. Kent*, 3 Moo. P. C. C. 334.
(*n*) [1907] 1 Ir. R. 315.

CHAPTER IX.

GIFTS FOR ILLEGAL, SUPERSTITIOUS AND CHARITABLE PURPOSES.

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I.—Gifts for Illegal Purposes, &c.—A testator cannot, of course, devote any part of his property to an illegal object, either directly, or by means of a condition (*a*), or a secret trust (*b*).

Nor can a testator direct that his property shall not be occupied or used for a certain period. Thus in *Brown v. Burdett* (*c*), a testatrix devised buildings to trustees upon trust that they should be blocked up for twenty years; it was held that this direction was nugatory, and that there was an intestacy during the twenty years. So a direction to carry on a business for a certain number of years, without giving any one the benefit of the profits made that during period, is inoperative (*d*).

The effect of a direction by a testator that his heir at law or next of kin shall not take any part of his estate is considered elsewhere (*e*).

II.—Superstitious Uses.—About the period of the Reformation, statutes were passed to defeat or prevent dispositions of property to purposes which were then accounted superstitious (*f*). Thus the statute 1 Edw. 6, c. 14, declared the king entitled to all real (*g*) and certain corporate personal property theretofore disposed of for

(*a*) See Chap. XXXIX. As to the application of the doctrine of *cy-près* to bequests for illegal purposes, see post, p. 243.

(*b*) See Chap. XXIV.

(*c*) 21 Ch. D. 667.

(*d*) *Re Cameron*, 26 Ch. D. 19.

(*e*) Chap. XXI.

(*f*) See the statute 23 Hen. 8, c. 10 (repealed by the act of 1888), which related only to uses declared of land; and

the statute 1 Edw. 6, c. 14, the preamble of which refers to the "superstition and errors" which had been brought into men's minds "by devising and phantasying vain opinions of purgatory and masses satisfactory, to be done for them which be departed."

(*g*) See *Att.-Gen. v. Vivian*, 1 Russ. 226; *Att.-Gen. v. Fishmongers' Company*, 2 Beav. 151, 5 My. & Cr. 11.

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the perpetual finding of a priest, or maintenance of any anniversary or obit or other like thing, or of any light or lamp in any church or chapel. This statute affects previous dispositions only. But by the earlier statute 23 Hen. 8, c. 10, all uses thereafter declared of land (except for terms of not more than 20 years) to the intent to have obits perpetual, or the continual service of a priest or other like uses, were made void. There is no statute making superstitious uses void generally (i), and the latter statute does not relate to personality. But, as Mr. Jarman points out (ii): "Superstitious uses which are not within the letter of these statutes, are nevertheless void, by the general policy of the law; and, in such cases, if charity be not the object, but the design of the bequest be to secure a benefit to the testator himself (as to say masses for his soul, &c.), the testator's own representative (who would be entitled if there was no such gift), and not the Crown, would be let in" (j). And as this principle of English law applies to personal estate as well as to land, it will invalidate a bequest of personalty for masses or like purposes, made by a testator domiciled in England to persons resident in a foreign country in which the purposes are to be carried out, and where such gifts are allowed by law (k).

Secret trusts.

It has been decided, that devisees may be compelled to disclose whether they take subject to a secret trust of this nature (l).

Protestant dissenters.

It is clear, that not only is a bequest to the poor ministers of Protestant dissenters good, but one having for its object the

(i) Per Sir W. Grant, *Cary v. Abbot*, 7 Ves. 495.

(ii) First edition, p. 188.

(j) *West v. Shuttleworth*, 2 My. & K. 684; *R. v. Lady Portington*, 3 Salk. 334; *Croft v. Evetts*, Moore, 784. See also *Re Blundell's Trusts*, 30 Beav. 360, better reported 31 L. J. Ch. 52; *Heath v. Chapman*, 2 Drew. 417; *Att.-Gen. v. Fishmongers' Company*, 2 Beav. 151, 5 M. & Cr. 11. Including the souls of others with his own in the intended benefit will not save the bequest, see s. cc. In *West v. Shuttleworth* there was a residuary bequest, and yet the void pecuniary legacies were held to belong to the next of kin. On this point, see *Shanley v. Baker*, 4 Ves. 732; and observe that in *West v. Shuttleworth*, the residuary legatees made no claim to the void legacies, and in fact supported the bequest of them. If the superstitious use had charity for its object, it would be executed cy-près, see *Cary v. Abbot*, 7

Ves. 495, and per Lord Eldon, 19 Ves. 487. But it is not clear that any use (except of the kind mentioned in the stat. 1 Edw. 6) would now be held void solely as being superstitious. In *Thorn-ton v. Howe*, 31 Beav. 14, Lord Romilly held that even a trust for propagating the sacred writings of Joanna Southcote would be enforced by the Court. Those writings aver that Joanna Southcote was with child by the Holy Ghost, &c., &c., delusions almost identical with those which in *Smith v. Tebbitt*, L. R., 1 P. & D. 398, were held to render a woman possessed by them incapable of making a will.

(k) *Re Elliott*, 39 W. R. 297.

(l) *R. v. Lady Portington*, 1 Salk. 162, 1 Eq. Ca. Ab. 96, pl. 6; see further as to secret trusts for charitable purposes, post, pp. 263 et seq. See as to superstitious uses, Duke Char. Uses, 106, 4 Rep. 104, Cro. Jac. 51, 1 Eq. Ca. Ab. 95, pl. 1, et seq. and Shelf. Ch. Us. 89, where the early cases are collected.

propagation of their religious opinions is also valid ; provided that such opinions, although at variance with the doctrines of the Established Church, are not contrary to law (*m*) ; thus bequests to an Unitarian chapel (*n*), or for the benefit of poor Irvingite ministers (*o*), or to the minister of a specified Baptist chapel (*p*), are valid.

Before the statute 2 & 3 Will. 4, c. 115, bequests for the propagation of the Roman Catholic religion were unlawful (*q*) ; but sect. 1 of that act, after noticing the acts in favour of Protestant dissenters, and a Scotch act imposing penalties on Roman Catholics ; and reciting, that notwithstanding the provisions of various acts passed for the relief of His Majesty's Roman Catholic subjects, doubts had been entertained whether it were lawful for His Majesty's subjects professing the Roman Catholic religion in Scotland to acquire and hold as real estate the property necessary for religious worship, education, and charitable purposes, and that it was expedient to remove all doubts respecting the right of His Majesty's subjects professing the Roman Catholic religion in England and Wales to acquire and hold property necessary for religious worship, education, and charitable purposes, enacts, " That His Majesty's subjects professing the Roman Catholic religion, in respect of their schools, places for religious worship, education, and charitable purposes in Great Britain, and the property held therewith, and the persons employed in or about the same, shall, in respect thereof, be subject to the same laws as the Protestant dissenters are subject to in England in respect to their schools and places for religious worship, education and charitable purposes, and not further or otherwise." By sect. 3, the act is not to extend to any suit actually pending, or commenced, or any property then in litigation, in any Court in Great Britain (*r*).

Roman Catholic Charities Act, 1832.

Roman Catholics placed on same footing as Protestant dissenters in respect of their schools, churches, &c.

(*m*) *Att.-Gen. v. Hickman*, 2 Eq. Ca. Ab. 193 ; *West v. Shuttleworth*, 2 My. & K. 684 ; and see statutes 18 & 19 Vict. c. 81, ss. 2, 3, and c. 86, s. 2. In *Doe v. Hawthorn*, 2 B. & Ald. 96, Abbott, J., afterwards Lord Tenterden, said, that the trust there in question of a chapel for the use of a congregation of Protestants " assembling under the patronage of the trustees of the late Countess of Huntingdon's College," was either a superstitious use within 23 Hen. 8, c. 10, or a charitable use within 9 Geo. 2, c. 36. But as to the former alternative it is notorious that the Court of Chancery unhesitatingly entertains suits for carrying into effect trusts of places of worship belonging to Protestant Dissenters. The principles on which it

deals with such trusts are stated with great fulness and perspicuity by Lord Eldon, in *Att.-Gen. v. Pearson*, 3 Mer. 353, which bears more immediately on the position of Unitarians, as to whom see now 7 & 8 Vict. c. 45, and of whom Lord Campbell said, 2 H. L. Ca. 863, that he had no doubt they would now on most occasions be considered as Protestant Dissenters.

(*n*) *Shrewsbury v. Hornby*, 5 Hare, 406 ; *Re Barnett*, 29 L. J. Ch. 871.

(*o*) *Att.-Gen. v. Lawes*, 8 Hare, 32.

(*p*) *Att.-Gen. v. Cock*, 2 Ves. 273.

(*q*) *Cary v. Abbot*, 7 Ves. 490. See also 4 Ves. 433, 6 Ves. 566, 1 Ba. & Be. 145 ; *Gates v. Jones*, cit. 2 Vern. 266.

(*r*) See also 23 & 24 Vict. c. 134.

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Effect of act.

It has been held that the act is retrospective, i.e., that it applies to the will of a testator who died before its passing (s); and also, that it authorises a bequest for the promotion of the Roman Catholic religion, as it places persons of this persuasion on the same footing as Protestant dissenters, the diffusion of whose religious tenets (as already observed) may be the subject of a valid trust. It is settled, however, that the act has no effect in rendering valid gifts to superstitious uses, as legacies to priests for offering masses for the repose of the testator's soul, &c. (t); nor, it is presumed, would it render valid such a trust as that which was the subject of discussion in *De Themmines v. De Bonneval* (u), namely, for printing and publishing a book which taught that the Pope had in all ecclesiastical matters a supremacy which was paramount even to the authority of the temporal sovereign. The case arose before the statute referred to, but Sir J. Leach rested his decision entirely on the ground that to allow such a publication was against public policy.

Roman
Catholic
Charities Act,
1860.

The Roman Catholic Charities Act, 1860, in effect provides that no lawful charitable trust for the exclusive benefit of Roman Catholics shall be invalidated by the addition of a superstitious trust, but that in every such case the Chancery Division may apportion the property so that part of it may be subject to the lawful trust and the residue applied to a lawful charitable trust for the benefit of Roman Catholics.

Jews.

Jews also are now by statute 9 & 10 Vict. c. 59, placed on the same footing as Protestant dissenters (v).

Law of
Ireland.

It may be mentioned that in Ireland it is lawful for a testator to bequeath money for masses for the souls of the dead (w). Such a bequest is a charitable gift, even if there is no direction that the

(s) *Bradshaw v. Tasker*, 2 My. & K. 221; and see *Re Michel's Trusts*, 28 Beav. 39; but Sir E. Sugden questioned this decision, 1 D. & War. 380.

(t) *West v. Shuttleworth*, 2 My. & K. 684; *Re Blundell's Trusts*, 30 Beav. 360; *Heath v. Chapman*, 2 Drew. 417. See also *Re Fleetwood*, 15 Ch. D. 594, 609.

(u) 5 Russ. 288.

(v) The cases relating to Jews before this act were, *Da Costa v. De Pas*, Amb. 228, 1 Dick. 258, 2 Ves. sen. 274, 276, 7 Ves. 76 (*De Costa v. De Paz*), 2 Sw. 487 n., 2 J. & W. 308; and *Straus v. Goldsmid*, 8 Sim. 614. The only difference between 2 & 3 Will. 4, c. 115, s. 1, and 9 & 10 Vict. c. 59, s. 2, is the omission from the latter enactment of the words, "and the persons employed

in or about the same." This enactment also has been held to be retrospective, *Re Michel's Trusts*, 28 Beav. 39.

(w) *Commissioners of Charitable Donations v. Walsh*, 7 Ir. Eq. R. 34; *Read v. Hodgins*, 7 Ir. Eq. R. 17; *Brennan v. Brennan*, Ir. R. 2 Eq. 321. As to gifts for the benefit of monastic orders, see *Sims v. Quinlan*, 16 Ir. Ch. 191, 17 Ir. Ch. 43; *Walsh v. Walsh*, Ir. R. 4 Eq. 396; *Kehoe v. Wilson*, 7 L. R. Ir. 10; *Liston v. Keegan*, 9 L. R. Ir. 531; *Murphy v. Cheevers*, 17 L. R. Ir. 205; *Carbery v. Cox*, 3 Ir. Ch. 231; *Roche v. M'Dermott*, [1901] 1 Ir. R. 394; *Burke v. Power*, infra note (z); *Cussen v. Hynes*, [1906] 1 Ir. R. 539; *Re Murphy*, ib. 505.

masses are to be said in public (*y*). But a bequest to members of a particular monastic order for saying masses is void (*z*). CHAPTER IX.

Apparently a similar rule would be applied to a bequest by a person resident in a British colony, for the purpose of performing ceremonies recognised by the religion or customs of the colony (*a*). British Colonies.

III.—Charitable Gifts.—Gifts of property for charitable purposes are in some respects favoured, and in others discouraged, by the law. Thus, while gifts of land by will for charitable purposes are subject to the statutory restrictions mentioned below (see sects. vi., x.), it is no objection to a gift of property for a charitable purpose that the purpose may last for ever, for gifts to charities are an exception to the general principle which forbids any disposition by which property is made inalienable for an indefinite period (*c*). Restrictions on gifts to charities.

Not void for perpetuity.

It must, however, be remembered that if a charitable gift is not immediate, but is made conditional upon a future and uncertain event, "it is subject to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises: if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*" (*d*). Thus a gift for the benefit of a volunteer corps, although charitable, is void if it is made to take effect "on the appointment of the next lieutenant-colonel" (*e*). Conversely, if property is given upon trust for a charity, with a proviso that on the happening of an event which may not take place within the limits allowed by the Rule against Perpetuities, the property is to go over to private individuals, this gift over is void (*f*). But property may be given to Charity A., subject to a proviso that on But may be void for remoteness.

(*y*) *O'Hanlon v. Logue*, [1906] 1 Ir. R. 247; *A.-G. v. Hall*, [1896] 2 Ir. R. 291, [1897] 2 Ir. R. 426, overruling *A.-G. v. Delaney*, Ir. R., 10 C. L. 104. Earlier cases are *Dillon v. Reilly*, Ir. R., 10 Eq. 152; *Phelan v. Slattery*, 19 L. R. Ir. 177; *Reichenbach v. Quin*, 21 L. R. Ir. 138; *Small v. Torley*, 25 L. R. Ir. 388; *Morrow v. McConville*, 11 L. R. Ir. 236; *Dorrian v. Gilmore*, 15 L. R. Ir. 69; *Healy v. A.-G.*, [1902] 1 Ir. R. 342; *Kehoe v. Wilson*, 7 L. R. Ir. 10; *Perry v. Tuomey*, 21 L. R. Ir. 480; *Brannigan v. Murphy*, [1896] 1 Ir. R. 418; *Richardson v. Murphy*, [1903] 1 Ir. R.

227.

(*z*) *Burke v. Power*, [1905] 1 Ir. R. 119.

(*a*) See *Yeap Cheah Neo v. Ong Cheng Neo*, L. R., 6 P. C. 381.

(*c*) *Thomson v. Shakespear*, 1 D. F. & J. 399; *Carne v. Long*, 2 D. F. & J. 75; *Re Clarke*, [1901] 2 Ch. 110.

(*d*) Per Lord Selborne, in *Chamberlayne v. Brockett*, L. R., 8 Ch. 211.

(*e*) *Re Lord Stratheden*, [1894] 3 Ch. 265. See also *Working Corporation v. Heather*, [1906] 2 Ch. 532.

(*f*) *Re Bowen*, [1893] 2 Ch. 491.

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the happening of a certain event it shall go over to Charity B., and the transfer will take effect notwithstanding the remoteness of the event (*g*).

So if property is effectually and absolutely devoted to charity, a direction that it shall not be applied in a certain way until after an event which may not happen within the period allowed by the Rule against Perpetuities, does not affect the validity of the gift (*h*).

Resulting trust.

Charities are to some extent an exception to the doctrine of resulting trusts, for if the income of property is given for charitable purposes, and the income afterwards increases so that there is a surplus beyond what is required, this is also treated as devoted to charity (*hh*).

What is a charity?

Stat. 43 Eliz. c. 4.

Charity has been defined to be a gift to a general public use (*i*). In order to ascertain what are charitable purposes, recourse is usually had to the preamble of the statute 43 Eliz. c. 4 (*j*), which enumerates various kinds of charity: viz. the relief of aged, impotent, and poor people (*k*), maintenance of sick and maimed soldiers and mariners, schools of learning (*l*), free schools and scholars in universities; repair

(*g*) *Christ's Hospital v. Grainger*, 1 Mac. & G. 460; *Re Tyler*, [1891] 3 Ch. 253. The editor ventures to think that the decision in *Re Tyler* is contrary to principle (Juridical Review, xviii. 140).

(*h*) *Martin v. Margham*, 14 Sim. 230; *Re Gyde*, 79 L. T. 261; *Re Swain*, [1905] 1 Ch. 669; *Wallis v. Sol.-Gen. for N. Z.*, [1903] A. C. 173.

(*hh*) See Chap. XXI.

(*i*) *Jones v. Williams*, Amb. 651. See also per Lord Cairns, *Goodman v. Mayor of Saltash*, 7 App. Ca. 633, 650. "Use" here means "benefit." See Sweet's Law Dictionary, s. v. *Use*.

(*j*) This statute is repealed by the Mortmain, &c., Act, 1888, but the preamble is set forth in the 13th section of the latter act, which in effect provides that references made in any enactment or document to charities within the meaning, purview and interpretation of the act of Elizabeth, "shall be construed as references to charities within the meaning, purview and interpretation of the said preamble." As to the meaning of the term "charitable purposes" in the Income Tax and Corporation Duty Acts, see *Reg. v. Comm. of Income Tax*, 22 Q. B. D. 296; s. c. s. n. *Commissioners for Special Purposes of Income Tax v. Pemsel*, [1891] A. C. 531;

Commissioners I. R. v. Scott, [1892] 2 Q. B. 152.

(*k*) *Nash v. Morley*, 5 Beav. 177; *Re Gosling*, 48 W. R. 300. See *Re Wall*, 42 Ch. D. 510, where a gift to persons "not under fifty years of age" was held to be a good charitable gift to "aged" persons within the meaning of this statute. But the benefit of such a charity is confined to persons who are in want: see post, p. 218. The use of the words "aged," "impotent," or "poor," is not necessary to a good charitable gift: see *Att.-Gen. v. Comber*, 2 Sim. & St. 93; *Powell v. Att.-Gen.*, 3 Mer. 48. In *Re Estlin*, 72 L. J. Ch. 687, a gift for the support of a Home of Rest for school teachers was held good, partly because it was for the benefit of impotent persons. But in *Re Good*, [1905] 2 Ch. 60, it was held that a gift for the benefit of "old" officers of a regiment meant "former" officers, and was therefore bad. As to the meaning of the term "poor," see *Att.-Gen. v. Duke of Northumberland*, 7 Ch. D. 745.

(*l*) *Att.-Gen. v. Nash*, 3 Br. C. C. 587; *Att.-Gen. v. Earl of Lonsdale*, 1 Sim. 105, post, p. 217; *Kirkbank v. Hudson*, 7 Pr. 212, and the cases on educational charities cited post. Of course an educational institution is not prevented from being a charity by the fact that it

of bridges, ports, havens, causeways (*m*) churches, sea-banks (*n*), and highways; education and preferment of orphans; the relief, stock, or maintenance for houses of correction; marriages of poor maids; supportation and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives (*o*); and aid or ease of any poor inhabitants, concerning payment of fifteens, setting out of soldiers, and other taxes.

Charity is not confined to the objects comprised in this enumeration; it extends to all cases within the spirit and intendment of the statute. Thus, gifts (*p*) for the erection of water-works for the use of the inhabitants of a town (*q*); to be applied for the benefit of a place (*r*), or for "charities and other public purposes in" a parish (*s*), or for the general improvement of a town (*t*), or for the establishment of a life-boat (*u*), or of a botanical garden (*v*); or museum (*w*); to the trustees and for the benefit of the British Museum (*x*); to the Royal, the Geographical, and the Humane, Societies (*y*); to the widows and orphans (*z*), or the poor inhabitants (*a*) of a parish ("poor" being construed those not receiving

involves instruction in a certain religious belief; *Dilworth v. Comm. of Stamps*, [1899] A. C. 99; *Bradshaw v. Tasker*, 2 My. & K. 221; *Walsh v. Gladstone*, 1 Ph. 290.

(*m*) *A.-G. v. Day*, [1900] 1 Ch. 31.

(*n*) *Wilson v. Barnes*, 38 Ch. D. 507.

(*o*) As in *A.-G. v. Ironmongers' Co.*, 2 Bea. 313 (s. c., 10 C. & F. 908, post, p. 235); *A.-G. v. Gibson*, 2 Bea. 317, n. Such a charity does not include prisoners for crime, as poachers: *Thrupp v. Collett*, 26 Beav. 125. A bequest for such a purpose is against public policy and void.

(*p*) Property acquired otherwise than by bounty (e.g., by taxation) may form the subject of a charity; it is not the source but the purpose alone that is the criterion: *Att.-Gen. v. Eastlake*, 11 Hare, 205; *Re St. Botolph Without Bishopsgate Parish Estates*, 35 Ch. D. 142.

(*q*) *Jones v. Williams*, Amb. 651; *Mayor of Faversham v. Ryder*, 5 D. M. & G. 350.

(*r*) *Att.-Gen. v. Earl of Lonsdale*, 1 Sim. 105; *Att.-Gen. v. Hotham*, T. & R. 209; *Att.-Gen. v. Webster*, L. R., 20 Eq. 483; *Wrexham Corporation v. Tamplin*, 28 L. T. 761.

(*s*) *Dolan v. Macdermot*, L. R., 5 Eq. 60, 3 Ch. 676; *Re Allen*, [1905] 2 Ch. 400.

(*t*) *House v. Chapman*, 4 Ves. 542; *Att.-Gen. v. Heelis*, 2 S. & St. 67; *Mitford v. Reynolds*, 1 Phil. 185.

(*u*) *Johnston v. Swann*, 3 Mad. 457.

(*v*) *Townley v. Bedwell*, 6 Ves. 194, where the testator had signified his expectation that the garden would be a public benefit. According to the report it would seem that the gift was held bad as being a gift of land for a charitable purpose; but Lord St. Leonards regarded the decision as grounded on the vagueness of the expression "public benefit": *Egerton v. Earl Brownlow*, 4 H. L. C. 242, sed qu.

(*w*) *Re Holburne*, 53 L. T. 212.

(*x*) *British Museum v. White*, 2 S. & St. 595. Compare an unreported case of *President of the United States v. Drummond*, cited 7 H. L. C. 155.

(*y*) *Beaumont v. Oliveira*, L. R., 6 Eq. 534, 4 Ch. 309.

(*z*) *Att.-Gen. v. Comber*, 2 S. & St. 93; *Thompson v. Corby*, 27 Beav. 649.

(*a*) *Att.-Gen. v. Clarke*, Amb. 422; see 14 Ves. 364. For other examples of charitable gifts for the benefit of poor persons, see *Waldo v. Caley*, 16 Ves. 206; *Gregory v. Att.-Gen.* 2 Bea. 366; *Baldwin v. Baldwin*, 22 Bea. 413; and the cases cited supra, p. 212, n. (*k*), and post, p. 217. As to a gift to the inhabitants of a place, see *Rogers v. Thomas*, 2 Kee. 8; *Goodman v. Mayor*

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parochial relief (*b*); or to trustees for the benefit of a parish (*c*); or to the churchwardens in aid of the poor's rate (*d*); or for providing a workhouse (*e*); to the widows and children of seamen belonging to a port (*f*); to "poor, credible, industrious persons, residing at A., with two children or upwards, or above fifty years of age, maimed or otherwise unable to get a living" (*g*); for the benefit of poor and aged persons who have done service to the cause of science (*h*); for preaching a sermon, keeping the chimes of the church in repair, playing certain psalms, and paying the singers in church (*i*); for building an organ gallery in a church (*j*), or repairing and ornamenting a chancel (*k*), or repairing a memorial window and mural monuments in a church (*l*), or repairing and keeping in repair a parish churchyard (*m*); or the burial grounds used by a religious sect (*n*) (including graves and headstones (*o*)); for endowing or erecting or equipping a hospital (*p*); for the reclamation of fallen women (*pp*); to a society formed principally for teaching poor children and nursing the sick (*q*); to a friendly society having for its object the relief of poverty (*r*); to

of *Saltash*, 7 App. Ca. 642, 650; *Re Christchurch Inclosure Act*, 35 Ch. D. 355, 370; *Re Norwich Town Close Estate*, 40 Ch. D. 298, 306.

(*b*) *Bishop of Hereford v. Adams*, 7 Ves. 324; *A.-G. v. Price*, 3 Atk. 109; *Att.-Gen. v. Clarke*, Amb. 422; *Att.-Gen. v. Wilkinson*, 1 Beav. 372; and see *Att.-Gen. v. Bovill*, 1 Phill. 762; *Att.-Gen. v. Corporation of Exeter*, 2 Russ. 45, 3 Russ. 395; *A.-G. v. Blizard*, 21 Bea. 233.

(*c*) *A.-G. v. Webster*, L. R., 20 Eq. 483; *Re St. Botolph*, 35 Ch. D. 142; *Re St. Stephen, Coleman Street*, 39 Ch. D. 492; *Re Garrard*, [1907] 1 Ch. 382 (gift to vicar and churchwardens to be applied as they think fit).

(*d*) *Doe v. Howells*, 2 B. & Ad. 744.

(*e*) *Webster v. Southey*, 36 Ch. D. 9 (lease); the decision to the contrary in *Burnaby v. Barsby*, 4 H. & N. 690, appears inconsistent with the current of authority, and cannot be relied on.

(*f*) *Powell v. Att.-Gen.*, 3 Mer. 48.

(*g*) *Russell v. Kellett*, 3 Sm. & Gif. 264. It was held first, that the gift pointed to individuals, and some having died before payment, that there could be no execution cy-près; but secondly, that the gifts were charitable, and did not pass to the representatives of those who, though they survived the testatrix, died before payment. The decision on the first point is probably

erroneous; see per Lord Herschell in *Re Rymer*, [1895] 1 Ch. at p. 32. See also *Bennett v. Honywood*, Amb. 708; *Mahon v. Savage*, 1 Sch. & L. 111, stated post, p. 220; and *Gregory v. Att.-Gen.*, 2 Bea. 366.

(*h*) *Weir v. Crum-Brown*, [1908] A.C. 162, stated more fully post, p. 226.

(*i*) *Turner v. Ogden*, 1 Cox. 316. See also *Durour v. Motteux*, 1 Ves. 320.

(*j*) *Adnam v. Cole*, 6 Beav. 353.

(*k*) *Hoare v. Osborne*, L. R., 1 Eq. 585.

(*l*) *Hoare v. Osborne*, sup.; *Re Rigley's Trust*, 36 L. J. Ch. 147. As to the meaning of ornaments of a church, see *Re Palatine Estate Charity*, 39 Ch. D. 54.

(*m*) *Re Vaughan*, 33 Ch. D. 187; *Re Douglas*, [1905] 1 Ch. 279; *Re Pardoe*, [1906] 2 Ch. 184.

(*n*) *Re Manser*, [1905] 1 Ch. 68.

(*o*) *Re Pardoe*, supra.

(*p*) *Pelham v. Anderson*, 2 Ed. 296, 1 Br. C. C. 444; *Att.-Gen. v. Kell*, 2 Bea. 575; *Re Unite*, 75 L. J. Ch. 163.

(*pp*) *Mahony v. Duggan*, 11 L. R. Ir. 260.

(*q*) *Cocks v. Mannors*, L. R., 12 Eq. 574.

(*r*) *Spiller v. Maude*, 32 Ch. D. 158, n.; *Re Lacy*, [1899] 2 Ch. 149. But see *Cunnack v. Edwards*, [1896] 2 Ch. 679, post, p. 241, n. (*n*).

found prizes for essays (*s*); for deserving literary men who have been unsuccessful (*t*); for letting out land to the poor at a low rent (*u*); for the increase and encouragement of good servants (*v*); for the benefit of ministers of any denomination of Christians (*w*); for the advancement of religion (*x*); for missionary objects (*y*); for the benefit, advancement, and propagation of education and learning in every part of the world (*z*); for the benefit of a regimental mess (*a*), or a volunteer corps (*b*), or a corps of commissioners (*c*); for the advancement of education in economic and sanitary science (*d*), or in law (*e*); for establishing and upholding an institution for the investigation and cure of diseases of quadrupeds and birds useful to man, and for maintaining a lecturer thereon (*f*); or for supporting societies having for their object the suppression and abolition of vivisection (*g*); or otherwise for the benefit of animals generally (*h*); or the encouragement of the practice of vegetarianism (*i*); and gifts in aid of the public revenue of the state (*j*); and finally, gifts for any purpose which is either for the public or general benefit of a place (*k*), or tends towards public religious instruction or

(*s*) *Farrer v. St. Catherine's College*, L. R., 16 Eq. 19.

(*t*) *Thompson v. Thompson*, 1 Coll. 395.

(*u*) *Crafton v. Frith*, 20 L. J. Ch. 198.

(*v*) *Loscombe v. Wintringham*, 13 Beav. 87.

(*w*) *Att.-Gen. v. Hickman*, 2 Eq. Abr. 193; *Att.-Gen. v. Gladstone*, 13 Sim. 7; *Att.-Gen. v. Cock*, 2 Ves. 273; *Att.-Gen. v. Lawes*, 8 Hare, 32; *Shrewsbury v. Hornby*, 5 Hare, 406; *Grieves v. Case*, 4 Br. C. C. 67, 2 Cox, 301, 1 Ves. jun. 548; *Milbank v. Lambert*, 28 Beav. 206; *Thorner v. Wilson*, 3 Drew. 245, 4 ib. 350; secus if it be to the person now minister, *semb. ib.* 351.

(*x*) *Re Manser*, [1905] 1 Ch. 68.

(*y*) *Re Kenny*, 97 L. T. 130, not following *Scott v. Brownrigg*, 9 L. R. Ir. 246. See *Allan's Executors v. Allan*, [1908] Ct. Sess. C. 807 (foreign missions).

(*z*) *Whicker v. Hume*, 14 Beav. 509, 1 D. M. & G. 506, 7 H. L. Ca. 124. "Learning" was taken to mean "being taught," not "knowledge," which would have been too indefinite.

(*a*) *Re Good*, [1905] 2 Ch. 60; *Re Donald's Estate*, [1909] W. N. 169. But a gift of a dwelling for the use of old officers of a regiment at a small rent during their life is not a good charitable gift; *ante*, p. 212, n. (*k*).

(*b*) *Re Lord Stratheden*, [1894] 3 Ch.

265. Compare *Re Stephens*, [1892] W. N. 140 (gift to National Rifle Association).

(*c*) *Re Clarke*, [1901] 2 Ch. 110.

(*d*) *Re Berridge*, 63 L. T. 470. As to gifts for educational purposes, see also *ante*, p. 212, n. (*l*).

(*e*) *Smith v. Kerr*, [1902] 1 Ch. 774.

(*f*) *London University v. Yarrow*, 23 Beav. 159, 1 De G. & J. 72. And see *Marsh v. Means*, 3 Jur. N. S. 790.

(*g*) *Re Foveaux*, [1895] 2 Ch. 501.

(*h*) *Re Douglas*, 35 Ch. D. 472; see *Armstrong v. Reeves*, 25 L. R. Ir. 325. A gift for the general benefit of animals belonging to a particular class (e.g., dogs) is good, but not a gift for the support of particular animals, e.g., the testator's horses and hounds, *Re Dean*, 41 Ch. D. 552.

(*i*) *Re Cranston*, [1898] 1 Ir. R. 431; *Re Slatter*, 21 T. L. R. 295.

(*j*) *Thellusson v. Woodford*, 4 Ves. 227; *Nightingale v. Goubourn*, 5 Hare, 484, 2 Phil. 594; *Newland v. Att.-Gen.*, 3 Mer. 684; *Ashton v. Lord Langdale*, 4 De G. & S. 402.

(*k*) Per Lord Cottenham in *Att.-Gen. v. Aspinall*, 2 My. & Cr. 622, 623; *Att.-Gen. v. Corporation of Shrewsbury*, 6 Bea. 220; *Att.-Gen. v. Corporation of Carlisle*, 2 Sim. 437; *British Museum v. White*, 2 S. & St. 596; *Goodman v. Mayor of Saltash*, 7 App.

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Religious charities.

Advowson.

Foreign charity.

edification (*l*), although combined with other objects (such as a gift for the furtherance of Conservative principles and religious and mental improvement (*m*), or for ringing church bells in commemoration of the restitution of the monarchy (*n*)) have been respectively held to be charitable. And in the case of charitable gifts for religious purposes the Court makes no distinction between one sort of religion, or one sect, and another (*o*). Their promotion or advancement are all equally "charitable," provided their doctrines are not subversive of all religion, or all morality (*p*). It seems that even a gift for religious purposes generally, is *prima facie* valid (*q*). An advowson may be the subject of a charitable trust if it is to be held for the benefit of a certain place, such as a particular parish (*r*). But a simple devise of an advowson upon trust from time to time to present a fit and proper person to the living, is not a charitable trust (*s*). Whether such a trust would be made a charitable one by restricting the choice of incumbents to clergymen of a particular type of thought, or to members of a particular society, seems doubtful (*t*).

A charity may be created for the benefit of persons resident in

Cas. 633; *Wilson v. Barnes*, 38 Ch. D. 507; *Re Christchurch Inclosure Act*, 38 Ch. D. 520; *Re Norwich Town Close Estate Charity*, 40 Ch. D. 298; *Re Mann*, [1903] 1 Ch. 232; *Re Allen*, [1905] 2 Ch. 400.

(*l*) *Att.-Gen. v. City of London*, 1 Ves. jun. 243; *Powerscourt v. Powerscourt*, 1 Moll. 616; *Baker v. Sutton*, 1 Keen, 232; *Att.-Gen. v. Stepney*, 10 Ves. 22; *Townsend v. Carus*, 3 Hare, 257; *Lloyd v. Lloyd*, 2 Sim. N. S. 266; *Wilkinson v. Lindgren*, L. R., 5 Ch. 570; *Cocks v. Manners*, L. R., 12 Eq. 585, per Wickens V.-C.; *Re Lea*, 34 Ch. D. 528; *Commissioners, &c. v. Pemsel*, [1891] A. C. 531; *Re White*, [1893] 2 Ch. 41; *Re Darling*, [1896] 1 Ch. 50.

(*m*) *Re Scowcroft*, [1898] 2 Ch. 638; *Re Darling*, [1896] 1 Ch. 50 ("to the poor and the service of God"); *Re Sinclair's Trust*, 13 L. R. Ir. 150. *Re Lea*, 34 Ch. D. 528.

(*n*) *Re Pardoe*, [1906] 2 Ch. 184.

(*o*) See *Att.-Gen. v. Pearson*, 3 Mer. 353, *West v. Shuttleworth*, 2 My. and K. 684, and the other cases referred to, ante, p. 209, n. (*m*). The case of *Da Costa v. De Pas*, Amb. 228, is referred to post. A gift to a militant religious body (such as an anti-papery association) may be a good charitable gift; *Re Delmar Charitable Trust*, [1897] 2 Ch. 163.

(*p*) Per Romilly, M. R., *Thornton v. Howe*, 31 Bea. 19, 20. In *Briggs v. Hartley*, 19 L. J. Ch. 416, a legacy for the best essay on the Sufficiency of Natural Theology when treated as a Science, was held inconsistent with Christianity and void. But this would probably not be followed. In *Pare v. Clegg*, 29 Beav. 589, the doctrines of Robert Owen (as to which see also *Russell v. Jackson*, 10 Hare, 214) were held by Romilly, M. R., to be visionary and irrational, but not illegal as being irreligious or immoral. The Court is sometimes compelled to declare good as a charitable bequest what it deems of very doubtful public utility: per Lord Selborne, L. R. 16 Eq. 24.

(*q*) See *Arnott v. Arnott*, [1906] 1 Ir. R. 127, and cases cited supra, n. (*l*) and post, p. 234. The decision in *Grimond v. Grimond*, [1905] A. C. 124, turned on Scotch law.

(*r*) See *Re St. Stephen*, 39 Ch. D. 492; *Hunter v. Att.-Gen.*, [1899] A. C. 309, reversing the decision of the C. A. in *Re Hunter*, [1897] 2 Ch. 105. Lewis on Perpetuities, 693 seq.; Gray on Perpetuities, § 627.

(*s*) *Re Church Patronage Trust*, [1904] 1 Ch. 41, 2 Ch. 643.

(*t*) *Ibid*. Questioning the decision of the Court of Appeal in *Re Hunter*, [1897] 2 Ch. 105, supra, n. (*r*).

a foreign country (*u*), but the English Courts will not enforce its administration (*uu*).

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It has been said that "charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education and learning; trusts for the advancement of religion; and trusts for other purposes of general public utility, not falling under any of the preceding heads (*v*). But these divisions are not mutually exclusive, and there may be a charity for purposes which are both eleemosynary and ecclesiastical (*v*). On the other hand, it is not every object of public utility that constitutes a good charity (*x*). Indeed, it is difficult to lay down any principle as to what constitutes a valid charitable trust for purposes of general public utility. It has been held that a charitable trust may be created for providing the inhabitants, or a particular class of the inhabitants of a place, with a privilege of fishing, pasture, or turbary (*y*), or even generally for their benefit (*z*). So gifts in aid of the public revenue or local rates and other burdens are charitable (*a*). On the other hand, a trust may be void because its benefits are so limited that it amounts to a private charity (*b*), or because it is too indefinite and vague (*c*).

A charity may have a double purpose.

It is evident from the preceding examples that, to constitute a charity in the legal sense, the poor need not be (though they commonly are) its sole or especial objects (*d*); for example, a trust for the advancement of education or learning is a good charitable purpose, without being restricted to destitute persons (*e*). And

Charity need not be eleemosynary.

(*u*) *Re Geck*, 69 L. T. 819, where the older authorities (including *New v. Bonaker*, L. R., 4 Eq. 655) are referred to. See *Whicker v. Hume*, ante, p. 215, note (*z*).

(*uu*) Post, p. 235.

(*v*) See the argument of Sir J. Romilly, in *Morice v. Bishop of Durham*, quoted in *Re Macduff*, [1896] 2 Ch. p. 466, and paraphrased by Lord Macnaghten in *Commrs. for I. T. v. Pemsel*, [1891] A. C. at p. 583.

(*w*) *Re Perry Almshouses*; *Re Ross's Charity*, [1899] 1 Ch. 21, where the question arose as to the meaning of "ecclesiastical charity" in sect. 75 of the Local Government Act, 1894.

(*x*) *Re Macduff*, supra; *Re Foveaux*, [1895] 2 Ch. 501; *Re Good*, [1905] 2 Ch. 60.

(*y*) *Goodman v. Mayor of Saltash*, 7 A. C. 633, and cases there cited; *Re Christchurch Inclosure Act*, 38 Ch. D.

520.

(*z*) *Re Norwich Town Charity*, 40 Ch. D. 298; and see the cases on trusts for the benefit of a parish, ante, p. 214, note (*c*).

(*a*) Ante, p. 214, n. (*d*), p. 215, n. (*j*).

(*b*) Post, p. 223, n. (*h*).

(*c*) See *Morice v. Bishop of Durham*, *Vezey v. Jamson*, and other cases, cited post, p. 229. The case of *Browne v. Yeale*, 7 Ves. 50, n. would probably not be now followed; see 10 Ves. 27, 533, (per Lord Eldon); [1896] 2 Ch. p. 471 (per Rigby, L. J.).

(*d*) As to charities for poor persons, see post, p. 218.

(*e*) *Att.-Gen. v. Earl of Lonsdale*, 1 Sim. 109; *Kirkbank v. Hudson*, 7 Price, 213, and the cases cited ante, p. 215, notes (*z*) (*d*) (*e*). Compare *Re Estlin*, 72 L. J. Ch. 687 (Home of Rest for Teachers).

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obviously it would be no objection to a gift for a public purpose that it might incidentally benefit wealthy persons. But a gift the main object of which is to add to the income or resources of persons who are, or may be, in possession of a competence, is not charitable (*f*). In the popular sense of the word, however, "charity" connotes the idea of poverty, and this sometimes affects the construction of gifts which are obviously intended to be charitable, so that a gift for the benefit of a certain class of the inhabitants of a place may be construed to mean poor persons belonging to that class; thus a legacy to "the widows and orphans" of a certain place was held to mean the poor widows and orphans of that place (*g*).

Legacy may be charitable though payable at once to individuals.

A legacy payable once for all may be charitable, as well as one given for the creation of a perpetual trust; as, a legacy to the widows and orphans of a named place (*h*); or to six honest and sober clergymen that are not provided with a living of 40*l.* (*i*); such gifts could not in their nature have proceeded from motives of personal bounty to particular individuals.

Charities for poor persons generally.

A gift for the benefit of poor persons generally is a good charitable gift (*j*). And a gift for the benefit of one or more poor persons belonging to a certain locality, or to a certain station in life or vocation, to be selected in manner directed by the testator, is also a good charitable gift (*k*). So a bequest to form a pension or superannuation fund for "old and worn-out clerks" in the employment of a certain firm, is a good charitable gift, being for the benefit of a section of the public (*l*). But in order that a gift for the benefit of poor persons belonging to a certain class may be valid, it must be for the benefit of persons who are actually poor, and not for the benefit of the least wealthy of a wealthy class; therefore, a bequest for the benefit of "the poorest" of the testator's kindred cannot be applied for the benefit of any kindred who are not really

^r (*f*) *A.-G. v. Duke of Northumberland*, 7 Ch. D. at p. 752; *Re Macdruff*, [1896] 2 Ch. at p. 471. See also *Re Gassiot*, 70 L. J. Ch. 242, and *Re Good*, [1895] 2 Ch. 60. As to trade-unions, friendly societies, &c., see post, p. 223.

(*g*) *Att.-Gen. v. Comber*, 2 S. & St. 93; *Powell v. A.-G.*, 3 Mer. 48; *Thompson v. Corby*, 27 Bea. 649; *Re Dudgeon*, 74 L. T. 613. See *Liley v. Hey*, infra, p. 219; *Re Wall*, 42 Ch. D. 510, ante, p. 212, n. (*k*).

(*h*) *A.-G. v. Comber*, 2 S. & St. 93;

Russell v. Kellett, 3 Sm. & G. 264.

(*i*) *A.-G. v. Glegg*, Amb. 584.

(*j*) *A.-G. v. Matthews*, 2 Lev. 167; *A.-G. v. Rance*, cited Amb. 422.

(*k*) See the cases cited above, notes (*g*) (*h*) (*i*); *A.-G. v. Pearce*, 2 Atk. 87; *Baldwin v. Baldwin*, 22 Bea. 413. In *Att.-Gen. v. Brandreth*, 1 Y. & C., C.C. 200, it was held that the trustees had not exercised their discretion properly.

(*l*) *Re Gosling*, 48 W. R. 300; but see *Re Gassiot*, 70 L. J. Ch. 242.

poor (*m*). And persons in receipt of parochial relief are, *prima facie*, not entitled to share in a bequest for poor persons (*mm*).

In *Thomas v. Howell* (*n*), the testator bequeathed 200*l.* to each of ten poor clergymen of the Church of England, to be selected by his friend J. O.; if these were charitable legacies, they would have had to abate; Malins, V.-C., held that the legacies were not charitable, thinking apparently that as soon as the ten poor clergymen were selected by J. O., the legacies took effect in the same way as if their names had been inserted in the will; the V.-C. drew a distinction in this respect between a legacy payable at once, and a legacy for the maintenance of a permanent charity. This view, however, is contrary to the decision in *A.-G. v. Glegg* (*o*), and is, it is submitted, unsound.

In *Liley v. Hey* (*p*), the testator devised real estate to trustees upon trust out of the rents to make certain annual payments and to distribute the remainder amongst the families of twenty-four persons, named in the will, "according to their circumstances, as in the opinion of the said trustees, they may need such assistance." It was held by Wigram, V.-C., that this was not a devise for charitable purposes within the meaning of the Mortmain Act, and that the trust was good for so long a period as the Rule against Perpetuities would allow, by which he appears to have meant that it was good during the lives of the persons who took immediately on the testator's death. The decision has been questioned (*q*) on the ground that it is inconsistent with *Isaac v. Dejries* and *A.-G. v. Price*, but it is submitted that it may be supported on the theory that the testator meant the devise to be for the benefit of the persons designated by him who should be living at the time of his death, for the trust was not one of selection, but of distribution; the objects of it were designated by the testator himself and were

(*m*) *A.-G. v. Duke of Northumberland*, 7 Ch. D. 745, dissenting from dictum of Wickens, V.-C., in *Gillam v. Taylor*, *infra*.

(*mm*) *Ante*, p. 214, n. (*b*).

(*n*) L. R., 18 Eq. 198.

(*o*) *Supra*, note (*i*). The V.-C. stated that the legacy to sixty poor clergymen in *Att.-Gen. v. Baxter* (1 Eq. Ca. Abr. 96, pl. 9, 1 Vern. 248, s. c. *Att.-Gen. v. Hughes*, 2 ib. 105), was held not to be charitable. Lord Hardwicke's note of the decision is that it was good, because really a legacy to sixty particular ejected ministers to be named by Baxter, and "as if a legacy of those sixty individuals" (7 Ves. 76); but

that appears to be in answer to the argument (1 Vern. 249) that "to suffer them to take by such a devise was almost to make a corporation of them, and would keep them in a perpetual schism." And as to the decision of the Court below that the clergyman could not take, elsewhere (1 Ves. sen. 537) he says of the case, "The Court held the charitable use was not contrary to law."

(*p*) 1 Ha. 580. See *Re Good*, [1905] 2 Ch. 60, *ante*, p. 212, n. (*k*).

(*q*) *Gillam v. Taylor*, L. R., 16 Eq. 581. The judgment of Wickens, V.-C., in this case has in its turn been criticised by Jessel, M.R., in *A.-G. v. Duke of Northumberland*, 7 Ch. D. 745.

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not necessarily destitute or infirm persons (*r*). If, on the other hand, the testator meant to create a trust for the benefit of the descendants ad infinitum of the persons named by him, then it would have been void as a perpetuity (*s*).

Poor
relations.

A gift for the perpetual benefit of the poor relations of the testator or any other person is a good charitable gift (*t*), subject, of course, to the rule that the persons entitled to participate in it must be actually, and not merely relatively poor, and that if there is more than enough to provide for the persons so entitled, the surplus must be applied in some manner to be determined by the Court (*u*).

An immediate gift of property for the testator's poor relations stands on a different footing, and it is not easy to extract a definite principle from the decisions. According to several old cases, such a gift is not charitable, but is saved from being void for uncertainty by being confined to the testator's statutory next-of-kin, and this even where the selection and distribution are to be made by a person designated for the purpose by the testator (*v*). According to other authorities, such a gift is a charitable bequest (*w*), and if there is a person designated by the testator to distribute the legacy, he may select any of the testator's poor relations, however remote (*x*).

Mahon v.
Savage.

In *Mahon v. Savage* (*y*) a testator bequeathed to his executor 1,000*l.* to be distributed among his (the testator's) poor relations, or such other objects of charity as should be mentioned in his private instructions. He left no instructions; and it was held by Lord Redesdale that the testator's design was to give to them as objects of charity, and not merely as relations; that a relation within the statute who had become rich before distribution was not entitled to a share, and that a share was not transmissible to representatives

(*r*) See *Re Gassiot*, 70 L. J. Ch. 242; *Bennett v. Honywood*, Amb 708.

(*s*) Compare *Re Good*, [1905] 2 Ch. 60, where a gift for the benefit of old officers of a regiment was held void; and *Laverty v. Laverty*, [1907] 1 Ir. R. 9, where a trust for the benefit of any persons having certain surnames was held void.

(*t*) *Isaac v. Defriez*, Amb. 595; *White v. White*, 7 Ves. 423; *A.-G. v. Price*, 17 Ves. 371; *Gillam v. Taylor*, L. R. 16 Eq. 581.

(*u*) *A.-G. v. Duke of Northumberland*, supra, p. 219, note (*m*), and the section on the doctrine of *cy-près* in this chapter.

(*v*) *Carr v. Bedford*, 2 Ch. R. 146; *Griffith v. Jones*, ib. 394; *Brunsdon v. Woolredge*, Amb. 507. That charity

was not the ground of Sir T. Sewell's judgment in *Brunsdon v. Woolredge* is clear; for the subject of gift under the will of William (dated 1757) included money to arise by sale of land, a gift of which to charitable uses would have been void by 9 Geo. 2, c. 36 (1736).

(*w*) *Mahon v. Savage*, 1 Sch. & L. 111. Mr. Jarman (1st ed. vol. ii. p. 51) cites a case of *Hall v. Att.-Gen.*, Rolls, July 28, 1829, in which Leach, M. R., held that a devise of real estate to trustees "in trust to pay the rents to such of my poor relations as my trustees shall think most deserving," was a charitable trust, and therefore void as a gift of an interest in land.

(*x*) *A.-G. v. Buckland*, cited Amb. 71

(*y*) 1 Sch. & L. 111.

(i.e., of an object who died before distribution). He also thought that the executors had a discretionary power of distribution, and need not include all the testator's poor relations, and that poor relations beyond the statute might be admitted. Mr. Jarman remarks (z): "This case is clearly distinguishable from a simple gift to poor relations; for the additional words denoted that charity was the main object of the testator."

If there is no person designated by the testator to distribute the legacy, and the Court is therefore called upon to make the distribution, it will be confined to the statutory next-of-kin (a). If the estate is being administered by the Court, the person to whom the testator has given the power of selection, will be directed by the Court to prepare a scheme (b). In some cases, where there is no person appointed by the testator to make the distribution, the Court has directed the Master to prepare a scheme (c), while in other cases it has simply divided the legacy among the statutory next-of-kin (d).

Selection of poor relations by court.

A gift for a purpose which is contrary to public policy is not a good charitable gift (dd).

Public policy.

A gift to procure masses for the soul of the testator and others is not charitable (e); nor is a gift to a convent of nuns whose sole object is sanctifying their own souls, and not performing any external duty of a charitable nature (f); nor a gift for the purchase of advowsons or presentations (g) unless they are to be held on a charitable trust (h); nor a gift for the erection or repair of a monument, vault, or tomb (i), whether it be to the memory or for the

What are not charitable uses.

(z) First edition, vol. ii. p. 51.

(a) *Harding v. Glyn*, 1 Atk. 469; *Edge v. Salisbury*, Amb. 70 (where the gift was to "my nearest relations"); *Widmore v. Woodroffe*, Amb. 636; *Mahon v. Savage*, 1 Sch. & L. 111.

(b) *Brunsdon v. Woolledge*, Amb. 507; *Mahon v. Savage*, supra.

(c) *A.-G. v. Buckland*, cit. Amb. 71.

(d) *Widmore v. Woodroffe*, Amb. 636.

(dd) *Habershon v. Vardon*, 4 De G. & S. 467 (gift for fomenting discord in foreign country): *Thrupp v. Collett*, 26 Bea. 125, ante, p. 213, n. (o) and post, p. 243.

(e) See the cases cited, n. (t) ante, p. 210.

(f) *Cocks v. Manners*, L. R., 12 Eq. 574. Compare *Morrow v. M'Conville*, L. R. Ir., 11 Eq. 236, and cases there cited; *Re Joy*, 60 L. T. 175. But a convent or other like body may combine charitable objects with private religious exercises so as to be a charitable insti-

tution: *Cocks v. Manners*, supra; *Re Delany*, [1902] 2 Ch. 642. See *Carbery v. Cox*, 3 Ir. Ch. 231; *Roche v. M'Dermott*, [1901] 1 Ir. R. 394; and the other cases on gifts to monastic orders cited ante, p. 210. As to gifts to the members of a religious society as individuals, see post, p. 224 and Chap. X.

(g) *Re Hunter*, [1897] 1 Ch. 518, 2 Ch. 105, s. c. nom. *Hunter v. Att.-Gen.*, [1899] A. C. 309. There were other objects to which the bequest might have been applied, and some of these objects were charitable, but the gift failed because these objects were not separated from the non-charitable objects: see post, p. 230; *Re Church Patronage Trust*, [1904] 2 Ch. 643.

(h) As in *Re St. Stephen*, 39 Ch. D. 492. As to what constitutes a charitable trust in the case of an advowson, see above, p. 216.

(i) *Hoare v. Osborne*, L. R., 1 Eq. 585; *Re Rigley's Trust*, 36 L. J. Ch.

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interment of the donor alone (*j*), or of himself and his family and relations (*k*), unless it forms part of the fabric or ornament of the church (*l*). Again, bequests for purposes of hospitality (*m*), or benevolence (*n*), or benevolence and liberality (*o*), or general utility (*p*), or for pious purposes (*q*), or for public (*r*), or philanthropic (*s*) purposes, or for "emigration uses" (*t*), or for the encouragement of a sport or pastime (*u*), are not charitable bequests; and a gift to one of the chartered companies of the City of London to increase their stock of corn, which they are (or were) compelled to keep for the London market, is not charitable, since it is in effect a gift to the company absolutely (*v*).

There are, however, numerous cases in which gifts expressed in general or vague terms have been held on the context to be confined to purposes which are charitable (*w*).

In *Ommanney v. Butcher* (*x*) the testatrix declared as to certain money that she wished it to be given in private charity. Sir T. Plumer, M. R., held that the words did not create a trust which could be carried into effect. Assisting individuals in distress was private charity; but such a purpose could not be executed by the

147; *Re Rogerson*, [1901] 1 Ch. 715; *Toole v. Hamilton*, [1901] 1 Ir. R. 383. Such a bequest is not within the Gifts for Churches Act, 1803; *Re Rigley's Trust*, *supra*.

(*j*) *Mellick v. President of the Asylum*, Jac. 180; *Adnam v. Cole*, 6 Beav. 353; *Lloyd v. Lloyd*, 2 Sim. N. S. 255; *Trimmer v. Danby*, 25 L. J. Ch. 424.

(*k*) See *Gravenor v. Hallum*, Amb. 643; *Doe d. Thompson v. Pitcher*, 3 M. & Sel. 407, 2 Marsh. 61, 6 Taunt. 359; *Richard v. Robson*, 31 Beav. 244; *Fowler v. Fowler*, 33 Beav. 616; *Hoare v. Osborne*, L. R., 1 Eq. 585; *Re Rigley's Trust*, 36 L. J. Ch. 147; *Fisk v. Att.-Gen.*, L. R., 4 Eq. 521; *Dawson v. Small*, L. R., 18 Eq. 114; *Re Vaughan*, 33 Ch. D. 187; *Re Tyler*, [1891] 3 Ch. 252. Lord Ellenborough suggested (3 M. & Sel. 407) that although repairing a donor's own tomb was not a charitable purpose, it was otherwise where the tomb was for his family. But the statute had been complied with, and the later cases admit no such distinction. These cases also shew that a trust for the perpetual repair of a tomb, not being charitable, is void as a perpetuity.

(*l*) Ante, p. 214; *Willis v. Brown*, 2 Jur. 987, is not clearly reported. As to gifts upon the condition of keeping a tomb, &c., in repair, see post, p. 280.

(*m*) *Re Hewitt*, 49 L. T. 587; *Langham v. Peterson*, 87 L. T. 744; *Re Bar-*

nett, 24 T. L. R. 788 (anniversary dinner).

(*n*) *James v. Allen*, 3 Mer. 17; *Re Jarman's Estate*, 8 Ch. D. 584; *Re Barnett*, 24 T. L. R. 788.

(*o*) *Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 532; contra by the law of Scotland, *Millar v. Rowan*, 5 Cl. & Fin. 99.

(*p*) *Kendall v. Granger*, 5 Beav. 300; *Langham v. Peterson*, 87 L. T. 744.

(*q*) *Heath v. Chapman*, 2 Drew. 417. The trust was for masses "and other pious uses:" and it was further held that even if the latter could, standing alone, be supported as "such pious uses as were charitable," yet they were vitiated by being connected with the direction for masses.

(*r*) *Vezey v. Jamson*, 1 S. & St. 69; *Blair v. Duncan*, [1902] A. C. 37, post, p. 230.

(*s*) *Re Macduff*, [1896] 2 Ch. 451, where *Browne v. Yeale*, 7 Ves. 50, n. is discussed.

(*t*) *Re Sidney*, [1908] 1 Ch. 126.

(*u*) *Re Nottage*, [1895] 2 Ch. 649; *R. Swain*, 99 L. T. 604.

(*v*) *Att.-Gen. v. Haberdashers' Company*, 1 My. & K. 420.

(*w*) *Dolan v. Macdermot*, *Pocock v. A.-G.*, *Re Sutton*, *Re Lloyd*, *Re Best*, stated or referred to *infra*, p. 231.

(*x*) *T. & R.* 260; and see *Nash v. Morley*, 5 Beav. 177; *Re Sinclair's Trust*, 13 L. R. Ir. 150.

Context
shewing
charitable
intention.

Bequests for
private insti-
tutions not
charitable.

Court or the Crown (*y*). So a gift to found a private museum (*z*), or library (*b*), or in aid of a subscription library (*c*), or of a mechanics' institute (*d*), or a trade union (*e*), or for the benefit of persons engaged in a certain trade (*f*), or for the benefit of an orphan school kept by an individual substantially at his own expense (*g*), or for the benefit of the children of the tenants on an estate (*h*), is not charitable.

Whether a gift to a friendly society is charitable or not, would seem to depend on the question whether, by the rules of the particular society, poverty is or is not a necessary element to entitle a member to the benefits of the society (*i*).

Friendly Society.

If a testator gives property for a purpose, beneficial to the public, or a section of it, but subject to a proviso that the public shall acquire no rights, no charitable trust is created (*j*).

Mr. Jarman lays it down, as a general principle (*k*), that "a gift will not be deemed charitable merely from the nature of the professional character of the devisee, or on account of the testator having accompanied the gift with an expression of his expectation that the devisee would discharge the duties incidental to such character, however intimately those duties may concern the welfare of others, as this merely denotes the motive of the gift, and not that the devisee is to take otherwise than beneficially. Thus, in *Doe d. Phillips v. Aldridge* (*l*), where the devise was to the Rev. A. A., a dissenting minister (described as preacher at the meeting-house of L.) for life, the testator adding, 'And I further expect that he will, with the help of God, after my decease, without delay, settle and forward everything in his power, to promote and carry on the work of God at L. aforesaid, both in his lifetime and after his decease;' it was contended, that the devise to A. A. was void, as charitable,

Bequest not necessarily charitable on account of professional or official character of legatee.

(*y*) Lord Langdale, M. R., thought a bequest "for the relief of domestic distress, and assisting indigent but deserving individuals," a good charitable bequest: *Kendall v. Granger*, 5 Beav. 303.

(*z*) *Thomson v. Shakespear*, Johns. 612, 1 D. F. & J. 399.

(*b*) *Re Hawkins*, 22 T. L. R. 521.

(*c*) *Carne v. Long*, 2 D. F. & J. 75; *Re Swain*, 99 L. T. 664.

(*d*) *Re Dutton*, 4 Ex. D. 54; *Re Sheraton's Trusts*, W. N. 1884, p. 174.

(*e*) *Re Amos*, [1891] 3 Ch. 159.

(*f*) *Re Gassiot*, 70 L. J. Ch. 242; *Re Barnett*, 24 T. L. R. 788.

(*g*) *Clark v. Taylor*, 1 Drew. 642.

(*h*) *Browne v. King*, 17 L. R. Ir. 448; *Re Cullimore's Trusts*, 27 L. R. Ir. 18. See *Re Tunno*, [1886] W. N. 154.

(*i*) See and compare *Re Clark's Trust*, 1 Ch. D. 497; *Spiller v. Maude*, 32 Ch. D. 158, n.; *Pease v. Pattinson*, 32 Ch. D. 154; *Re Buck*, [1896] 2 Ch. 727; *Re Lacy*, [1899] 2 Ch. 149, where *Cunnack v. Edwards*, [1896] 2 Ch. 679 (post, p. 241, n. (n)), is referred to.

(*j*) *Re Pitt-Rivers*, [1902] 1 Ch. 403.

(*k*) First edition, p. 193.

(*l*) 4 T. R. 264; *Donnellan v. O'Neill*, Ir. R. 5 Eq. 523.

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being not in his individual capacity, but in the character of preacher, and in confidence that he would discharge the duties of that station. But the Court held that it was not charitable, and thought the point too clear for discussion.

Trusts too indefinite to be pronounced charitable.

"It generally happens, however, that where the words of the will fail to point out charity as the object of the testator's gift, they nevertheless shew that he meant the devisees or legatees to take the property as trustees, and not for their benefit. Thus in the case of *Morice v. Bishop of Durham* (m), (which is a leading case) it was decided that a bequest to the Bishop of D., to dispose of *to such objects of benevolence and liberality* as he should approve, was not charitable, and that the bishop was a trustee for the next of kin."

Mr. Jarman also cites *Doe d. Toone v. Copestake* (n), where an estate was devised to trustees, to be applied by them and the officiating ministers of the congregation or assembly of the people called Methodists assembling at L., and as they should from time to time think fit to apply the same; it was held that the devise was not charitable, the application being left to the trustees still more indefinitely than it was in *Morice v. Bishop of Durham*, and it was not argued that the trust was restricted to charitable purposes merely because the Methodist ministers were appointed trustees with others (o).

Gift to charitable society,

But a gift to a society or institution having a charitable object is *prima facie* a gift for the purposes of the society or institution, and is therefore a good charitable gift (p). Thus a gift to a religious institution or society is a charitable gift, unless it appears in the particular case that the institution or society is not charitable, in which case the gift is only good if it is intended for the benefit of the persons who are members of the institution or society at the testator's death (q). So a gift to the governors of a charitable institution is a good charitable gift (r). And a gift to the minister for the

or to "minister" or "vicar and churchwardens" for the time being.

(m) 9 Ves. 399, 10 Ves. 532; ante, p. 217, and post, Chap. XIV. Followed in *Re Davidson*, 99 L. T. 222.

(n) 6 East, 328.

(o) If the gift had been to the minister for the time being, or to the minister and his successors without other trustees, it would have been a good charitable gift on the principle laid down in *Thorner v. Wilson* and other cases cited post, note (s).

(p) *Re White*, [1893] 2 Ch. 41; *Mahony v. Duggan*, 11 L. R. Ir. 260.

(q) As in *Cocks v. Manners*, L. R., 12 Eq. 574, where the society was for

the encouragement of private devotion: supra, p. 221. See also *Re Delany's Estate*, 9 L. R. Ir. 227; *Morrow v. McConville*, 11 L. R. Ir. 236; *Mahony v. Duggan*, ib. 260; *Re Wilkinson's Trusts*, 19 L. R. Ir. 531; *Bradshaw v. Jackman*, 21 L. R. Ir. 12, cited post, Chap. X.; *Re Joy*, 60 L. T. 175.

(r) Per Lord St. Leonards, *Incorporated Society v. Richards*, 1 D. & War. 294; and per Lord Hatherley, *Att.-Gen. v. Sidney Sussex Coll.*, L. R., 4 Ch. 730; *Re Maguire*, L. R., 9 Eq. 632; *Re Lea*, 34 Ch. D. 528 (legacy to the general superintendent of the Salvation Army).

time being of a chapel, or to the minister and his successors (s), or to the vicar and churchwardens for the time being of a parish (t), is *primâ facie* a good charitable gift; and none the less so because the property is to be applied in such manner as the legatees think fit (u). And where a testator gave a legacy to three persons by name, "A., B., and C., Nazareth House, Hammersmith, or their successors," and it appeared that A., B., and C. were at the date of the will, and at the testator's death, holders of official positions in a religious and charitable community occupying Nazareth House, it was held that the testator by the use of the word "successors" must have meant their successors in office, and that the bequest was therefore made to them as officials of the charity (v).

But where a testator made a bequest to the C. O. S., a charitable society, upon trust to apply one-tenth of the income for the purposes of the society, and to pay the residue to such other society or societies as in the opinion of the governing body of the C. O. S. should be most in need of help, it was held that no general charitable intention could be inferred from the terms of the gift, because the "other society or societies" were not necessarily charitable. The gift, therefore, failed as to nine-tenths of the bequest (w).

If money is bequeathed to a municipal corporation upon trusts or for purposes which the testator does not specify, it will not be assumed that they were meant to be charitable (x).

Charitable
object not
implied.

IV. Uncertainty.—A charitable gift may fail by lapse (y), or

Uncertainty
in the object.

(s) *Grieves v. Case*, 4 B. C. C. 67, 2 Cox, 301, 1 Ves. jun. 548; *Thornber v. Wilson*, 3 Drew. 245, 4 ib. 351; *Robb v. Bishop Dorian*, 1 R., 9 C. L. 483, 11 C. L. 292; *Gibson v. Representative Church Body*, 9 L. R., Ir. Ch. 1. See also *Smart v. Prujean*, 6 Ves. 567, and *Cocks v. Mannors*, L. R., 12 Eq. 574. In the last case the gift to the convent, though held not charitable, was still treated as a trust for the purposes of the institution; not involving a perpetuity, but capable of being performed by the existing members spending the gift as they pleased: (as to which, see *Brown v. Dale*, 9 Ch. D. 78; and cf. *Thomson v. Shakespear*, *Carne v. Long*, *Re Clark's Trust*, *sup.*, which were void for perpetuity). In *Aston v. Wood*, L. R., 6 Eq. 419, a legacy "to the trustees of Zion Chapel, to be apportioned according to statement appending," no such statement being forthcoming, was held to fall into the residue. The express

reference to a trust to be declared appears to have rebutted any presumption in favour of the chapel. Moreover, there was the same difficulty as in *Doe v. Copestake*, *supra*, namely, that the testator appointed trustees of his own, either in addition to or in substitution for the trustees of the chapel.

(t) *Re Garrard*, [1907] 1 Ch. 382.

(u) *Ibid.* The principle does not apply if the legatee is expressly authorised to apply the money for purposes not exclusively charitable: *Re Davidson*, [1909] 1 Ch. 567.

(v) *Re Delany*, [1902] 2 Ch. 642. Compare *Re Laffan and Downes' Contract*, [1897] 1 Ir. R. 469; *Re Brown*, [1898] 1 Ir. R. 423.

(w) *Re Freeman*, [1908] 1 Ch. 720.

(x) *Corporation of Gloucester v. Wood*, 3 Ha. 131; s. c., s. n. *Corporation of Gloucester v. Osborn*, 1 H. L. C. 272, stated in Chap. XIV.

(y) *Infra*, p. 238.

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because the purpose which the testator had in mind has become impossible (z), or because the subject-matter of the gift is uncertain (a), but a charitable gift is never void for uncertainty in the object (aa). Consequently a gift for charitable purposes is good, even if the testator leaves the selection of the specific purposes to his executor or some other person (b), or has left a blank in his will for the name or description of the specific charitable institution or purpose to which he intends it to be devoted (c), or has otherwise failed to indicate definitely the exact way in which he wishes the money to be applied (d). Nor is a charitable bequest void for uncertainty merely because the body of persons for whose benefit it is given is large and fluctuating (e), or because it gives the testator's trustees a wide power of selection (f). So if a testator bequeaths a legacy to a charitable institution which has never existed, this is *primâ facie* a good charitable bequest (g). And if a testator bequeaths a legacy to a charity by a name or description which is common to two or more institutions, and it cannot be ascertained which was the intended object, the legacy will be divided between them, or administered *cy-près* in some other manner (h). But where a testator

(z) *Infra*, p. 236.

(a) *Post*, Chap. XIV.

(aa) This of course assumes that the object is a charity. But a gift may be void for uncertainty if it is expressed in such general language that it includes objects which are not charitable; *post*, p. 229.

(b) As in *Whicker v. Hume*, 14 Bea. 509; *Lewis v. Allenby*, L. R., 10 Eq. 668; *Dick v. Audsley*, [1908] A. C. 347 (where the powers given to the trustees were of the widest possible description). See also *White v. White*, *Moggridge v. Thackwell*, *Mills v. Farmer*, *Att.-Gen. v. Boulbee*, and other cases cited *post*, p. 234.

(c) *Pieschel v. Paris*, 2 S. & St. 384, *post*, p. 235; *Re White*, [1893] 2 Ch. 41; *Re Macduff*, [1896] 2 Ch. 451. The decision in *Aston v. Wood*, L. R. 6 Eq. 419, proceeded on the principle laid down in *Corporation of Gloucester v. Wood*, 3 Ha. 131 (s. c. *Corporation of Gloucester v. Osborn*, 1 H. L. C. 272), namely that a charitable intention cannot be presumed from the mere gift of money to a public or quasi-public body; see *ante*, p. 225.

(d) *Att.-Gen. v. Syderfin*, 7 Ves. 43 n. (see per C. A., [1893] 2 Ch. 53); *Comm. Charitable Donations v. Sullivan*, 1 Dr. & War. 501; *Yates v. University College*, L. R. 7 H. L. 438; *Re*

Huxtable, [1902] 2 Ch. 793, *post*, p. 232; *Re Garrard*, [1907] 1 Ch. 382; *Gillan v. Gillan*, 1 L. R. Ir. 114; *Pocock v. Att.-Gen.*, 3 Ch. D. 342, *post*, p. 231; *Re Forester*, 13 T. L. R. 555. See *Nightingale v. Goulbourn*, 5 Ha. 484, 2 Phil. 594, where the gift was to "the Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country Great Britain": held a good charitable bequest. See *ante*, p. 215.

(e) *Re Brown*, [1898] 1 Ir. R. 423.

(f) As in *Weir v. Crum-Brown*, [1908] A. C. 162, where the trustees were to make a scheme for the relief of indigent bachelors and widowers "who have shown practical sympathy either as amateurs or professionals in the pursuits of science in any of its branches, whose lives have been characterised by sobriety, morality and industry, and who are not less than fifty-five years of age."

(g) *Infra*, p. 241; *Re Davis*, [1902] 1 Ch. 876.

(h) *Waller v. Childs*, Amb. 524; *Bennett v. Hayter*, 2 Bea. 81; *Simon v. Barber*, 5 Russ. 112; *Re Clergy Society*, 2 K. & J. 615; *Re Kilvert's Trusts*, L. R. 7 Ch. 170; *Re Alchin's Trusts*, L. R. 14 Eq. 230; *Re Barnard*, 7 T. L. R. 73.

bequeathed to each of the inmates for the time being of "the several hospitals of or in the vicinity of Canterbury" a certain yearly sum, it was held that the bequest was void for uncertainty, principally on the ground that the amount of the fund to be appropriated to answer the bequest could not be determined (*hh*).

Where the gift is incompletely expressed (as "to the P. A. Society or some one or more kindred institutions") the Court will settle a scheme for its application (*i*).

If, however, the executors or trustees of a will have an absolute discretion of selecting the charitable objects and purposes to which the testator's property is to be applied, the Court will not, it seems, in the absence of special circumstances, require a scheme, but will leave the application of the property to the trustees (*ii*).

It will be remembered that where a testator makes a bequest to a charitable society, and gives it a power of application sufficiently wide to cover non-charitable objects, the Court will not infer a general charitable intention from the mere fact that the society is a charitable one (*j*).

If a testator gives a legacy to a charity by a particular name or description, and it is found that there is no institution exactly answering the description, and that there are two or more institutions to which the description partially applies, parol evidence is admissible to shew the locality and nature of the rival institutions, and the connection between the testator and one or both of them (*k*); for example, it may be proved that the testator during his life subscribed to one of the institutions (*l*).

In *Lee v. Pain* (*m*), the testatrix by a codicil bequeathed a legacy of 100*l.* to "Highbury College" and 500*l.* to "the Hoxton Academy." There had formerly been an institution called the Hoxton Academy, but ten years before the date of the codicil it had been removed to

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Uncertainty in the amount.

Alternative gift.

Where trustees have discretion.

Inference of charitable intention.

Ambiguous description.
Parol evidence.

Gifts to two institutions.

(*hh*) *Flint v. Warren*, 15 Sim. 626.

(*i*) *Re Delmar Charitable Trust*, [1897] 2 Ch. 163. As to schemes, see post, pp. 234, 244.

(*ii*) *Re Delmar C. T.*, supra; *Warren v. Clancy*, [1898], 1 Ir R. 127; *Re Pardoe*, [1906] 2 Ch. 184; *Armitage v. Gordon*, 15 T. L. R. 453; *Re Squire's Trust*, 17 T. L. R. 724.

(*j*) *Re Freeman*, [1908] 1 Ch. 720, and other cases cited, post, p. 230.

(*k*) The cases of *Bradshaw v. Thompson*, 2 Y. & C. C. C. 295; *Wilson v. Squire*, 1 Y. & C. C. C. 654; *Smith v. Ruger*, 5 Jur. N. S. 905; *Re Davies' Trusts*, 21 W. R. 154, are referred to in Chap. XXXV. The following cases also illustrate the same principle: *Buxton v.*

Blakiston, 2 T. L. R. 293; *Re Bradley*, 3 T. L. R. 668; *Re Beale*, 6 T. L. R. 308; *Re Mussard*, 7 T. L. R. 742; *Re Doane*, 9 T. L. R. 2; *Re Johnson*, 9 T. L. R. 277; *Re Barker*, 11 T. L. R. 83; *Re Lycett*, 13 T. L. R. 373.

(*l*) *Re Fearn's Will*, 27 W. R. 392; *Re Kilvert's Trusts*, L. R., 7 Ch. 170; *British Home for Incurables v. Royal Hospital for Incurables*, 90 L. T. 601; *Makeown v. Ardagh*, Ir. R., 10 Eq. 445. Other kinds of evidence are referred to in *Re Clergy Society*, 2 K. & J. 615, post, p. 242. See *Re Morgan*, 25 T. L. R. 303, where the society was identified by the name of its secretary.

(*m*) 4 Ha. 254.

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Highbury and was thenceforward called Highbury College ; consequently if the testatrix had simply bequeathed 500*l.* to the Hoxton Academy the Court would probably have held Highbury College entitled to it, but such a construction was excluded by the bequest of 100*l.* to Highbury College. It is true that the principle of this decision was disregarded in *Re Maguire* (*n*), where a testatrix bequeathed a legacy of 200*l.* to the I. A. C. S. and 200*l.* to the I. C. P. S., both charitable institutions ; at the date of the will there was an I. A. C. S., but shortly before the testatrix's death it changed its name to the I. S. A. S. ; there had never been any such society as the I. C. P. S., but the I. S. A. S. had objects similar to those which would have been carried out by the I. C. P. S. if it had existed for the purposes indicated by the name ; it was held that the I. S. A. S. was entitled to both legacies, but the Attorney-General did not object, and the point decided in *Lee v. Pain* does not seem to have been argued.

Where two societies unite.

In *Re Joy* (*o*) the testatrix bequeathed a legacy of 200*l.* each to two societies which amalgamated after the date of the will : it was held that the united society was entitled to 400*l.*

Gift partly good and partly bad.

If a testator bequeaths a fund for two definite purposes, one of which is illegal and the other charitable, the question arises how far the latter purpose can be carried into effect. According to some of the authorities, it seems that if the illegal purpose is the primary purpose, the surplus only being given to charity, and the primary purpose is of such a nature that the amount required to carry it out cannot be ascertained, the result is that the surplus cannot be ascertained and the whole gift fails (*p*). But if the primary purpose is of such a definite nature that the testator must have intended the charity to take a substantial sum by way of surplus, then the effect of the failure of the primary purpose is that the charity takes the whole. A common instance of this kind of gift is where a testator gives a fund upon trust to apply the income in the first place in maintaining a tomb, and to apply the surplus to some charitable purpose (*q*).

(*n*) L. R., 9 Eq. 632.

(*o*) 60 L. T. 175. See *Re Adams*, 4 T. L. R. 757.

(*p*) *Chapman v. Brown*, 6 Ves. 404, stated below, Chap. XIV. ; *Cramp v. Playfoot*, 4 K. & J. 479. In *Fisk v. Att.-Gen.* (L. R., 4 Eq. 521), Wood, V.-C., thought that the authority of *Chapman v. Brown* had been restricted by the decision of the House of Lords in *Magistrates of Dundee v. Morris* (3 Macq. 134). But in *Re Birkett* (9 Ch. D. 576), Jessel, M.R., thought

that *Chapman v. Brown* was not affected.

(*q*) *Re Rogerson*, [1901] 1 Ch. 715 ; following *Fisk v. Att.-Gen.*, L. R., 4 Eq. 521 ; *Dawson v. Small*, L. R., 18 Eq. 114 ; and *Re Birkett*, 9 Ch. D. 576. *Fowler v. Fowler*, 33 Bea. 616, and *Kirkmann v. Lewis*, 38 L. J. Ch. 570, appear to be overruled ; but the state of the authorities is far from satisfactory.

(*r*) L. R., 1 Eq. 585.

were three primary objects, one of which was illegal, and it was held that one-third of the fund fell into the residue, and that the charity to which the surplus was given took the income arising from the other two-thirds after satisfying the two legal primary purposes.

If, however, the testator has given a fund for two purposes *pari passu*, one of them being illegal and the other charitable, the Court will endeavour to ascertain what portion of the fund would be sufficient to satisfy the illegal purpose if it were legal; this part of the gift fails, and the charity only takes the balance of the fund (*s*). If it is impossible to make the calculation, the Court will divide the fund between the two purposes (*t*).

The Court does not take upon itself to frame schemes for the disposal of money for any other than charitable purposes. All moneys, therefore, not bequeathed in charity must have some definite object, or must devolve as undisposed of (*u*), except in cases where it may be held that the trustee takes absolutely. The general consideration of such gifts will be reserved for a subsequent chapter, as more properly falling under the head of gifts void for uncertainty; but it must be here noticed, that where the bequest is for charitable purposes, and also for purposes of an indefinite nature not charitable, and no apportionment of the bequest is made by the will, so that the whole might be applied for either purpose, the whole bequest is void (*v*). A distinction not now recognised was indeed formerly taken, that such a bequest was good, if there were trustees named, to whose discretion the testator had committed the carrying out of his intentions, and with whom, therefore, the Court would not interfere (*w*). Such a distinction will be found inconsistent with the decisions presently noticed; and it seems now established, that the Court will only recognise the validity of trusts which it can either itself execute, or can control when in process of being executed by trustees (*x*).

Thus, in *Vezey v. Jamson* (*y*), where a testator gave the residue of his estate to his executors, upon trust to apply and dispose of

All indefinite trusts void unless for charity.

Bequests for charitable and other indefinite purposes void altogether.

(*s*) *Re Vaughan*, 33 Ch. D. 187.

(*t*) *Hoare v. Osborne*, L. R., 1 Eq. 585; *Re Rigley's Trust*, 36 L. J. Ch. 147.

(*u*) *Morice v. Bishop of Durham*, 9 Ves. 399, 10 ib. 522; *James v. Allen*, 3 Mer. 17; *MacLaughlin v. Campbell*, [1906] 1 Ir. R. 588. See *Ommaney v. Butcher*, ante, p. 222. This question is further referred to in Chap. XXIV.

(*v*) *Re Macduff*, [1896] 2 Ch. 451; *Blair v. Duncan*, [1902] A. C. 37; *Re*

Sidney, [1908] 1 Ch. 126, 488. See *Langham v. Peterson*, 87 L. T. 744, post, n. (*z*).

(*w*) *Waldo v. Caley*, 16 Ves. 206; *Horde v. Earl of Suffolk*, 2 My. & K. 59; the latter case, though decided after *Vezey v. Jamson*, did not notice it; and see the observations of Cottenham, C., 1 My. & Cr. 293.

(*x*) *Nash v. Morley*, 5 Beav. 182; *Blair v. Duncan*, [1902] A. C. 37.

(*y*) 1 S. & St. 69.

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the same in or towards such charitable uses or purposes, person or persons, or otherwise, as he might by any codicil, or by memorandum in his own handwriting, appoint, and as the laws of the land would admit of; and, in default, upon trust to pay and apply the same in or towards such charitable or public purposes, as the laws of the land would admit of; or to any person or persons, and in such shares, manner, and form as his (the testator's) executors, or the survivor of them, or the executors or administrators of such survivor, should in their or his discretion, will, and pleasure, think fit, or as they should think would have been agreeable to him, if living, and as the laws of the land did not prohibit: Sir J. Leach, V.-C., observed, that the testator had not fixed upon any part of the property a trust for a charitable use, and the Court could not, therefore, devote any part of it to charity; he had given it to the trustees expressly upon trust, and they could not, therefore, hold it for their own benefit; the purposes of the trust being so general and undefined, they must fail altogether, and the next-of-kin become entitled.

And in *Kendall v. Granger* (z), where the trustees were directed to dispose of the residue for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility, in such mode and proportions as their own discretion might suggest, irresponsible to any person or persons whatsoever; Lord Langdale, M. R., decided that the gift was void for uncertainty. He said that to make the bequest valid, it must be obligatory on the trustees to apply the whole (a) of it in charity; it was not a question whether the trustees might apply the fund to a charitable purpose, but whether by the words of the will they were bound to do so. To make the bequest valid it must be obligatory on them.

The principle laid down in the foregoing cases was the subject of much difference of judicial opinion in the recent case of *Hunter v. Att.-Gen.* (b). The House of Lords finally decided that the terms of

(z) 5 Beav. 303. See also *Thompson v. Thompson*, 1 Coll. 392; *Ellis v. Selby*, 7 Sim. 352, affirmed 1 My. & Cr. 286 ("charitable or other purposes"); *Williams v. Kershaw*, 5 Cl. & Fin. 111 ("benevolent, charitable, and religious purposes"); *Blair v. Duncan*, [1902] A.C. 37 ("charitable or public purposes"); *Langham v. Peterson*, 87 L. T. 744 ("charity or works of public utility"); *Grimond v. Grimond*, [1905] A.C. 124 ("charitable or religious institutions or societies"); *Re Pardoe*, [1906] 2 Ch. 184 ("public charities and institutions"); *Re Sidney*, [1908] 1 Ch. 126, 488

("charitable uses or emigration uses"); *Re Freeman*, [1908] 1 Ch. 720 ("other societies"); *Re Davidson*, 99 L. T. 222 ("other societies" &c.); *Re Hewitt's Estate*, 49 L. T. 587 ("acts of hospitality or charity"); *Boyle v. Boyle*, Ir. R. 11 Eq. 433; *Shaw's Trustees v. Eason's Trustees*, 8 F. 52; *Thomson v. Shakespear*, John. 612, 1 D. F. & J. 399; *Re Jarman's Estate*, 8 Ch. D. 584.

(a) See *James v. Allen*, 3 Mer. 17; *Re Jarman's Estate*, supra.

(b) [1899] A. C. 309, reversing the decision of C. A. in *Re Hunter*, [1897] 2

the gift, if it had been valid, would have authorised the trustees to expend the whole fund for a purpose not charitable (namely the purchase of advowsons), and that consequently there was no general trust for charity and the whole gift failed.

Such being the rule, the terms of the trust will first be closely examined to see whether, though not the most correct or most appropriate for describing only a charitable object, they ought not in fair construction to be so confined. Thus, in *Dolan v. Macdermot (c)*, where the trust was to lay out "in such charities and other public purposes as lawfully might be in the parish of T.," as the trustees should think proper, it was held that the words referring to the parish of T. prevented the gift from being uncertain, and that the words "other public purposes" meant purposes ejusdem generis, i.e., charitable, and that they were used only as filling up a description of purposes which, although charitable within the statute of Elizabeth, (and in that sense included in "charities"), were not within the popular meaning of the word "charities," and therefore the whole gift shewed an intention to create a charity for the benefit of the parish.

Charity held the sole purpose, notwithstanding doubtful expression.

Again, in *Pocock v. Att.-Gen. (d)*, where a testator, after giving several charitable legacies out of a particular fund, directed the residue of it "to be given by his executors to such charitable institutions as he should by any future codicil give the same, and in default of any such gift, then to be distributed by his executors at their discretion"; the testator made no further codicil, and it was held that the direction in favour of charity ran through the whole sentence: that the testator intended to choose the charitable institutions himself, but that if he failed to do so his executors were to choose them.

On the same principle, a bequest of a sum to "be given in charitable and deserving objects," or "for charitable and benevolent institutions," or "for religious and benevolent societies or objects" is a good charitable gift (e). And a gift "for such missionary objects

Ch. 105, and restoring that of Romer, J., [1897] 1 Ch. 518. Followed in *Re Davidson*, [1909] 1 Ch. 567.

(c) L. R., 5 Eq. 60, 3 Ch. 676. The principle of this decision was applied in *Re Allen*, [1905] 2 Ch. 400.

(d) 3 Ch. D. 342. Cf. *Wheeler v. Sheer*, Mos. 288, cited 1 Mer. 91, 97; *Re Pardoe*, [1906] 2 Ch. 184.

(e) *Re Sutton*, 28 Ch. D. 464; *Re Lloyd*, 10 T. L. R. 66; *Re Best*, [1904] 2 Ch. 354; *Hay's Trustees v. Baillie*, [1908] Ct. Sess. Ca. 1224. *Jemmit v.*

Verril, Amb. 585, n., is therefore good law notwithstanding Lord Cottenham's disapproval of it in *Ellis v. Selby*, 1 My. & Cr. 292. See also *Wilkinson v. Lindgren*, L. R. 5 Ch. 570, where the gift was to certain specified charitable institutions "or to any other religious institutions or purposes" as the trustees might think proper; and it was held that the word "religious" must be carried on so as to apply to the "purposes," and that the gift was good. So a gift for charities,

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as M. shall select," if M. is known to the testator to be engaged in a particular kind of missionary work, is not void for uncertainty (f).

And if a testator makes a bequest to A. "for the charitable purposes agreed on between us," evidence is admissible to shew what those purposes were (g).

Distinction where the gift is for charitable and other ascertained objects, though apportionment left to trustees.

The foregoing cases, where the gifts were held void for uncertainty, must be distinguished from those where the bequest is for a charitable purpose, and for another ascertained object; for here even though the amount to be devoted to each object be not specified, and the apportionment be left to the discretion of trustees, yet the trust is such that the Court can control the execution of it so far as to see that the trustees appropriate no part of the benefit to themselves; whereas in the former cases the non-charitable object, (which may absorb the whole,) is so indefinite as to be wholly beyond the control of the Court; and to hold that such a gift is valid, would be in effect to hold the trustees entitled for their own benefit.

Trustees declining to apportion, donees take equally.

The objects among whom the trustees are to apportion the testator's bounty being sufficiently definite, are not to be disappointed by the trustees refusing to exercise their power or dying before doing so. In such event, the Court will divide the fund equally among the several objects, upon the principle that equality is equity.

Thus, in *Att.-Gen. v. Doyley* (h), where a testator directed his trustees and the survivor, and the heirs of such survivor, to dispose of his property to such of his relations of his mother's side as were most deserving, and for such charitable purposes as they should also think most proper: one of the trustees declined to act, and Sir J. Jekyll, M. R., directed that one-half of the property should go to the testator's relatives on the mother's side, and the other half to charitable uses.

So, in *Salisbury v. Denton* (i), where a testator bequeathed a fund to be at the disposal of his widow by her will, therewith to apply a part to the foundation of a charity school or such other charitable endowment for the poor of O. as she might prefer, and under such restrictions as she might prescribe, and the remainder to be at her disposal among the testator's relatives as she might

societies, and institutions "to be selected by A.," was held, on the context, to mean charitable societies and institutions, *Re Douglas*, 35 Ch. D. 472. See also *Arnott v. Arnott*, [1906] 1 Ir. R. 127, ante, p. 216.

(f) *Re Kenny*, 97 L. T. 130.

(g) *Re Huxtable*, [1902] 2 Ch. 793.

(h) 4 Vin. Abr. 485, 2 Eq. Cas. Ab. 194, 7 Ves. 58, n.

(i) 3 K. & J. 529.

direct: the widow having died without exercising her power of apportioning the fund, it was held by Sir W. P. Wood, V.-C., that the gift was not void, but that the Court would divide the fund in equal moieties.

In *Adnam v. Cole* (j), where a testator bequeathed the residue of his personal estate (consisting partly of leasehold property) to trustees upon trust to lay out the same in building such a monument to his memory as they should think fit, and in building an organ gallery in the parish church, it was held by Lord Langdale, M. R., that the trustees had not rightly exercised their discretion in applying the whole to the monument, and he referred it to the Master to ascertain in what proportion the residue ought to be divided between the two objects.

This case, it will be observed, differs from the preceding, in the mode of division adopted by the Court; the specific nature of the objects enabling the Court to apportion the fund between them without resorting to the expedient of cutting the knot by equal division. But the case is equally an authority against holding the bequest void for uncertainty (k).

And if, instead of a trust for a charitable *and* another definite object, there be a trust for a charitable *or* another definite object, as trustees shall appoint, there would be an implied trust for both in default of appointment (l).

In *Down v. Worrall* (m), where the trust was for charitable or pious (n) uses at the discretion of the trustees or otherwise for the benefit of the testator's sister and her children; one of the trustees died while part of the fund was still unappointed, and Sir J. Leach, M. R., held that the unappointed part was undisposed of and belonged to the next-of-kin. The decision seems to be inconsistent with the authorities, and is generally considered incorrect (o).

V. Doctrine of Cy-près—Failure—Lapse.—Except so far as the law restrains the dedication to charitable uses of leaseholds

Bequest of pure personality to charitable purposes favoured by the Courts.

(j) 6 Beav. 363. The trust for building the organ gallery failed of course under 9 Geo. 2, c. 36, so far as it depended on the leaseholds. See *Crafton v. Frith*, 20 L. J. Ch. 198.

(k) In like manner, if there are several charitable objects, and the share of each is undefined, the Court will direct inquiries to ascertain the proportion due to each: *Re Rigley's Trust*, 36 L. J. Ch. 147; *Champney v. Davy*, 11 Ch. D. 949; compare *Hoare v. Osborne*, L. R., 1 Eq. 585, supra

p. 228.

(l) *Brown v. Higgs*, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561; *Fordyce v. Bridges*, 2 Phill. 497. But see *Thompson v. Thompson*, 1 Coll. 399, 8 Jur. 839.

(m) 1 My. & K. 561.

(n) A "pious" use is not necessarily a charitable use, but may be made so by the context: *Heath v. Chapman*, 2 Drew. 417.

(o) See *Salisbury v. Denton*, 3 K. & J. 529.

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and money charged on or arising out of land, as explained in a subsequent part of this chapter, "a man may dispose of his whole personal estate (*p*) to charitable purposes capable of enduring for ever, in despite of the claims of his nearest kindred; and dispositions so made are strongly favoured in point of construction (*q*); for by a rule peculiar to gifts of this nature, if the donor declare his intention in favour of charity indefinitely, without any specification of objects, or in favour of defined objects, which happen to fail, from whatever cause; although, in such cases, the particular mode of application contemplated by the testator is uncertain or impracticable, yet the general purpose being charity, such purpose will, notwithstanding the indefiniteness or failure of its immediate objects, be carried into effect" (*r*). Thus, in the case of a gift to the poor in general (*s*), or to charitable uses generally (*t*), or for the advancement of religion, expressed in the most vague and indefinite terms (*u*); or to such charitable uses as the testator's executor shall appoint, and the testator revokes the appointment of the executor (*v*); or the executor renounces probate (in which case he cannot claim to exercise his discretion) (*w*); or to such charitable uses as A. shall appoint, and A. dies in the lifetime of the testator (*x*), or neglects or refuses to appoint (*y*); or to such charitable uses as the testator himself shall appoint or has appointed, and he dies without making an appointment (*z*), or the instrument of appointment cannot be found (*a*), or where the testator makes a disposition in favour of an object which has no existence (*b*), or for a purpose

Such bequests
executed
cy-près, when.

(*p*) Since the passing of the Mortmain and Charitable Uses Act, 1891, impure personalty can be given to charity, and a testator can also devote his real estate to charity, subject to the necessity of its being sold within a certain time: see sect. x. of this chapter.

(*q*) *Cary v. Abbot*, 7 Ves. 490; *Anon.* Freem. Ch. Ca. 262; *Baylis v. Att.-Gen.*, 2 Atk. 239; *Da Costa v. De Pas*, Amb. 228, cit. 7 Ves. 76; *Johnston v. Swann*, 3 Mad. 457.

(*r*) First edition of this work, p. 216. Mr. Jarman's statement of the law must be qualified, so far as gifts in favour of defined objects are concerned, by the decisions in *Fisk v. Att.-Gen.*, and other cases; see *Re Ovey*, 29 Ch. D. 560.

(*s*) *Att.-Gen. v. Matthews*, 2 Lev. 167; s. c. *Att.-Gen. v. Peacock*, Finch, 245; *Att.-Gen. v. Rance*, cit. Amb. 422.

(*t*) *Clifford v. Francis*, Freem. Ch. Ca. 330; *Att.-Gen. v. Herrick*, Amb. 712.

(*u*) *Powerscourt v. Powerscourt*, 1 Mol. 616; and cases cited ante, p. 216.

(*v*) *White v. White*, 1 Br. C. C. 12.

(*w*) *Att.-Gen. v. Fletcher*, 5 L. J. N. S. Ch. 75.

(*x*) *Moggridge v. Thackwell*, 1 Ves. jun. 464, 3 Br. C. C. 517, 7 Ves. 36, 13 Ves. 416. In this case, and in *Mills v. Farmer*, 1 Mer. 55, Lord Eldon went very fully into the general doctrine. The decision of Romilly, M. R., contra, in *Chamberlayne v. Brockett*, 41 L. J. Ch. 789, is erroneous.

(*y*) *Att.-Gen. v. Boulbee*, 2 Ves. jun. 380, 3 Ves. 220.

(*z*) Freem. Ch. Ca. 261; *Mills v. Farmer*, 1 Mer. 55; *Commissioners of Ch. Don. v. Sullivan*, 1 D. & War. 501; *Gillan v. Gillan*, 1 L. R. Ir. 114.

(*a*) *Att.-Gen. v. Syderfen*, 1 Vern. 224, 7 Ves. 43, n.

(*b*) *Att.-Gen. v. City of London*, 3 B. C. C. 171; *Loscombe v. Wintringham*, 13 Beav. 87; post, p. 241; *Re Davis*, [1902] 1 Ch. 876; but see *Att.-Gen. v. Oglander*, 3 Br. C. C. 166.

which has become impossible (*d*); or unnecessary (*e*); or cannot legally be carried out in the manner directed by the testator (*f*); or bequeaths to the trustees of a charity who refuse to accept (*g*); or to a particular charity by a description equally applicable to more than one (and it is wholly uncertain which was intended (*h*)); or having evinced his intention to give certain property in charity, only disposes of part of it in favour of certain named charitable purposes (*i*), or leaves blanks in his will for the names of the charities and the proportion to be allotted to each (*j*); in these and all such cases, though the bequest would, upon the ordinary principles which govern the construction of testamentary dispositions, be wholly or partly void for uncertainty, yet the purpose being charity, the Crown as *parens patriæ*, or the Court of Chancery, will execute it *cy-près* (*k*).

Foreign charities are an exception to the general rule, for as the court has no jurisdiction to administer a foreign charity, it cannot execute the trust *cy-près*. Consequently if the persons who are appointed by the testator to administer the charity abroad, disclaim or refuse to accept the trusts, the gift fails (*kk*).

Exception in the case of a foreign charity.

The rule is not displaced or superseded by a residuary bequest to other charitable uses contained in the same will. The legacy does not fall into the residue; for the doctrine is that it fails in the mode only and not in substance; and *cy-près* means the

Although there is a residuary bequest.

(*d*) *Att.-Gen. v. Guise*, 2 Vern. 266; *Att.-Gen. v. Gibson*, 2 Bea. 317, n. *Hayter v. Trego*, 5 Russ. 113; *Att.-Gen. v. Ironmongers' Company*, Cr. & Ph. 208, 10 Cl. & Fin. 908; *Att.-Gen. v. Glyn*, 12 Sim. 84; *Martin v. Margham*, 14 ib. 230; *Incorporated Society v. Price*, 1 J. & Lat. 498; *Re Hyde's Trusts*, 22 W. R. 69; *Att.-Gen. v. Bushby*, 24 Bea. 299; *Re Villers-Wilkes*, 72 L. T. 323; *Re Mann* [1903] 1 Ch. 232, *infra* n. (*s*). If the performance of the trust is merely postponed, any accumulations of income will be applied for the purposes of the original gift: *Forbes v. Forbes*, 18 Bea. 552; *Att.-Gen. v. Craven*, 21 Bea. 392; if it is impossible, the income is applied *cy-près*: *Att.-Gen. v. Bowyer*, 3 Ves. 714.

(*e*) *Re Ashton's Charity*, 27 Beav. 115; *Wilson v. Barnes*, 38 Ch. D. 507; *Att.-Gen. v. Day*, [1900] 1 Ch. 31.

(*f*) *Martin v. Margham*, 14 Sim. 230; *Biscoe v. Jackson*, 35 Ch. D. 460, referred to below, pp. 237, 261; *Re Sutton*, [1901] 2 Ch. 640; *Re Mann*, [1903] 1 Ch. 232.

(*g*) *Att.-Gen. v. Andrew*, 3 Ves. 633;

Denyer v. Druce, Taml. 32; *Reeve v. Att.-Gen.*, 3 Hare, 191.

(*h*) *Simon v. Barber*, 5 Russ. 112; *Bennett v. Hayter*, 2 Beav. 81; *Re Clergy Society*, 2 K. & J. 615. As to misdescription of charitable objects, see Chap. XXXV.

(*i*) *Arnold v. Att.-Gen.*, Shower Parl. Ca. 22; and see the cases on the exclusion of charitable gifts from the doctrine of resulting trusts, post Chap. XXI.

(*j*) *Pieschel v. Paris*, 2 S. & St. 384; *Re White*, [1893] 2 Ch. 41. Secus, of course, if the total amount applicable to charity be left in blank, *Hartshorne v. Nicholson*, 26 Beav. 58.

(*k*) *Lewis v. Allenby*, L. R., 10 Eq. 668; *Re Piercy*, 65 L. J. Ch. 364; *Re Pyne*, [1903] 1 Ch. 83.

(*kk*) *New v. Bonaker*, L. R., 4 Eq. 655, explained in *Re Geck*, 69 L. T. 819. But if the trustees are in this country, the Court has jurisdiction to settle a scheme; *Re Vagliano*, 75 L. J. Ch. 119; post p. 246; *Re Davis's Trust*, 61 L. T. 430.

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nearest to that which has so failed, not the nearest to the testator's other charitable purposes (*l*). But if the testator expressly provides that, in case the particular mode of application directed by him should fail, the legacy shall fall into the residue, it should seem that the rule is excluded (*m*). For however exceptional, it is a rule of construction, and must yield to a contrary intention (*n*).

But not if
contrary
intention
appears by
the will.

Gift to parti-
cular charity.

Such contrary intention may be collected by construction from the very terms of the gift; which may so clearly define the particular object of gift as to render the testator's intention incapable of execution otherwise than in the mode pointed out by the will. The mode is then of the substance, and if it cannot be pursued the legacy will fail altogether. Thus in *Att.-Gen. v. Bishop of Oxford* (*o*) the bequest was "to build a church at W. where the chapel now is"; the bishop (who was patron and parson) would not let it be built there, and the churchwardens suggested that "the old chapel should be repaired, the living augmented, &c.," while the next-of-kin insisted that a new church must be built and the surplus divided among them: but Lord Kenyon observed that if the bishop objected he could not interfere; that as to repairing, &c., he could not do that; the intention must be implicitly followed, or nothing could be done. So in *Corbyn v. French* (*p*) the legacy was to the trustees of a chapel to discharge a mortgage thereon: the mortgage had been already paid off; and Lord Alvanley held the legacy void by the stat. 9 Geo. 2, c. 36; but he also held that if it had not been so, it would have been void because the object intended could not be effected, and there was no ground to apply it to any other purpose (*q*).

On the same principle, where a testator bequeathed money to maintain an almshouse on a particular piece of land, and the trust could not be carried out because the almshouse was not in

(*l*) *Mayor of Lyons v. Adv.-Gen. of Bengal*, 1 App. Ca. 91; *A.-G. v. Day*, [1900] 1 Ch. 31.

(*m*) See *Mayor of Lyons v. Adv.-Gen. of Bengal*, 1 App. Ca. 111, 115 (the Lucknow Fund); *Re Randell, Randell v. Dixon*, 38 Ch. D. 213.

(*n*) See Lord Eldon's judgment, *Moggridge v. Thackwell*, 7 Ves. 68, a case which illustrates the length to which the doctrine has been carried.

(*o*) 1 Br. C. C. 444 n., and cited 4 Ves. 432, also 2 Ves. jun. 388, 3 Ves. 646. In *Att.-Gen. v. Bishop of Chester*. 1 Br. C. C. 444, the legacy was retained until it could be seen whether the object which the testator had in view could be carried out. In *Re Villers-*

Wilkes, 72 L. T. 323, there were some general words which seem to have prevented the total failure of the bequest. If property is given to charity in an uncertain future event, there is a resulting trust in the meanwhile: *Att.-Gen. v. Craven*, 21 Bea. 392. As to the Rule against Perpetuities, see ante, p. 211.

(*p*) 4 Ves. 431.

(*q*) *Re White's Trusts*, 33 Ch. D. 449, seems to have been decided on this principle, though the V.-C. (Baon) said that the case was "purely and distinctly that of a lapsed legacy." A similar question arose in *Sinnett v. Herbert*, L. R. 7 Ch. 232, but was not decided.

mortmain, it was held that the bequest could not be administered cy-près (r).

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But if a testator bequeaths a sum of money to establish a charity, involving the future acquisition of land (the land to be provided from some other source), the Court will inquire whether the necessary land will be acquired within a reasonable time, and, if not, the legacy will be administered cy-près, provided the testator shews a general intention in favour of charity (s).

Where land required cannot be obtained, fund may be administered cy-près.

In *Att.-Gen. v. Bushby (t)*, a testator in 1494 devised property to be applied for ever in the discharge of the tax of the commonalty of a certain town to King Henry VII. and his successors; it was not known what was meant by the tax referred to, and the freemen of the town had long been in the habit of applying the income for their own benefit; in 1857 the Court directed a scheme to be prepared for the application of the income for the benefit of the town or its inhabitants generally. In this case it is clear that the property had been dedicated to charitable purposes by lapse of time, but if in a similar case the question were raised on the death of the testator, it may be that the specific purpose for which the property was given would be held to have failed.

Lapse of time.

If a testator bequeaths a fund, the income of which is to be applied in repairing a road, and the duty of repairing it is afterwards by statute imposed on a local authority, the authority is entitled to be paid the income (u).

The principle laid down in *Att.-Gen. v. Bishop of Oxford* was followed in *Cherry v. Mott (v)*, where a testator desired that, if his personal estate should be sufficient for the purpose, a presentation to Christ's Hospital should be bought for the son of a freeman of H.; the personal estate proved insufficient. Sir C. Pepys, M. R., said: "This legacy is conditional. There is no gift if the personal estate be not sufficient to fulfil the contract." He added, "Another objection is that this is a gift for a particular purpose which cannot take effect by reason of the refusal of the governors, and that it

Cherry v. Mott.

(r) *Att.-Gen. v. Whitchurch*, 3 Ves. 141; *Philpott v. St. George's Hospital*, 6 H. L. C. 338, and other cases cited post, pp. 260 seq.; *Re Taylor*, 58 L. T. 538.

(s) *Chamberlayne v. Brockett*, L. R. 8 Ch. 206; *Biscoe v. Jackson*, 35 Ch. D. 460, where the gift was to establish a soup kitchen and cottage hospital in the parish of S., and this was held to shew a general intention to benefit the poor of the parish. So in *Re Mann* ([1903] 1 Ch. 232) a testatrix be-

queathed a sum for the benefit of "M. Institute," which was a private building used for purposes beneficial to the inhabitants of the locality, but not dedicated to charity: it was held that the legacy must be administered under the direction of the Court. See also *Wallis v. S.-G. for New Zealand*, [1903] A. C. 173; *Re White's Trusts*, supra.

(t) 24 Beav. 299.

(u) *A.-G. v. Day*, [1900] 1 Ch. 31.

(v) 1 My. & C. 123.

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therefore fails altogether." After citing *Att.-Gen. v. Bishop of Oxford*, and Lord Alvanley's view of the doctrine, he referred to the more extended sense in which it was understood by Lord Eldon, and concluded, "In this case, however, there is no gift except in the direction to do that which cannot be effected. It is not within the principle of those cases in which the Court executes a general purpose cy-près, the particular mode being impossible" (w).

This case has been referred to as standing on special ground as a conditional legacy. But as the condition required only that the estate should suffice for the particular mode, the appellation of "conditional" appears not to mark any difference in kind, but only the cogency of the terms to indicate that the mode was of the substance of the gift (x).

Partial exclusion of the cy-près doctrine.

Lord Alvanley said he thought the legacy in *Corbyn v. French* (supposing it not illegal), as well as the legacy in *Att.-Gen. v. Bishop of Oxford*, might each have been applied in repairing the particular building, though not for any other purpose (y). But partial exclusion of the rule is scarcely less significant than total exclusion. For the rule is that where the substantial intention is charity, but the particular mode cannot be carried into effect, the Court (or the Crown) supplies another mode (z): which other mode need not bear any absolute resemblance to that intended by the testator; only it must first be ascertained that none can be found nearer to it (a). Thus a trust for redemption of British slaves in Barbary having, after a long continuance, failed for want of objects, was executed by Lord Cottenham in favour of charity schools in England and Wales (b). This must be borne in mind in considering the cases that remain to be noticed.

Cy-près does not imply an absolute resemblance.

Cases of "lapse."
Clark v. Taylor.

In *Clark v. Taylor* (c), a legacy was bequeathed "to the treasurer

(w) *Re University of London Fund*, [1909] 2 Ch. 1, is another instance of the doctrine of cy-près being excluded, the legacy being conditional on a specific scheme being carried out.

(x) As to conditional legacies to charities being void under the Rule against Perpetuities, see *Chamberlayne v. Brockett*, L. R. 8 Ch. 206, post, p. 280.

(y) See also *New v. Bonaker*, L. R., 4 Eq. 655, where a legacy to be applied for a charitable purpose in a foreign country having been refused by the government of that country, apparently on grounds of public policy, it was not argued that it should be applied cy-près in this country. Cf. *Att.-Gen. v. City of London*, 3 Br. C. C. 171.

(z) Per Lord Eldon, 7 Ves. 69. See also per Grant, M. R., 9 Ves. 405. And see *Pease v. Pattinson*, 32 Ch. D. 154 (*Hartley Colliery Fund*); *Biscoe v. Jackson*, 35 Ch. D. 460.

(a) Per Lord Cottenham, Cr. & Ph. 227. Originally the rule seems to have been wholly unqualified, for, according to Wilmot, C. J. (Opin. 32, 33), "the Court thought one kind of charity would embalm a testator's memory as well as another."

(b) *Att.-Gen. v. Ironmongers' Company*, Cr. & Ph. 208, 10 Cl. & Fin. 908. *Att.-Gen. v. Edalji*, 97 L. T. 292, was the case of a denominational school being closed.

(c) 1 Drew. 642.

of the Female Orphan School at G., patronised by Mrs. E., for the benefit of that charity"; the school had been established and maintained by Mrs. E. at her own expense, without treasurer or other official, and seems to have come to an end about the same time that the testator died (*d*). Kindersley, V.-C., said there was a recognised distinction between a gift showing a general charitable purpose, and pointing out the mode in which it was to be carried into effect, and a gift to a particular institution; that here the institution being a mere private school maintained by the beneficence of Mrs. E., he could not say the legacy was to go to any other institution. But this decision has been questioned, and, according to the later authorities, it clearly cannot be supported unless it went on the ground that the school had come to an end before the testator's death, so that the legacy lapsed.

In *Russell v. Kellett* (*e*), a legacy of fixed amount was given to each of a number of poor persons answering a certain description; some of them survived the testatrix, but died before payment, and it was held by Stuart, V.-C., that their legacies lapsed. He said the doctrine of cy-près meant that some other object could be found in a reasonable degree nearly answering the object mentioned by the testatrix, but that here was such a singular and particular definition of the objects as made it impossible to find any other so nearly resembling them as to justify the application of the doctrine. The will also gave the residue of the property to the legatees in proportion to their legacies, and it was held that only those living at the time of distribution could take. The case was a peculiar one, and is probably not valuable as an authority on the general principle (*f*).

*Russell v.
Kellett.*

In *Marsh v. Means* (*g*), a testator gave a legacy, payable after the death of his wife, for continuing a certain publication (which had been published by the Association for Promoting Humanity to Animals) according to principles stated in one of its numbers, viz. to expose cruelty to animals, to diffuse moral and religious information, &c. At the date of the will the publication had been discontinued, and the association itself was extinct; and it was held by Wood, V.-C., that this was not a bequest for promoting these principles, but for continuing the publication of this particular book, which brought the case within *Clark v. Taylor*, so that

*Marsh v.
Means.*

(*d*) See *Re Slevin*, [1891] 2 Ch. 236; *Re Rymer*, [1895] 1 Ch. 19.

(*e*) 3 Sm. & Gif. 264, ante.

(*f*) See per Lord Herschell in *Re*

Rymer, [1895] 1 Ch. at p. 32.

(*g*) 5 W. R. 815, also reported (but obscurely) 3 Jur. N. S. 790.

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the doctrine of cy-près was not applicable, and the gift lapsed by extinction of the object.

Fisk v.
Att.-Gen.

Again, in *Fisk v. Att.-Gen.* (*h*), where a legacy was given "to the Ladies' Benevolent Society at L. as part of its ordinary funds," and before the testator's death the society ceased to exist, Wood, V.-C., said it has been expressly decided by *Clark v. Taylor* and *Russell v. Kellett*, that when a gift was made by will to a charity which had expired, it was as much a lapse as a gift to an individual who had expired; and that though the point might some day require further consideration, he could not interfere with the settled authorities.

Clark v. Taylor and *Fisk v. Att.-Gen.* were followed by Pearson, J., in *Re Ovey* (*i*), and by the Court of Appeal in *Re Rymer* (*j*), where the authorities were discussed at length.

The question sometimes arises as to the degree of failure or cesser of a charitable institution which will constitute a lapse. Thus, in *Re Waring* (*k*), a testatrix bequeathed a legacy to the "St. A. School," which, at the date of the will, was carried on under a trust deed as a Church of England school under the management of the vicar of the parish; before the death of the testatrix the school ceased to be carried on during the week in accordance with the trust deed, but was used on Sundays as a Sunday school: it was held by Kekewich, J., that the legacy had not lapsed.

Cases where
doctrine of
lapse is
inapplicable.

If the bequest is to a named institution merely as the instrument for executing the testator's charitable intent, which he fully describes, the failure of the institution will not involve the failure of the charitable trust (*kk*).

It is also clear that, where the charitable object fails after the testator's death, and before the legacy has been paid, the gift will not lapse. In *Hayter v. Trego* (*l*), where the bequest was to "the D. Asylum for Female Penitents," which was dissolved after the testator's death, it was assumed that the legacy was to be applied cy-près, the only question argued being whether this should be done by the Crown or by the Court. And in *Re Slevin* (*m*), it was held that

(*h*) L. R., 4 Eq. 521. See also *Langford v. Gowland*, 3 Gif. 617; *Makeown v. Ardagh*, Ir. R., 10 Eq. 445. But see the observations of Lord Selborne, C., in *Chamberlayne v. Brockett*, L. R., 8 Ch. 211.

(*i*) 29 Ch. D. 560.

(*j*) [1895] 1 Ch. 19. See also *Re Joy*, 60 L. T. 175; *Re Davies' Trusts*, 21 W. R. 154; *Re Adams*, 4 T. L. R. 757 (amalgamation with other institution); *Re Bradfield*, 8 T. L. R. 696 (discon-

tinuance of branch).

(*k*) [1907] 1 Ch. 166.

(*kk*) *Marsh v. Att.-Gen.*, 2 J. & H. 61. Compare *Att.-Gen. v. Stephens*, 3 My. & K. 347 (abolition of office); *Re Rymer*, [1895] 1 Ch. 19; *Re Mann*, [1903] 1 Ch. 232.

(*l*) 5 Russ. 113.

(*m*) [1891] 2 Ch. 236, reversing the decision of Stirling, J., [1891] 1 Ch. 373. Compare the cases cited *supra* p. 235, n. (*d*), in some of which the

a charitable bequest to an institution which ceases to exist after the testator's death, and before the legacy has been paid, does not lapse so as to let in the residuary legatee, but will be applied by the Crown for some analogous purpose of charity, irrespective of whether or not any general charitable intention that the fund shall be administered cy-près is indicated by the will, on the ground that, as the charity existed at the testator's death, the legacy became the property of that charity.

The case of *Marsh v. Means*, above cited, was not an ordinary case of lapse, because the object of the gift had ceased to exist before the date of the will. Probably the decision turned on the specific nature of the gift, and if it had been expressed in more general terms effect might have been given to it. Thus in *Coldwell v. Holme (mm)*, a testatrix bequeathed 200*l.* to "The Benevolent Institution for X." (describing the charitable objects of the institution), an institution which had existed, but had ceased to exist at the date of the will; there was, however, at the date of the will an old-established society called "The Royal M. Society for X.," and it was held that this society was entitled to the legacy. Possibly the same result might have been reached by applying the doctrine of cy-près.

In *Re Buck (n)*, a legacy was bequeathed to a friendly society which was established to provide annuities for its members and their widows and children, if in distressed circumstances; the legacy was not required, because the funds of the society were sufficient to provide for the surviving annuitants: it was held that the legacy had not lapsed and was applicable cy-près.

If there is a gift to a charitable institution by name, and no such institution can be found to have existed, this does not necessarily prevent the legacy from being successfully claimed by another institution, similar in name or in object to the non-existent institution (o). If, however, there is no institution which can establish its claim, it will generally be presumed that the testator, in naming the institution, merely intended to indicate the purpose to which he wished the legacy applied, for it is clear he could not have intended to benefit a particular institution, and the legacy will be applied cy-près (p).

particular scheme which the testator had in mind could not be carried out.

(mm) 2 Sm. & G. 31.

(n) [1896] 2 Ch. 727. A friendly society is not *prima facie* a charitable institution, and if it comes to an end its funds are not applicable cy-près; *Cunnack v. Edwards*, [1896] 2 Ch. 679;

Braithwaite v. Att.-Gen., [1909] 1 Ch. 510.

(o) See the cases referred to *infra*, note (r), and in Chap. XXXV.

(p) *Loscombe v. Wintringham*, 13 Beav. 87; *Re Maguire*, L. R., 9 Eq. 632; *Re Rymer*, [1895] 1 Ch. 19; *Re Davis*, [1902] 1 Ch. 876.

Doctrine of cy-près applied where bequest not required.

Where institution never existed.

CHAPTER IX.

Where there are several charities equally answering the description.

It sometimes happens that a legacy is given to a particular institution by a description equally applicable to more than one. It cannot here be presumed that the testator did not intend to select one in particular; for he may have known, and, considering the terms of the bequest, probably did know, only one answering the description; yet, as it cannot be ascertained which, the particular purpose fails; nevertheless it is clear that the legacy will be applied *cy-près*, or divided between the two institutions (*r*).

Where legacy conditional.

Cherry v. Mott (*s*) shows that there may be a conditional legacy to a charity as well as for any other purpose, and that if the condition is not fulfilled the legacy fails in substance. And if the condition is such that it need not be performed within the limits allowed by the Rule against Perpetuities, the gift is void (*t*). Such cases must be distinguished from those where the intention is to give a fund to charity at once, though there may be an indefinite suspense or abeyance in its actual application. If the particular purposes may be answered, though not immediately, the fund will be retained—how long does not clearly appear: but if those purposes turn out on inquiry to be impracticable, then the fund will be applied *cy-près*. And during such retention there is no resulting trust for heir or next-of-kin (*u*).

Where charitable purposes do not exhaust the fund.

It has been already mentioned that where a testator shews an intention to devote certain property to charitable purposes, and fails to specify all or some of them, the property so undisposed of will be applied *cy-près* (*v*). It is also explained in a subsequent chapter (*w*) that gifts to charity are an exception to the doctrine of resulting trusts in this respect, that where property is given to a charity and the income afterwards increases, so that there is a surplus after satisfying the purposes for which it was given, this surplus is also, as a general rule, applicable *cy-près*.

Surplus income.

Cases within the Mortmain Acts.

It remains to be noticed, that the *cy-près* doctrine does not apply to bequests which are made void by the Mortmain Act of 1736 or 1888, and therefore a bequest of money to be laid out in land is not executed *cy-près*, i.e., applied to an allowed charitable purpose.

(*r*) *Bennett v. Hayter*, 2 Beav. 81; *Re Clergy Society*, 2 K. & J. 615; *Re Alchin's Trusts*, L. R., 14 Eq. 230, and the other cases cited above, p. 235.

(*s*) 1 My. & C. 132, ante, p. 237.

(*t*) As to the application of the Rule against Perpetuities to charities, post, p. 280.

(*u*) *Att.-Gen. v. Oglander*, 3 Br. C. C.

166; *Abbott v. Fraser*, L. R., 6 P. C. 96; *Chamberlayne v. Brockett*, L. R., 8 Ch. 206; *Biscoe v. Jackson*, 35 Ch. D. 460; *Re Robinson*, [1892] 1 Ch. 95; *Re Villers-Wilkes*, 72 L. T. 323, and the other cases referred to above, p. 235.

(*v*) *Supra*, pp. 234 seq.

(*w*) Chap. XXI. *Re Ashton's Charity*, 27 Bea. 115.

But an express gift over, in case the charitable gift cannot by law take effect, is valid (x).

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The reason preventing a gift which is void under the Mortmain Act from being applied cy-près, namely that it is made void by the statute, also applies to other gifts for purposes which are expressly forbidden (y). And a similar rule applies to a bequest, if the purposes for which it is made are illegal because they are contrary to the policy of the law : such a gift cannot be applied cy-près, although the intention of the testator is to benefit (according to his ideas) a certain section of the public. On this principle bequests for promoting doctrines inconsistent with Christianity, or morality, or with the fundamental doctrines of the British constitution, or for purchasing the discharge of persons imprisoned for poaching, have been held void (z). But where the reason why a bequest cannot be applied in a particular way is that, although not expressly forbidden, it nevertheless contravenes the policy of a statute, then if the main object of the bequest is charitable and is sufficiently general it will be applied cy-près. Thus in *Da Costa v. De Pas* (a), a bequest for instructing people in the Jewish religion was held to be contrary to the law relating to the Established Church, and was applied cy-près. So in *Cary v. Abbot* (b), a bequest for bringing up poor orphan children in the Roman Catholic faith was held to be void only in the manner and not in the substance, and was applied cy-près. Such bequests would, at the present day, be held to be legal in all respects (c). In *Att.-Gen. v. Vint* (d), a bequest for providing the inmates of a workhouse with fermented liquor was directed to be administered cy-près, in such a way as not to contravene the provisions of the

Illegal purposes.

(x) *Att.-Gen. v. Tancred*, 1 Ed. 10, 1 W. Bl. 90, Amb. 354; *De Themmines v. De Bonneval*, 5 Russ. 288. *Robinson v. Robinson*, 19 Beav. 494; *Carter v. Green*, 3 K. & J. 591; *Warren v. Rudall*, 4 lb. 618; and per Lord Eldon, *Sibley v. Perry*, 7 Ves. 522; overruling *Att.-Gen. v. Tyndall*, 2 Ed. 207. The grounds of the decision in *Att.-Gen. v. Hodgson*, 15 Sim. 150, shew that it is not an authority against the validity of such a gift over. But as to those grounds, see *Warren v. Rudall*, 4 K. & J. 603, stated post, Ch. X.

(y) See *Att.-Gen. v. Whorwood*, 1 Ves. Sen. 534; *Moggridge v. Thackwell*, 7 Ves. 36; *Sims v. Quinlan*, 16 Ir. Ch. 191; 17 Ir. Ch. 43 where the subject is discussed. The dicta of the judges in the various cases are not easy to reconcile.

(z) *De Themmines v. De Bonneval*, 5 Russ. 288; *Briggs v. Hartley*, 19 L. J. Ch. 416; *Thompson v. Thompson*, 1 Coll. 395; *Russell v. Jackson*, 10 Ha. 204; *Thrupp v. Collett*, 26 Bea. 125. As to *Briggs v. Hartley*, see supra, p. 216, n. (p).

(a) Amb. 228. If the bequest had been merely in aid of worship in accordance with the Jewish religion, it would apparently have been good even in 1754: see 3 Mer. p. 393, n.

(b) 7 Ves. 490, and see per Lord Eldon, 17 Ves. p. 487.

(c) See the enactments and cases referred to, ante, pp. 208 seq., and the general principle in favour of gifts for religious purposes, stated supra, p. 216.

(d) 3 De G. & S. 704.

CHAPTER IX.

Whether
the Crown
or the Court
administers
charity.

law relating to workhouses. But if the testator has no general charitable intention and has only a particular object in view, which is illegal, then the bequest fails altogether (e).

The general law of charities is beyond the scope of this treatise, but it may be mentioned that with respect to the particular cases in which the Crown, and those in which the Court, undertakes the office of administering charities, the distinction seems to be, that where the bequest is by the intervention of trustees, even though those trustees die in the testator's lifetime or refuse to act, it devolves upon the Court (f); but where the object is charity without a trust interposed, the direction must be by the sign manual of the Sovereign (g). Accordingly, in *Re Pyne* (h), where the testatrix gave her residuary estate to trustees in trust for such charitable purposes as she might thereafter specify by codicil, and she failed to do so, it was held that the Court had jurisdiction to direct a scheme. In a case (i) where there was a bequest to a voluntary charitable society, which existed when the will was made, and also at the death of the testator, but was dissolved before his assets could be administered, it was held that the execution devolved on the Court.

But this decision seems to have proceeded partly on the ground that the testator shewed a general charitable intention; and in *Re Slevin* (j), where there was a legacy to a charitable institution which was in existence at the death of the testator, but ceased to exist before legacy was paid, it was held that the legacy fell to be administered by the Crown.

Both the Crown and the Court, however, in the exercise of their discretion, alike act upon the principle of adhering as closely as possible to the spirit of the donor's expressed or presumed intention (k).

Where the testator's object is sufficiently defined, and is capable of being carried into effect, it will not be departed from upon a notion of more extended utility (l).

(e) See per M. R. in *Att.-Gen. v. Hurst*, 2 Cox, 364; *Carbery v. Cox*, 3 Ir. Ch. R. 231.

(f) *Moggridge v. Thackwell*, 7 Ves. 36; *Paice v. Archbishop of Canterbury*, 14 Ves. 364; *Att.-Gen. v. Gladstone*, 13 Sim. 7; *Reeve v. Att.-Gen.*, 3 Hare, 191; *Pocock v. Att.-Gen.* 3 Ch. D. 342; *Re Huxtable*, [1902] 2 Ch. 793. But the Court frequently dispenses with a scheme if the testator has given his trustees an absolute discretion of determining the objects of a charitable gift: ante, p. 227.

(g) *Att.-Gen. v. Fletcher*, 5 L. J., N. S., Ch. 75, Pepps, M. R.; *Denyer v. Druce*, Tambl. 32; *Kane v. Cosgrave*, Ir. R., 10 Eq. 211. See *Att.-Gen. v. Herrick*, Amb. 712, and the note to *Da Costa v. De Pas*, Amb. 228. In *Felan v. Russell*, 4 Ir. Eq. 701, the trustee died before a scheme was settled.

(h) [1903] 1 Ch. 83.

(i) *Hayter v. Trego*, 5 Russ. 113.

(j) [1891] 2 Ch. 236.

(k) 7 Ves. 87.

(l) *Att.-Gen. v. Whiteley*, 11 Ves. 241.

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Crown
charity.

In *Wallis v. Sol.-Gen. for New Zealand* (e), the question was raised whether, if a charity instituted by a Crown grant to trustees becomes impossible of performance, the Court has jurisdiction to administer it cy-près, but in the view of the case taken by the Judicial Committee, the point became immaterial (f).

Where a pecuniary legacy is bequeathed absolutely to a person, to be applied for such charitable purposes as he may in his discretion select, or is bequeathed absolutely to a corporation existing for only charitable purposes, the Court will direct payment, without requiring that a scheme be settled by itself for its appropriation (g). And the same rule obtains where a legacy is given to the treasurer or other officer of a charitable institution, though not a corporation, to become part of the general funds of that institution (h). But where the legacy is to be applied, not as part of the general funds of the institution, but for certain permanent charitable trusts, which the testator has pointed out, the Court will take upon itself to insure the accomplishment of the testator's object by a scheme of its own (i).

Where the
Court will pay
legacies to a
charity with-
out a scheme.

And if a legacy is bequeathed for a charitable purpose, subject to a continuing condition, the fund may be retained in court and the income paid out so long as the condition is complied with (ii).

Continuing
condition.

Where a legacy is given to a foreign charity, the Court will direct it to be paid to the persons appointed by the testator to receive it, and will not take upon itself to administer the fund (j). Nevertheless the Court has jurisdiction to secure a legacy given for charitable

Foreign
charity.

(e) [1903] A. C. 173.

(f) Their lordships held that the donors were certain Maori chiefs. The Court of Appeal in New Zealand thought that the Crown was the grantor, as the natives had merely a right of occupation, and not a legal title which they could transfer to anyone else; this seems the correct view (see [1901] A. C. p. 567). The Court of Appeal also thought that, according to the law of New Zealand, the Crown, as *parens patriæ*, has the duty not only of enforcing charitable trusts, but also of protecting the rights of the natives in respect of land occupied by them, and that where these two duties conflict, the Court may have a difficulty in applying the doctrine of cy-près. The Judicial Committee failed to appreciate this point.

(g) *Waldo v. Caley*, 16 Ves. 206; *Horde v. Earl of Suffolk*, 2 My. & K. 97; *Warren v. Clancy*, [1898] 1 Ir. R. 512; *Richardson v. Murphy*, [1903] 1 Ir.

R. 227; *Society for the Propagation of the Gospel in Foreign Parts v. Att.-Gen.*, 3 Russ. 142; *Walsh v. Gladstone*, 1 Phil. 290.

(h) See *Wellbeloved v. Jones*, 1 S. & St. 43; *Re Barnett*, 29 L. J. Ch. 871; *Re Lea*, 34 Ch. D. 528; *In bonis McAuliffe*, 44 W. R. 304.

(i) *Ib.*; *Corp. of Sons of the Clergy v. Mose*, 9 Sim. 610.

(ii) *Re Robinson*, [1892] 1 Ch. 95; [1897] 1 Ch. 85.

(j) *Provost, &c., of Edinburgh v. Aubery*, Amb. 236; *Collyer v. Burnett*, Tam. 79; *Milford v. Reynolds*, 1 Phil. 194; *Emery v. Hill*, 1 Russ. 113. See *Mayor of Lyons v. East India Company*, 1 Moo. P. C. C. 293. In *Re Fraser*, 22 Ch. D. 827, a bequest was given for the benefit of the blind in Inverness-shire, and, the executor having declined to act, leave was given to the Attorney-General to apply to the Scotch Court for the settlement of a scheme. Compare *Forbes v. Forbes*, 18 Bea. 552.

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purposes by a subject of the Crown, whether in or out of this country, and will sometimes order the fund to be carried to a separate account in Court, and the income only paid over to the person named in the will, subject to an account of the mode of its application (*k*). And if a fund is given to English trustees to be retained and invested in this country, for the benefit of a foreign charity, the Court has jurisdiction (which it will exercise in a proper case) to settle a scheme (*l*).

As already explained, the Court will not apply the *cy-près* doctrine to a foreign charity, unless the trustees are within the jurisdiction (*m*).

Charity
Commis-
sioners.

It will, of course, be remembered that under the Charitable Trusts Acts, 1853 to 1894, the Charity Commissioners, and in some cases the Board of Education, have power to frame schemes for the application or management of endowed charities (*n*). Such schemes ought to be framed in accordance with the doctrine of *cy-près*, and if any scheme is framed on a wrong principle the Court will vary it (*nn*).

Policy of
early times in
regard to
charity.

VI. The Mortmain Acts of 1736 and 1888 (*o*).—"The policy of early times," says Mr. Jarman (*p*), "strongly favoured gifts, even of land, to charitable purposes. Thus, not only was no restraint imposed on such dispositions by the early statutes of wills, but the act of 43 Eliz. c. 4 (*q*), as construed by the Courts, tended greatly to facilitate gifts of this nature, such act having been held to authorise testamentary appointments to corporations for charitable uses (*r*), and even to enlarge the devising capacity of testators, by rendering valid devises to those uses by a tenant in tail (*s*); and also by a copyholder, without a previous surrender to the use of the will (*t*), though it was admitted that the statute did not extend to the removal of personal disabilities, such as infancy, lunacy, and the like (*u*).

(*k*) *Att.-Gen. v. Lepine*, 2 Sw. 181; *Att.-Gen. v. Sturge*, 19 Beav. 597.

(*l*) *Re Vagliano*, 75 L. J. Ch. 119.

(*m*) *New v. Bonaker*, L. R., 4 Eq. 655, ante, p. 235.

(*n*) See for example *Re Peel's School*, L. R., 3 Ch. 543; *Re Gilchrist Educational Trust*, [1895] 1 Ch. 367. Educational charities are now under the control of the Board of Education: Board of Education Act, 1899; Orders in Council, 1900 to 1902.

(*nn*) *Re Camptden Charities*, 18 Ch. D. 311.

(*o*) The wills of testators dying after August 5th, 1891, are governed by the Mortmain, &c., Act, 1891, post, p. 274.

(*p*) First edition, p. 197.

(*q*) Ante, p. 212.

(*r*) *Flood's case*, Hob. 136. See 1 D. & War. 303 seq.

(*s*) *Att.-Gen. v. Rye*, 2 Vern. 453; *Att.-Gen. v. Burdet*, ib. 755. See also 3 Ch. Rep. 154.

(*t*) *Rivet's Case*, Moore, 890, pl. 1253, 3 Ch. Rep. 220.

(*u*) See *Collison's Case*, Hob. 136.

“To the same policy we may ascribe that rule of construction, presently considered, by the effect of which property once devoted to charity was never allowed to be diverted into any other channel, by the failure or uncertainty of the particular objects. At the commencement of the eighteenth century, however, the tide of public opinion appears to have flowed in an opposite direction, and the legislature deemed it necessary to impose further restrictions on gifts to charitable objects; from the nature of which it may be presumed that the practice of disposing by will of lands to charity had antecedently prevailed to such an extent as to threaten public inconvenience. It appears to have been considered, that this disposition would be sufficiently counteracted by preventing persons from aliening more of their lands than they chose to part with in their own lifetime; the supposition evidently being, that men were in little danger of being perniciously generous at the sacrifice of their own personal enjoyment, and when uninfluenced by the near prospect of death.” Accordingly, the stat. of 9 Geo. 2, c. 36, (usually called the Statute of Mortmain,) after referring in the preamble to the public mischief caused by improvident alienations or dispositions made by languishing or dying persons or by other persons to charitable uses to take place after their deaths, to the disherison of their lawful heirs (*v*), enacted, that from and after 24th June, 1736, no hereditaments, or personal estate to be laid out in the purchase of hereditaments, should be given, conveyed, or settled to or upon any persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered, in trust or for the benefit of any charitable uses whatsoever, unless such gift or settlement of hereditaments or personal estate (other than stocks in the public funds) be made by deed indented (*w*), sealed and delivered in the presence of two credible witnesses (*x*), twelve calendar months before the death of the donor, including the days of the execution and death, and enrolled (*y*) in

Mortmain
Act, 1736.

No hereditaments, or personal estate to be laid out in the purchase of hereditaments, to be disposed of or charged for any charitable use, other than by indenture enrolled in Chancery, &c.

(*v*) “The legislature has itself here declared the object of the legislation, and what the mischief was which was intended to be remedied. This recital is therefore of much importance in construing the rest of the statute”: per Blackburn, J., 8 H. L. C. p. 624. It is hardly necessary to say that this preamble does not appear in the act of 1888, being inconsistent with modern ideas of parliamentary drafting. But it is still referred to by the Courts, notwithstanding its repeal. See per Stirling, J., [1895] 1 Ch. p. 425, and the

Privy Council, [1895] A. C. p. 94.

(*w*) The deed need no longer be indented, 24 Vict. c. 9, s. 1; 51 & 52 Vict. c. 42, s. 4 (6).

(*x*) In *Wickham v. M. of Bath*, L. R., 1 Eq. 17, it was held that the witnesses must not only be present, but subscribe the attestation clause.

(*y*) As to copyholds, and cases where the conveyance to trustees is by one deed, and the declaration of trust by another, see 24 Vict. c. 9, ss. 2, 4; 25 Vict. c. 17, ss. 1, 3, 4; 51 & 52 Vict. c. 42, s. 4 (9). A deed conveying to a

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Chancery within six calendar months after the execution, and unless such stocks be transferred six calendar months before the death, and unless the same be made to take effect in possession (z) for the charitable use, and be without any power of revocation, reservation (a), trust, &c., for the benefit of the donor, or of any persons claiming under him.

Exception.

The second section provided, that purchases for valuable consideration should not be avoided by the death of the grantor within the twelve months, leaving, however, such purchases subject to the other conditions imposed by the act (b). The third section declared all gifts, conveyances, settlements, of any hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any hereditaments, &c., not perfected according to the act, void (c).

Mortmain
and Charit-
able Uses
Act, 1888.

This act was repealed, except so much of section 5 thereof (d) as had not been repealed, but the provisions of the first three sections thereof as modified by later acts (e) were in effect re-enacted by the fourth section of the Mortmain and Charitable Uses Act, 1888 (f). That section, so far as material for the present purpose, enacted as follows :—" (1.) Subject to the savings and exceptions contained in this act, every assurance of land to or for the benefit of any charitable uses, and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, shall be made in accordance with the requirements of this act, and unless so made shall be void." The assurance must (2) take effect in possession; and must, (3), except as provided by sub-ss. (4), (5), be without any power of revocation, reservation, &c., for the benefit of the assurator, or of any person claiming under him. (6.) If the assurance was of land, not being land of copyhold

charity land already in mortmain does not require enrolment, *Ashton v. Jones*, 28 Beav. 460.

(z) I.e. giving the right to possession, *Fisher v. Brierley*, 10 H. L. Ca. 159. As to actual retention of possession by the donor, not expressly authorised by the deed, furnishing evidence of a secret reservation, see s. c. and *Way v. East*, 2 Drew. 44. A lease for years to take effect in possession within one year is good, 26 & 27 Vict. c. 106.

(a) This does not preclude the donor from reserving to himself a power of regulating the charity, 2 Cox, 301. See also 1 Mer. 327. And certain restrictive covenants and other provisions are now permissible, see 24 Vict. c. 9, s. 1; 51 & 52 Vict. c. 42, s. 4 (4, 5).

(b) On this section see *Price v. Hathaway*, 6 Mad. 304; *Milbank v. Lambert*, 28 Beav. 206; and 9 Geo. 4, c. 85; 24 Vict. c. 9, ss. 1, 3, 4; 25 Vict. c. 17, ss. 2, 5; 27 Vict. c. 13, s. 4; 29 & 30 Vict. c. 57.

(c) As to exceptions from the operation of the statutory restraint in favour of the Universities, &c., see post, p. 270.

(d) This section limits the number of advowsons to be held by colleges and houses of learning, and was repealed by the Stat. 45 Geo. 3, c. 101, as to colleges, &c., in the Universities of Oxford and Cambridge.

(e) Stats. 24 Vict. c. 9; 27 Vict. c. 13.

(f) Stat. 51 & 52 Vict. c. 42.

or customary tenure, or was of personal estate, not being stock in the public funds, it must be made by deed executed in the presence of at least two witnesses. (7.) Such assurance, unless made in good faith for valuable consideration, must be made at least twelve months before the death of the assurator; and (9) the assurance, or, if the uses of land were declared by a separate instrument, then that instrument, must be enrolled in the Central Office of the Supreme Court within six months after the making of the assurance. (8.) An assurance of stock in the public funds, unless made in good faith, &c., must be made by transfer at least six months before the death of the assurator.

By section 10, unless the context otherwise required, the term "assurance" included devise, bequest and every other assurance by will or codicil, and "land" included tenements and hereditaments, corporeal and incorporeal, of whatsoever tenure, and any estate or interest in land (g).

The effect of these two statutes was to render absolutely void every testamentary gift of land, or of any interest in land, or of money arising from (h), or charged on, or connected with land (i), and every bequest of personalty to be laid out in land for charitable purposes; with the effect that any such property so devised or bequeathed went to the heir or next-of-kin, or to the residuary devisee or legatee, as the case might be (j). The operation of the acts is confined to land in England (k).

So far as regards the wills of testators dying after the 5th August, 1891, the fourth section of the Mortmain, &c., Act, of 1888 has been in effect repealed by the Mortmain, &c., Act of 1891, referred to in the next section, and land, and all

Mortmain,
&c., Act of
1891.

(g) This definition is repealed as regards the wills of testators dying after 5th August, 1891, by the M. & C. U. Act, 1891, below, p. 274.

(h) Post, p. 250.

(i) A voluntary covenant to pay a sum to a charity after covenantor's death is void under this act, so far as it would affect chattel real assets, *Jeffries v. Alexander*, 8 H. L. Ca. 594, and see s. c. as to validity of "devices to evade the statute," and as to the object of the act; and *Fox v. Lownds*, L. R., 19 Eq. 453. But where a settlor covenanted to pay a sum to trustees of a deed whereby a power of testamentary appointment was given to his wife; the wife by her will appointed part of the sum to charitable uses; the settlor survived the wife, and died without having paid the sum; his estate consisted partly of

impure personalty: it was held that the sum being a mere debt from the settlor's estate, the charitable gift was not in any part void under the Mortmain Act, *Re Robson*, 19 Ch. D. 156. As to subscription funds, and as to parol declarations of trust, see *Girdlestone v. Creed*, 10 Hare, 480.

(j) There is, however, a distinction between devises of land in England for charitable purposes and bequests of money to purchase land in England for charitable purposes, for a bequest of this nature may be valid if made by a testator domiciled abroad, although a devise by him of the land would be void: see *Re Hewit*, [1891] 3 Ch. 568; *Canterbury (Mayor, &c., of) v. Wyburn*, [1895] A. C. 89; post, p. 272.

(k) Post, p. 271.

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kinds of interests in land, and money arising from the sale of land, may now be given to charity, subject to the requirement that if land is given to charity it must, as a general rule, be sold within a certain time.

Notwithstanding this radical change in the law, the effect of the older acts of 1736 and 1888 is still of practical importance, and the decisions on them must be referred to.

What species
of property
within the
statutes.

The act of 1888, like the act of 1736, extends to leaseholds and money secured on mortgage, whether in fee or for years (*l*), or by deposit of title-deeds (*m*), and to arrears of interest on any such mortgage (*n*), and to money charged by way of mortgage on sums invested on any such mortgage (*o*), and even to judgment debts, so far as they operate as a charge on real estate (*p*). Each act also applies to the proceeds of land directed to be sold (*q*). And where a testator had bequeathed his personal estate upon trusts for a charity, and afterwards contracted to sell real estate, it was held that his lien on the property for the purchase-money was "an interest in land" within the meaning of the statute, and accordingly could not pass with the rest of his personal estate (*r*). So a sum of money which ought to have been raised for the benefit of A. by the execution of a trust for sale of real estate, was held to constitute an interest in land which could not legally be bequeathed by A. to a charity (*s*). And it made no difference, as sometimes supposed (*t*), whether the testator was alone entitled to the whole proceeds of the land directed to be sold, and therefore entitled to take the land unconverted, or whether he was entitled only to a share of the proceeds, or to a sum payable thereout. In either

(*l*) *Att.-Gen. v. Graves*, Amb. 155; *Att.-Gen. v. Caldwell*, ib. 635; *Att.-Gen. v. Meyrick*, 2 Ves. 44; *Att.-Gen. v. Earl of Winchelsea*, 3 Br. C. C. 373; s. c. nom. *Att.-Gen. v. Hurst*, 2 Cox, 364; *White v. Evans*, 4 Ves. 21; *Paice v. Archbishop of Canterbury*, 14 Ves. 364; *Currie v. Pye*, 17 Ves. 462; *Kilford v. Blaney*, 29 Ch. D. 145, 31 Ch. D. 56. See s. 3 of the act of Geo. 2, and *Toppin v. Lomas*, 16 C. B. 159. As to the case of a debt only partially secured by mortgage, the security being insufficient, see *Smith v. Sopwith*, [1877] W. N. 208; not a considered judgment.

(*m*) *Alexander v. Brame*, 30 Beav. 153; *Lucas v. Jones*, L. R., 4 Eq. 73; *Chester v. Chester*, L. R., 12 Eq. 444 (deposit of lease).

(*n*) *Ib.*

(*o*) *Re Watts*, 29 Ch. D. 947. The decision turned on the question whether the testator's interest was such that he could by foreclosure have acquired the original mortgage; 27 Ch. D. 318.

(*p*) *Collinson v. Pater*, 2 R. & My. 344. And see *Jeffries v. Alexander*, 8 H. L. Ca. 594.

(*q*) Post, p. 256.

(*r*) *Harrison v. Harrison*, 1 R. & My. 71. See also *Shepherd v. Beetham*, 6 Ch. D. 597 (lien for premium payable on grant of lease).

(*s*) *Att.-Gen. v. Harley*, 5 Mad. 321.

(*t*) *Marsh v. Att.-Gen.*, 2 J. & H. 61; *Lucas v. Jones*, L. R., 4 Eq., 73.

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case, if the real estate had not, in fact, been sold before A.'s death, his interest was then an interest in land and within the statute (*u*).

If a testator gave pure personalty to trustees upon trust to invest in investments which included real securities, and to pay the income to A. for life, and after his death to apply the capital for the benefit of a charity, the fact that the trustees invested the money in real securities did not make the gift to the charity invalid (*v*). But if the gift to the charity was of the investments as they stood at the death of the tenant for life the case was different (*w*).

Effect of investing fund in real securities.

If money bequeathed to a charity arose partly out of land and partly out of pure personalty, the bequest was void *pro tanto* (*x*). The manner in which charitable legacies given out of a mixed fund abated, is stated in section viii. of this chapter.

Legacy partly arising out of land.

If a testator was entitled to a fund which was charged on or arose out of a trust estate consisting of pure and impure personalty, and bequeathed it to a charity, the validity of the bequest seems to have depended on whether the fund could be apportioned. If it was charged on the pure and impure personalty, it could not be apportioned, and the bequest failed (*y*). If the fund arose partly out of land and partly out of pure personalty, there seems on principle to have been no reason why it should not be apportioned. Lord Cairns, however, refused to do so in *Brook v. Bradley* (*z*); in that case A. directed a conversion of his real and personal estate, and out of the proceeds bequeathed a legacy of 3000*l.* to B., payable after the death of X.; B. predeceased X., having by her will bequeathed her personal property applicable for the purposes of mortmain to trustees for charitable purposes; Lord Cairns considered that the legacy of 3000*l.* was "charged" on the real and personal estate of A. and therefore could not be apportioned. Malins, V.-C., in a similar case (*a*) found no difficulty in apportioning the legacy according to the values of the real estate and personal estate of the first testator, and his decision seems correct. Fry, L. J., in *Re Watts* (*b*), pointed out the distinction between money arising partly out of land and partly out of personalty, and money charged on land and personalty.

Bequest of part of a mixed fund.

Where a testator had a reversionary interest in personalty,

Bequest of reversionary interest.

(*u*) *Brook v. Badley*, L. R., 3 Ch. 672. See also *Aspinall v. Bourne*, 29 Beav. 462; *Cadbury v. Smith*, L. R., 9 Eq. 43; *Re Watts*, 29 Ch. D. 947. Thus *Shadbolt v. Thornton*, 17 Sim. 49, is overruled.

(*v*) *Re Hamilton*, [1896] 2 Ch. 617.

(*w*) *Re Corcoran*, 62 L. J. Ch. 267.

(*x*) *Waite v. Webb*, 6 Madd. 71.

(*y*) *Re Watts*, 29 Ch. D. 947.

(*z*) L. R., 3 Ch. 672.

(*a*) *Re Hill's Trusts*, 16 Ch. D. 173.

(*b*) *Supra*.

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which, during the life of the tenant for life was subject to a power of investment in real securities, and the testator bequeathed this interest to a charity, the existence of the power did not affect the validity of the bequest, if it was never exercised (c). But if, at the date of the will and at the date of the testator's death, part of the trust fund was invested in real securities, the bequest failed pro tanto (d).

Property
savouring of
realty.

Early deci-
sions respect-
ing canal
shares and
debentures.

By the older authorities the act of Geo. II. was held to extend to every description of property savouring of the realty; as, the privilege by a grant from the Crown of laying chains in the river Thames for mooring ships (e); canal shares (f); and money secured by assignment of turnpike tolls (g), or of the poor's rate and county rates (h). These authorities were followed in comparatively recent times by similar decisions regarding money secured by mortgage of the rates imposed on the occupiers of houses by improvement commissioners (i), or by mortgage of railway (j), harbour (k), dock (l), bridge (m), or canal (n) tolls, all which are commonly called debentures (o). All these were held to be within the plain words of the act, "charges or incumbrances affecting hereditaments."

But "the current of modern decisions is against the older cases, and while there is to be discovered an inclination formerly to carry the provisions of the act beyond the legislature, the tendency of modern decisions has been the other way" (p). Thus charges on

(c) *Re Beaumont's Trusts*, 32 Bea. 191.

(d) *Re Prichard's Settlement*, 88 L. T. 197.

(e) *Negus v. Coulter*, Amb. 367.

(f) *Howse v. Chapman*, 4 Ves. 542; *Tomlinson v. Tomlinson*, 9 Beav. 459.

(g) *Knapp v. Williams*, 4 Ves. 430 n.; *Ashton v. Lord Langdale*, 4 De G. & S. 402. As to *Knapp v. Williams*, see *Re Christmas* and *Re David*, post.

(h) *Finch v. Squire*, 10 Ves. 41. The principle of this decision, viz. that such rates being directly charged in respect of the occupation of land may be considered as arising out of the land, was recognised by Cotton, L. J., in *Re Christmas*, 33 Ch. D. 342. See also per Lord Macnaghten, *Payne v. Esdaile*, 13 App. Ca. 628.

(i) *Thornton v. Kempson*, Kay, 592; *Chandler v. Howell*, 4 Ch. D. 651; see also *Howse v. Chapman*, 4 Ves. 542 (where, however, the form of security is not given); *Toppin v. Lomas*, 16 C. B. 159 (Westminster improvement bonds having the benefit of a general

mortgage of lands).

(j) *Ashton v. Lord Langdale*, supra.

(k) *Ion v. Ashton*, 28 Beav. 379; see *Re Christmas*, post.

(l) *Alexander v. Brame*, 30 Beav. 153.

(m) *Re David*, 43 Ch. D. 27.

(n) *Re Langham's Trust*, 10 Hare, 446.

(o) If the debenture was in form a bond or promissory note for money borrowed on the credit of the undertaking, but not by assignment of the tolls or of the undertaking, it was held not within the act, *Myers v. Perigal*, 16 Sim. 533; and per Wood, V.-C., *Re Langham's Trust*, sup.; and *Bunting v. Marriott*, 19 Beav. 163 (Tothill Fields Improvement). There is nothing in the word "debenture" which imports a charge on property or anything more than a mere promise to pay. See per Denman, J., in *Edgington v. Fitzmaurice*, 29 Ch. D. 469.

(p) Per Lord St. Leonards, 2 D. M. & G. 619.

improvement rates (*q*), or harbour duties (*r*), or on the undertaking of a waterworks corporation (*s*), or on the borough funds of municipal corporations (*t*), though arising partly from rents of land, have been held not to give the holders an interest in land so as to be within the mischief of the act (*u*). And moneys charged on police rates are not within the act, as they do not affect the land, but merely give a right to call for payment out of the rates (*v*). But if money is secured by a direct charge on the land, it confers an interest in the land and is within the act (*w*).

It is also settled that shares in all joint stock companies or partnerships, whether incorporated or not (*x*), having power to hold land for trading purposes (*y*), where such land is vested in the corporation or in individuals (as the case may be), in trust only to use the land for the purpose of profit as part of the stock in trade, even though the undertaking be based entirely upon the holding of land, as in the cases of railway, dock, market, gas, canal, mining, and land-jobbing companies, and also, of course, where the holding of land is only incidental to the business, as in the case of banking and assurance companies, are exempted from the operation of the act (*z*). The exemption does not depend on the clause frequently inserted in acts and deeds of settlement declaring shares to be personal estate and transmissible as such (*a*), nor on the nature of the business (*b*), but on the nature of the individual shareholder's interest (*bb*). And the fact that by the dissolution

Shares in
Joint Stock
Companies
not within
the act.

(*q*) *Jervis v. Lawrence*, 22 Ch. D. 202.

(*r*) *Re Christmas*, 33 Ch. D. 332.

(*s*) *Re Parker*, [1891] 1 Ch. 682.

(*t*) Stats. 5 & 6 Will. 4, c. 76, s. 92; 45 & 46 Vict. c. 50.

(*u*) *Re Thompson*, 45 Ch. D. 161; *Re Pickard*, [1894] 3 Ch. 704, where the authorities are discussed.

(*v*) *Re Harris*, 15 Ch. D. 565.

(*w*) *Cluff v. Cluff*, 2 Ch. D. 222; *Re Holmes*, 60 L. J. Ch. 267; *Re Hallett*, 5 Times L. R. 285; *Re Crossley*, [1897] 1 Ch. 928.

(*x*) As to companies or partnerships not incorporated, see *Myers v. Perigal*, 11 C. B. 90, 2 D. M. & G. 599; *Watson v. Spratley*, 10 Exch. 222 (case on the Stat. of Frauds); *Hayter v. Tucker*, 4 K. & J. 243; and the authorities cited in those cases.

(*y*) See 10 & 11 Vict. c. 78.

(*z*) *Att.-Gen. v. Giles*, 5 L. J., N. S., Ch. 44; *Sparling v. Parker*, 9 Beav. 450; *Walker v. Milne*, 11 Beav. 507; *Thompson v. Thompson*, 1 Coll. 381; *Hilton v. Giraud*, 1 De G. & S. 183; *Ashton v. Lord Langdale*, 4 De G. & S. 402; *Myers v. Perigal*, 16 Sim. 533;

Re Langham's Trust, 10 Hare, 446; *Edwards v. Hall*, 11 Hare, 1; 6 D. M. & G. 74; *Bennett v. Blain*, 15 C. B. (N. S.) 518 (corn-exchange); *Hayter v. Tucker*, 4 K. & J. 243 (cost-book mine); *Entwistle v. Davis*, L. R., 4 Eq. 272 (land company); overruling *Ware v. Cumberlande*, 20 Beav. 503, and *Morris v. Glynn*, 27 Beav. 218. Shares in a railway company, whose line is leased to another company at a rent, are on the same footing, *Taylor v. Linley (Linley v. Taylor)*, 1 Giff. 67, 2 D. F. & J. 84. As to Surplus Lands Stock, see *Re Hollon*, 69 L. T. 425.

(*a*) 10 Hare, 449. A deed would of course be insufficient for the purpose, *Baxter v. Brown*, 7 M. & Gr. 216. Besides personality, unless "pure," is within the act.

(*b*) *Entwistle v. Davis*, L. R., 4 Eq. 272, stated below.

(*bb*) *Myers v. Perigal*, 2 D. M. & G. 620. A debenture charging the "undertaking" of a railway company does not give the holder an interest in land. See post.

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of a company the shareholders may become specifically interested in the real property, is to be considered as a remote event, and no more avoiding a bequest of a share to a charity than a like bequest of a simple contract debt would be avoided, because it might ultimately become a judgment debt, and thus a charge upon realty (c).

This doctrine was fully adopted in *Entwistle v. Davis* (d), where shares in land companies were held not to be within the statute. But if the land of a company or partnership be vested in any person in trust, not for the purposes of the undertaking generally, but for the individual shareholders or partners in proportion to their shares, then such shares are an interest in land within the meaning of the act of Geo. II., for then the individual shareholder would have power to call upon the trustee, not merely for his share of the profits, but for part of the very land itself, which, in the cases previously considered, he could not do (e). So a share in a private partnership, holding land, is within the statute, since (unlike a share in a public company) it cannot be realised without sale of the land (f).

Railway debentures, &c
Later decisions.

The current of decision regarding debentures secured by mortgage of the undertaking of a railway or similar company has also been reversed (g), and it is now settled that, as all that the mortgagee can touch under such an instrument, is the profits of the undertaking, he has not such a charge on hereditaments as falls within the act (h).

Principle of *Attree v. Howe* applies to undertakings of all public bodies.

The principle of the decision is applicable to the debentures of all public bodies with parliamentary powers and duties to be exercised for the public benefit, as harbour, dock, canal, and

(c) See 5 Beav. 442, 2 D. M. & G. 620, 7 ib. 525, 10 Exch. 222, 245, L. R., 4 Eq. 276. Whether shares of the nature now under consideration are goods and chattels within the Bankrupt Act, see *Ex p. Vauxhall Bridge Company*, 1 Gl. & J. 101, and *Ex p. Lancaster Canal Company, Re Dilworth*, Mont. & Bli. 94. On the nature of shares as qualification for the county vote, see *Baxter v. Brown*, 7 M. & Gr. 198; *Bulmer v. Norris*, 9 C. B. N. S. 19; *Watson v. Black*, 16 Q. B. D. 270. Shares in an incorporated company held not an interest in land within s. 4 of Stat. of Frauds, *Bradley v. Holdsworth*, 3 M. & Wel. 422; nor within s. 17, *Duncuft v. Albrecht*, 12 Sim. 189. So (as to s. 4) shares in a cost-book mine, *Hayter v. Tucker*, 4 K. & J. 243; *Watson v.*

Spratley, 10 Exch. 222; *Powell v. Jessop*, 18 C. B. 337; *Walker v. Bartlett*, ib. 845. Shares in the Chelsea Waterworks Co. were held (before 1 Vict. c. 26) to pass by unattested codicil, *Bligh v. Brent*, 2 Y. & C. 268.

(d) L. R., 4 Eq. 272.

(e) Per Wood, V. C., *Hayter v. Tucker*, 4 K. & J. 251.

(f) *Ashworth v. Munn*, 15 Ch. D. 363.

(g) See *Doe d. Myatt v. St. Helen's Railway*, 2 Q. B. 364.

(h) *Gardner v. London, Chatham and Dover Railway*, L. R., 2 Ch. 201; *Attree v. Howe*, 9 Ch. D. 337. See also *Re Mitchell's Estate*, 6 Ch. D. 655; *Walker v. Milne*, 11 Beav. 507; *Harrison v. Cornwall Minerals Co.*, 16 Ch. D. 66.

waterworks companies (*i*), and public bodies constituted for the improvement of towns (*j*).

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But if the bonds or debentures issued by a public body amount to a specific assignment of certain tolls, and such tolls constitute an interest in land, or if the securities are by statute charged on real estate, they are within the mischief of the act, and could not, before 1891, be given to charitable purposes (*k*).

Bridge
tolls, &c.

Growing crops, which pass under a devise of the land on which they are growing, and clearly, therefore, savour of realty, are within the act (*l*). But rent, when due, is in the nature of fruit fallen: it is severed from the land, and the right of distress is not an interest in land, but merely a right to enter and enforce payment of the debt by seizure of the chattels there found. Arrears of rent may, therefore, be bequeathed to a charity; but not rent accruing after the testator's death in respect of land contracted by him to be sold (*m*). So may tenant's fixtures, which, on the determination of his lease, the testator might carry away with him (*n*).

Growing
crops.Arrears of
rent.Tenants'
fixtures.

Where lands were devised in trust for a charity, the trust not only was itself void, but vitiated the devise of the legal estate on which it was ingrafted (*o*); and therefore, in such cases, the heir might recover at law; except where there were other trusts not charitable (*p*); or where the trust was secret, that is, where the devisee had verbally promised to hold in trust for a charity (*q*); in either of which excepted cases the devise carried the estate to the trustee, and the heir or residuary devisee must prosecute his claim in equity (*r*).

Charitable
trust vitiates
the legal
estate.

(*i*) *Holdsworth v. Davenport*, 3 Ch. D. 185; *Walker v. Milne*, 11 Beav. 507; *Re Christmas*, 33 Ch. D. 332; *Re Yerbury's Estate*, 62 L. T. 55; *Re Thompson*, 45 Ch. D. 161; *Re Holmes*, 60 L. J. Ch. 267; *Re Parker*, [1891] 1 Ch. 682, all cited in *Re Pickard*, [1894] 3 Ch. 704. The cases of *Ashton v. Lord Langdale*, 4 De G. & S. 402 (railway debentures), and *Chandler v. Howell*, 4 Ch. D. 651 (mortgage of "works," &c., by improvement commissioners), must be considered overruled.

(*j*) *Jervis v. Lawrence*, 22 Ch. D. 202.

(*k*) *Re David*, 41 Ch. D. 168; 43 Ch. D. 27; *Cluff v. Cluff*, 2 Ch. D. 222; *Re Crossley*, [1897] 1 Ch. 928.

(*l*) *Symonds v. Marine Society*, 2 Giff. 325.

(*m*) *Edwards v. Hall*, 11 Hare, 6, 6 D. M. & G. 74; *Brook v. Badley*, L. R., 4 Eq. 106 (a mining "rent"); *Thomas v. Howell*, L. R., 18 Eq. 203.

(*n*) *Johnston v. Swann*, 3 Mad. 467.

(*o*) *Adlington v. Cann*, 3 Atk. 155; *Doe d. Burdett v. Wright*, 2 B. & Ald. 710; *Pilkington v. Boughey*, 12 Sim. 114; *Cramp v. Playfoot*, 4 K. & J. 479. See also *Churcher v. Martin*, 42 Ch. D. 312 (deed not enrolled, &c., held void as to passing legal estate).

(*p*) *Willet v. Sandford*, 1 Ves. 186; see also *Doe v. Copestake*, 6 East, 328; *Doe v. Pitcher*, 6 Taunt. 359; *Arnold v. Chapman*, 1 Ves. 108; *Young v. Grove*, 4 C. B. 668; *Doe d. Chidgey v. Harris*, 16 M. & Wels. 517; *Wright v. Wilkin*, 31 L. J. Q. B. 196; *Re Lacy*, [1899] 2 Ch. 149.

(*q*) *Sweeting v. Sweeting*, 3 N. R. 240. As to secret trusts, post, p. 263.

(*r*) As to the right of the lord in the case of copyholds, see *Gallard v. Hawkins*, 27 Ch. D. 298. In the case of personality, if there is no next-of-kin, the property goes to the Crown, *Re Gosman*, 15 Ch. D. 67.

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It was held, under the old law, that where the conveying of land to a charity was enjoined as a condition subsequent, as where the devise was to A., on condition that he conveyed Whiteacre (part of the devised estate) to a charity, the condition alone was void, and the devise was absolute (s). It is submitted that under the Mortmain Act of 1891 (t) such a condition would be valid.

Where trustees may select charities exempt from act.

If a testator devises land, or bequeaths a fund consisting wholly or partly of impure personalty, to such charitable institutions as his trustees may determine, and the trustees make a selection, this operates as the exercise of a power of appointment, and the names of the institutions selected are read into the will; if the institutions so selected, or any of them, are exempt from the act, they take their shares in full (u), but as to such of them as are subject to the act, their shares fail wholly or partially in accordance with the rule mentioned below (sec. viii.) (v).

According to the judgment of Kay, J., in *Re Clark* (w), the decision in *Lewis v. Allenby* turned on the use by the testator of the expression "hospitals and other institutions," and he therefore declined to hold that a bequest of impure personalty to trustees upon trust "to give it to the poor as they may think fit" could be valid, even if the trustees selected charitable institutions exempt from the Mortmain Acts. The distinction seems somewhat technical, but *Re Clark* has been referred to in later cases without disapproval (x).

Bequest of proceeds of real estates to charity illegal.

Though the act of 1888, like the act of Geo. II., does not in terms apply to the proceeds of land directed to be sold, yet it is settled by construction, that a fund of this nature is within its spirit and meaning (y), on the ground, it should seem, that the legatee might have elected to take it as land (z); and a legacy payable out of such a fund of course shared the same fate (a).

(s) *Poor v. Mial*, 6 Mad. 32.

(t) Post, p. 274.

(u) *Lewis v. Allenby*, L. R., 10 Eq. 668; *Re Ovey*, 31 Ch. D. 113; *Re Seton Smith*, 73 L. T. 732 n.

(v) *Re Piercy*, [1898] 1 Ch. 565.

(w) 52 L. T. 406.

(x) *Re Seton Smith* and *Re Piercy*, supra.

(y) *Att.-Gen. v. Lord Weymouth*, Amb. 20; *Curtis v. Hutton*, 14 Ves. 537; *Trustees of British Museum v. White*, 2 S. & St. 595. The bequest was not made valid by the fact that the charity is a foreign one: *Curtis v. Hutton*, supra. But a bequest of the proceeds of land abroad, for charitable purposes in England, is good: *Beau-*

mont v. Oliveira, L. R., 4 Ch. 309, post, p. 272; and a bequest of pure personalty, to be expended in the purchase of land in a foreign country for charitable purposes, was not within the Mortmain Act; *Att.-Gen. v. Mill*, 2 Dow. & Cl. 393; *Re Geck*, 69 L. T. 819; see post, p. 272.

(z) It is an interest in land, per Lord Cairns, L. R., 3 Ch. 674.

(a) *Page v. Leapingwell*, 18 Ves. 463. Even if the land was partnership property: *Ashworth v. Munn*, 15 Ch. D. 363. But not a mere debt due under a settlement from the settlor's estate to the trustees, and appointed in favour of a charity under a general power contained in the settlement, though such debt be

The act expressly embraces the converse case of money being directed to be laid out in "land" (b), and the prohibition applied not only where the investment in "land" was expressly directed by the will, but also where it resulted from the nature and regulations of the charity itself (c).

In *Crafton v. Frith* (cc), a testator directed his residue to be applied for certain educational purposes, and in purchasing land to be let out to the poor at a low rent: it was held that the residue was divisible into two parts, and that the bequest of one part for the purchase of land was void.

A recommendation to trustees to purchase land is imperative, and, consequently, had the same invalidating effect as a trust which is mandatory in terms (d). But a mere power had not this effect (e). So if an option was given to the trustees to lay out the money in land, or upon government or personal security (f), or, generally, to execute the trust in either of two ways, the one lawful, the other not (g), or, if the regulations of the charity were such that the money bequeathed might, if the act were out of the way, be applied either in one way or the other (h), the bequest was valid (i). It was attempted to bring within the scope of this principle a direction to invest on such mortgage securities as the trustees should approve, which, it was contended, authorised the trustees to lay out the fund on mortgages of personal chattels, or on Irish or Scotch real securities (some of which the testator was already possessed of); but Lord Langdale, considering that the reasoning savoured too much of refinement, held the bequest to be void (j). In a case of this kind

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So, of bequest of money to be laid out in land.

Where bequest divisible.

Trust, power, or option to invest in land.

in fact payable out of proceeds of sale of land, *Re Robson*, 19 Ch. D. 156.

(b) Sect. 4 (1), read with the definition of "land" in sect. 10. See *Att.-Gen. v. Heartwell*, 2 Ed. 234; *Pritchard v. Arbouin*, 3 Russ. 458.

(c) *Widmore v. Woodroffe*, Amb. 636; *Middleton v. Clitherow*, 3 Ves. 734. And see *Denton v. Manners*, 25 Beav. 38, 2 De G. & J. 675.

(cc) 20 L. J. Ch. 198. Compare *Adnam v. Cole*, 6 Bea. 363.

(d) *Att.-Gen. v. Davies*, 9 Ves. 546; *Kirkbank v. Hudson*, 7 Pri. 212; *Pilkington v. Boughey*, 12 Sim. 114.

(e) *Att.-Gen. v. Goddard*, T. & R. 348.

(f) *Sorresby v. Hollins*, Amb. 211, 9 Mod. 221; *Widmore v. Governors of Queen Anne's Bounty*, 1 Br. C. C. 13, n.; *Att.-Gen. v. Parsons*, 8 Ves. 186; *Curtis v. Hutton*, 14 Ves. 537; *Edwards v. Hall*, 11 Hare, 11, 12; 6 D. M. & G. 89; *Dent v. Allcroft*, 30 Beav. 335; *Salus-*

bury v. Denton, 3 K. & J. 529; *Graham v. Paternoster*, 31 Beav. 30; *Wilkinson v. Barber*, L. R., 14 Eq. 96; *Re Hedgman*, 8 Ch. D. 156.

(g) *Mayor of Faversham v. Ryder*, 18 Beav. 318, 5 D. M. & G. 350; *Baldwin v. Baldwin*, 22 Beav. 419; *London University v. Yarrow*, 1 De G. & J. 72; *Sinnett v. Herbert*, L. R., 7 Ch. 243; *Lewis v. Allenby*, L. R., 10 Eq. 668.

(h) *Church Building Society v. Barlow*, 3 D. M. & G. 120; *Carter v. Green*, 3 K. & J. 591; *Denton v. Manners*, 2 De G. & J. 675, 682. Unless the purpose of the gift be expressly confined by the will to the illegal object; see last case.

(i) The authorities are referred to and criticised in *Re Piercy*, [1898] 1 Ch. 565; below, p. 258.

(j) *Baker v. Sutton*, 1 Kee. 224. Cf. *London University v. Yarrow*, sup., where a choice between London and Dublin was expressly given.

CHAPTER IX.

Where the purchase of land is the ultimate object, the trust is bad.

Legacy valid where the purchase of land is not essential to the trust.

the real question is whether the trustees have power to invest, and do invest, on securities which do not fall within the act : if so the bequest is good (*k*).

So, if investment in land was the ultimate destination of the money, the bequest was not protected by the circumstance of provision being made for its suspension during an indefinite period ; and, therefore, a gift of personal estate, to be laid out in the purchase of lands, has been repeatedly held to be void, although the trustees were empowered to invest the money in the funds until an eligible purchase could be made (*l*) ; neither would a direction to purchase, though accompanied by a legal alternative direction for the application of the money in case the purchase cannot be conveniently made, give the trustees such a discretion as to take the bequest out of the statute, where there was no impediment to the primary trust but the statute (*m*). These determinations have clearly overruled *Grimmett v. Grimmett* (*n*).

It is clear, that where the will is silent as to the purchase or acquisition of land, and the charitable trust or purpose is of a nature which admits of its being fully and conveniently executed without such purchase or acquisition, the legacy is good. Thus, where the testator bequeathed 2,800*l*. Three per cent. Reduced annuities, and directed the dividends to be applied "for and towards establishing a school," Lord Loughborough said, that this did not include the purchase or renting of land : the master might teach in his own house, or in the church (*o*). So, in another case, the bequest of personalty, "to be a perpetual endowment and maintenance of two schools," was considered, by Richards, C. B., to be so far good ; though it was rendered void by the addition of a recommendation to purchase land (*p*). And even where the interest of the bequeathed fund was directed to be applied in "providing a proper school-house," Sir J. Leach, V.-C., thought that, as the intention might be executed by hiring a house, without the necessity of pur-

(*k*) "*Baker v. Sutton and Johnston v. Swann* I take to have been overruled if and so far as they differ from *Lewis v. Allenby*": per Rigby, L. J. in *Re Piercy*, [1898] 1 Ch. at p. 577.

(*l*) *Grieves v. Case*, 4 Br. C. C. 67 ; *English v. Orde*, Duke, Ch. Uses, 432 ; *Pritchard v. Arbovin*, 3 Russ. 458 ; *Mann v. Burlingham*, 1 Kee, 235.

(*m*) *Att.-Gen. v. Hodgson*, 15 Sim. 146. But see *Warren v. Rudall*, 4 K. & J. 603, affirmed in D. P. sub nom. *Hall v. Warren*, 9 H. L. Ca. 420, post, Chap. LVIII.

(*n*) Amb. 210. *Grimmett v. Grim-*

mett was referred to by the Court of Appeal in *Re Piercy*, [1898] 1 Ch. 565, as laying down good law, but it would appear that the learned judges were really referring to *Sorresby v. Hollins* (9 Mod. 221), which is quoted in a very confusing way in *Grimmett v. Grimmett*.

(*o*) *Att.-Gen. v. Williams*, 4 B. C. C. 526 (2 Cox, 387) ; *Hill v. Jones*, 2 W. R. 657 ; see also *Att.-Gen. v. Jordan*, Highmore, Mortmain, add., 23 ; *Martin v. Wellstead*, 23 L. J. Ch. 927 ; *Hartshorne v. Nicholson*, 26 Beav. 58 ; *Baldwin v. Baldwin*, 22 Bea. 413, post, p. 260, n. (*c*).
(*p*) *Kirkbank v. Hudson*, 7 Price, 221.

chasing land, the bequest was valid ; and that, too, though the will contained expressions showing that the testator contemplated the perpetuity of the charity (*q*). So, where the trustees were expressly directed to apply the income of a charity fund in the purchase or rental of an appropriate building (*r*). Also where trustees were directed to apply a fund upon trust to hire rooms for the reception of poor women (*s*).

But in these cases much reliance was placed on the circumstance that the purposes of the will were to be answered out of the annual income as it arose, leaving the principal untouched. Where a legacy was given towards “establishing” a school near the Angel Inn at E., provided a further sum could be raised in aid thereof if found necessary ; Sir G. Turner, V.-C., said that the first words indicated an intention to occupy a site in the neighbourhood referred to ; and that the latter words removed all doubt, shewing that the establishment of the school was not to be by a succession of small payments, but by the immediate expenditure of a sum of money. He thought it clear that the intention was that land should be purchased (*t*).

Contra where purchase of land intended.

Capital, to “establish” a school ;

Similar decisions were come to in *Dunn v. Bownas* (*u*), where a testator bequeathed a sum of money to the mayor and corporation of N., in trust for the purpose of “establishing” a hospital ; and in *Tatham v. Drummond* (*v*), where there was a bequest of money to be applied towards the “establishment” of slaughter-houses. In the latter case Lord Westbury adopted Lord Loughborough’s rule (*w*) that the Court would not alter its conception of the purposes of a testator merely because they happened to fall within the prohibitions of the statute.

a hospital ;

a slaughter house ;

So a bequest to “found” a chapel (*x*), or school (*y*), was, under the old law, *primâ facie* void.

—to “found” a chapel, &c.

But a bequest to “endow” churches and chapels in populous districts (*z*), or to “support” a school at A. (*a*), or to “found a

Legacy to endow churches, schools, &c., good.

(*q*) *Johnston v. Swann*, 3 Mad. 457 ; and see *Crafton v. Frith*, 15 Jur. 737, 20 L. J. Ch. 198.

(*r*) *Davenport v. Mortimer*, 3 Jur. 287, (V.-C. Shadwell).

(*s*) *Re Robson*, 19 Ch. D. 156.

(*t*) *Att.-Gen. v. Hull*, 9 Hare, 647 ; and see *Att.-Gen. v. Hodgson*, 15 Sim. 146 ; *Longstaff v. Rennison*, 1 Drew. 28 ; *Re Clancy*, 16 Beav. 295 ; *Kirkmann v. Lewis*, 38 L. J. Ch. 570. In *Martin v. Wellstead*, 23 L. J. Ch. 927, the testator clearly contemplated the purchase of land.

(*u*) 1 K. & J. 596. Compare *Re*

Unite, 75 L. J. Ch. 163, where the legacy was given towards the rebuilding and equipment of a hospital.

(*v*) 4 D. J. & S. 484, reversing Wood, V.-C., 33 L. J. Ch. 438.

(*w*) *Att.-Gen. v. Williams*, 2 Cox, 387.

(*x*) *Hopkins v. Phillips*, 3 Giff. 182.

(*y*) *Re Vere*, 22 T. L. R. 273.

(*z*) *Edwards v. Hall*, 11 Hare, 1, 6 D. M. & G. 74.

(*a*) *Re Hedgman*, 8 Ch. D. 156 ; *Kirkbank v. Hudson*, 7 Pri. 221, per Richards, C. B., *supra* ; *Dent v. Allcroft*, 30 Beav. 335.

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charitable endowment" (b), is good. A bequest to establish an "institution" may also be good if the purpose of the institution as described does not require the purchase of land (c).

Endowment of future church.

If a testator bequeaths a fund for endowing a church neither erected nor commenced before his death, the Court will direct an inquiry whether the fund can be so applied within a reasonable time (d).

Legacy to be applied in erecting a building, bad.

It has been much questioned whether a bequest of money, to be applied in the "erection" of a school-house or other building, for charitable purposes, was bad under the old law, as involving a trust to purchase. Lord Hardwicke considered that if the trustees could get a piece of ground given to them, so that land need not be purchased, the gift was good (e); but the contrary is now settled (f): and to make such a bequest valid, in cases within the act of 1736 or 1888, the testator must either point to land already in mortmain, or he must forbid the purchase of land (g). Thus, in *Mather v. Scott* (h), where a testator bequeathed a legacy to trustees, with a request that they would entreat the lord of the manor to grant land for building almshouses, Lord Langdale, M. R., held that the language of the bequest was not sufficiently expressed to exclude a purchase, and therefore the gift failed. And it is equally clear that a legacy, on condition that the legatee provide land for effecting the testator's object, was void, as being in truth a purchase of the land from the legatee (i). And it did not avail, that charity legatees, by whom a fund was directed to be laid out in the erection of buildings, possessed and offered to appropriate for the purpose land already in mortmain, unless the bequest were so framed as not to admit of a new purchase being made for the occasion (j); nor was a bequest

Legacy on condition that legatee provides land, void.

(b) *Salisbury v. Denton*, 3 K. & J. 529.

(c) *Baldwin v. Baldwin*, 22 Beav. 413 (trust to provide annuities for indigent persons, with directions for the management of the "institution"). *Re Holburne*, 53 L. T. 212 ("maintenance and endowment" of art collection). And see per Lord Cranworth, *London University v. Yarrow*, 1 De G. & J. 81 (hospital for animals).

(d) *Sinnott v. Herbert*, L. R., 7 Ch. 232.

(e) *Vaughan v. Farrer*, 2 Ves. 182; *Att.-Gen. v. Bowles*, ib. 547, 3 Atk. 806.

(f) *Foy v. Foy*, 1 Cox, 163; *Pelham v. Anderson*, 2 Ed. 296, 1 Br. C. C. 444, 11; *Att.-Gen. v. Nash*, 3 Br. C. C. 588;

Att.-Gen. v. Whitchurch, 3 Ves. 144; *Chapman v. Brown*, 6 ib. 404; *Att.-Gen. v. Parsons*, 8 ib. 186; *Att.-Gen. v. Davies*, 9 Ves. 535; *Pritchard v. Arbouin*, 3 Russ. 458; *Att.-Gen. v. Hodgson*, 15 Sim. 146; *Smith v. Oliver*, 11 Beav. 481.

(g) *Att.-Gen. v. Davies*, 9 Ves. 544, *Pratt v. Harvey*, L. R., 12 Eq. 544.

(h) 2 Kee. 172.

(i) *Att.-Gen. v. Davies*, 9 Ves. 535; and see *Dunn v. Bownas*, 1 K. & J. 602.

(j) *Giblett v. Hobson*, 5 Sim. 651, 3 My. & K. 517; *Re Watmough's Trusts*, L. R., 8 Eq. 272; *Re Cox*, 7 Ch. D. 204. In *Giblett v. Hobson*, Lord Brougham held that circumstances dehors the will might be investigated for the purpose of getting at the intention,

to build made valid by a proviso that the legacy should not be paid until the building had been commenced (*k*).

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But if the testator expressly forbade a purchase, though he declared his expectation or desire that land would be provided from other sources (*l*), or if the direction was to build "when and so soon as land shall at any time be given for the purpose" (*m*), the bequest was valid: for the statute does not forbid the dedication of land to charity by act inter vivos; on the contrary, it expressly regulates the manner of doing so, and there is nothing to invalidate a bequest of money for building upon land so provided (*mm*).

Bequest to build good, if the will forbids the purchase of land.

If the legacy is conditional on land being acquired at some future indefinite time the legacy is, of course, void, but if the gift is absolute, and only the mode of executing the trust is postponed, the legacy is valid (*n*). In such a case, the Court will direct an inquiry whether the necessary land has been provided, and if there is no prospect of the land being provided within a reasonable time, the Court will direct the fund to be applied *cy-près* (*o*).

A direction to the trustees not to violate the Mortmain Acts, or to have due regard to the application of the fund being consistent with the laws then in force, is equivalent to forbidding the purchase of land (*p*).

The bequest of a sum of money to be applied in the erection of buildings on land which is already devoted to charitable purposes (*q*), or in the repair and improvement of buildings appropriated to charity (*r*), is unquestionably valid, as by such gifts no additional

Improvement of land already in mortmain allowed.

i.e. evidence of "surrounding circumstances," according to the general rule. See *Att.-Gen. v. Hyde*, Amb. 751; *Booth v. Carter*, L. R., 3 Eq. 757; *Cresswell v. Cresswell*, L. R., 6 Eq. 69, 75. And see Chap. XV.

(*k*) *Pratt v. Harvey*, L. R., 12 Eq. 544, correcting the dictum of Alderson, B., *Dixon v. Butler*, 3 Y. & C. 677.

(*l*) *Philpott v. St. George's Hospital*, 6 H. L. Ca. 338, reversing 21 Beav. 134, and overruling *Trye v. Corporation of Gloucester*, 14 Beav. 173. See also *Henshaw v. Atkinson*, 3 Mad. 306; *Att.-Gen. v. Williams*, 2 Cox, 387; *Cawood v. Thompson*, 1 Sm. & Giff. 409; *Re White's Trusts*, W. N. 1882, p. 113; 33 Ch. D. 449.

(*m*) This was assumed in *Chamberlayne v. Brockett*, L. R. 8 Ch. 206, and is according to Lord Cranworth's judgment in *Philpott v. St. George's Hospital*, 6 H. L. Ca. 357. See also *Biscoe*

v. Jackson, W. N. 1882, p. 18.

(*mm*) Compare *Abbott v. Fraser*, L. R., 6 P. C. 96.

(*n*) *Chamberlayne v. Brockett*, supra; *Re Gyde*, 79 L. T. 261; ante, p. 212.

(*o*) *Sinnett v. Herbert*, L. R., 7 Ch. 232; *Re White's Trusts*, 33 Ch. D. 449; *Biscoe v. Jackson*, 35 Ch. D. 460; *Re Gyde*, 79 L. T. 261.

(*p*) *Dent v. Allcroft*, 30 Beav. 335; *Biscoe v. Jackson*, 35 Ch. D. 460; *Hill v. Jones*, 2 W. R. 657.

(*q*) *Glubb v. Att.-Gen.*, Amb. 373; *Brodie v. Duke of Chandos*, 1 Br. C. C. 444, n.; *Att.-Gen. v. Bishop of Oxford*, ib.; *Att.-Gen. v. Parsons*, 8 Ves. 186; *Att.-Gen. v. Munby*, 1 Mer. 327; *Shaw v. Pickthall*, Dan. 92; *Fisher v. Brierly*, 1 D. F. & J. 643.

(*r*) *Harris v. Barnes*, Amb. 651; *Att.-Gen. v. Bishop of Chester*, 1 Br. C. C. 444. See also *Champney v. Davy*, 11 Ch. D. 949.

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land is thrown into mortmain(s). But, as before stated, a reference to land already in mortmain must be found in the will. A bequest to build a parsonage house at C. "in manner as I have already promised the same," was held to refer to a transaction by which a site had already been appropriated for the purpose, and so by implication to the site itself (t). So a bequest to build a parsonage house in connection with B. church was upheld, on the ground that a site had in fact (though this was not noticed in the will) been appropriated to the purpose, and that the trustees would not have been justified in purchasing any other land for the purpose(u). And a bequest to help enlarge the parish church at M. was held good as impliedly referring to the glebe or churchyard (v). But a bequest "to erect a new chapel at H. instead of the one now in use when such an erection shall take place," was held not to be a reference to the site on which the old chapel stood (w).

Legacy to be applied in discharging an incumbrance on charity property invalid.

A legacy to be applied in the liquidation of a subsisting incumbrance on real estate, which is already subject to charitable uses, appears to have been considered as not falling within the same principle as a legacy to build on land so subject, but as appropriating to charity a new interest in land. Thus, a bequest of a sum of money, to be applied in paying off a mortgage debt on a meeting-house, could not be supported under the old law (x); and it mattered not that the incumbrance was equitable only (y).

Legacy founded on a devise which fails, void.

Where a legacy, which, standing alone, would be valid, was founded upon and derived its purpose and object from an illegal devise, it was necessarily involved in the failure of such devise. Thus, if a testator, after devising certain messuages to be converted into almshouses, bequeathed the interest of a sum of money to the occupiers of such houses, as the devise was clearly void, the legacy

(s) The general principle is discussed in *Edwards v. Hall*, 11 Ha. 1; 6 D. M. & G. 74. As to the evidence required in these cases, that the land on which the expenditure is to be made has been effectually devoted to charity, vide *Ingley v. Dobson*, 4 Russ. 342; *Shaw v. Pickthall*, Dan. 92.

(t) *Sewell v. Crewe-Read*, L. R., 3 Eq. 60.

(u) *Cresswell v. Cresswell*, L. R., 6 Eq. 69.

(v) *Re Hawkin's Trusts*, 33 Beav. 570.

(w) *Re Watmough's Trusts*, L. R., 8 Eq. 272, dissenting from *Booth v. Carter*, L. R., 3 Eq. 757, which is contra.

(x) *Corbyn v. French*, 4 Ves. 418. But debts incurred in respect of a meeting-house are not always a lien on it; and where they are not so, a bequest to enable the debtor to pay them is of course valid, *Bunting v. Marriott*, 19 Beav. 163.

(y) *Waterhouse v. Holmes*, 2 Sim. 162. And see *Re Lynall's Trust*, 12 Ch. D. 211, where a legacy was given to pay all claims chargeable upon certain almshouses: there was no charge on the almshouses, but the trustees were personally liable for repairs; the legacy was held void, and fell into residue.

was equally so (z). Or, if a testator devised a messuage to be used as a school-house for the education of poor children, and bequeathed a fund to trustees, with a direction to apply the income in keeping the school-house in repair, and providing a master, the statute, by invalidating the devise of the house, deprived the pecuniary legacy of its object, which consequently failed (a); and in some other instances, presenting not quite so simple and obvious an application of the principle, a bequest, valid in itself, has been held to fail, from the impracticability of the general scheme, of which it forms a part (b).

It is to be observed, that if a legacy, which is directed to be laid out in land, is actually paid, (the party paying it not availing himself of the statute,) and the trustee lays it out accordingly, the Court will not execute the trust (c). But if lands be devised in trust for charity, and have been held and applied accordingly for a long series of years, it will be presumed against the heir, that all proper means have since been taken to dedicate the property effectually to the charity (d).

Equity will not execute trust though the legacy has been paid.

Contra after lapse of time.

VII.—Secret Trusts for Charity.—As Mr. Jarman points out (dd): “The statute of the 9th Geo. II. cannot be evaded by a secret trust, and the heir may compel a devisee to disclose any promise which he may have made to the testator to devote the land to charity (e). And such promise, if denied by the devisee, may be proved by evidence aliunde (f). The trust, by whatever means

Secret trust for charity invalidates devise.

(z) *Att.-Gen. v. Goulding*, 2 Br. C. C. 428; *Att.-Gen. v. Whitchurch*, 3 Ves. 141; *Limbrey v. Gurr*, 6 Mad. 151; *Price v. Hathaway*, ib. 304; *Smith v. Oliver*, 11 Beav. 481; *Att.-Gen. v. Hodgson*, 15 Sim. 146; *Re Cox*, 7 Ch. D. 204; *Green v. Britten*, 42 L. J. Ch. 187; *Crampe v. Playfoot*, 4 K. & J. 479; *Re Taylor*, 58 L. T. 538.

(a) *Att.-Gen. v. Hinzman*, 2 J. & W. 270. In cases the converse of this, namely, where the valid gift is the primary one, and the invalid gift is ancillary and subordinate to it, the former, of course, is not affected by the illegality of the latter, *Blandford v. Fackerell*, 4 Br. C. C. 394, 2 Ves. jun. 238; *Att.-Gen. v. Stepany*, 10 Ves. 22.

(b) *Grieves v. Case*, 2 Cox, 301.

(c) *Att.-Gen. v. Ackland*, 1 R. & My. 243. But the legacy, if paid in mistake, might, it is presumed, be recovered back by the party paying it. It seems

that where a legatee is called upon to refund, he is not in general, liable to interest (*Gittins v. Steele*, 1 Sw. 199).

(d) *Att.-Gen. v. Moor*, 20 Beav. 119; and see *Att.-Gen. v. Drummond*, 1 D. & War. 380.

(dd) First ed. p. 206.

(e) *Boson v. Statham*, 1 Ed. 508; *Muckleston v. Brown*, 6 Ves. 52; *Martin v. Hatton*, cit. ib. 61; *Stickland v. Aldridge*, 9 Ves. 516; *Paine v. Hall*, 18 Ves. 475. So if land be conveyed to trustees for a charitable purpose by deed in other respects conforming to the act, a secret undertaking with the grantor to reserve the benefit to himself for his life will, if proved, invalidate the conveyance, *Way v. East*, 2 Drew. 44; *Fisher v. Brierly*, 1 D. F. & J. 643, in which, however, the evidence failed to shew any such understanding.

(f) *Edwards v. Pike*, 1 Cox, 17, 1 Ed. 267; *Re Spencer's Will*, 57 L. T. 519.

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established, invalidates the devise (*g*). This doctrine evidently assumes that the trust, if legal, would have been binding on the conscience of, and might have been enforced against, the devisee; and this ground failing, the rule does not apply. As where a testator, after devising lands by a will duly attested, declares a trust in favour of charity by an unattested paper or by parol, the statute law, which affords to the devisee a valid defence against any claim on the part of the charity, of course equally defends him against the claim of the heir, founded on the charitable trust (*h*). The case would be different, however, if the devisee had induced the testator to give him the estate absolutely, under an assurance that the unattested paper was a sufficient declaration of the trust for a charity" (*i*).

And if the testator communicates to the devisee that the devise is made to him for charitable purposes which the testator means to specify, and the testator dies without doing so, it seems clear that the devisee will hold the land upon trust for the heir-at-law (*j*).

Secret trust,
when valid.

In cases where the statute does not apply, so that the testator could, if he pleased, have devised the land for certain charitable purposes, a devise to A. upon a secret trust for those charitable purposes is valid: as where the testator devises in this manner land which he might have devised under the Church Building Act (*k*).

And it is assumed that, in cases falling within the Mortmain, &c., &c., Act, 1891, land may be devised upon a secret trust for a charity, with the same effect as if the devise had been made directly to the charity (*kk*).

The law relating to secret trusts in general is discussed elsewhere (*l*).

Assets not
marshalled
in favour of
charity.

VIII.—Assets not marshalled in Favour of Charity.—The rule is thus stated by Mr. Jarman (*m*): "Marshalling assets is the adoption of this principle: that where there are two funds and two parties, one of whom has a claim exclusively upon one fund, and the other the liberty of resorting to either, the Court will send the

(*g*) *Russell v. Jackson*, 10 Hare, 204; *Moss v. Cooper*, 1 J. & H. 352; *Spriggett v. Jennings*, L. R., 10 Eq. 488; cf. *McCormick v. Grogan*, L. R., 4 H. L. 82. But the devisee took the legal estate, ante, p. 255.

(*h*) *Adlington v. Cann*, 3 Atk. 141; *Stickland v. Aldridge*, 9 Ves. 519; *Wallgrave v. Tebbs*, 2 K. & J. 313; *Lomax v. Ripley*, 3 Sm. & Giff. 48; *Jones v. Badley*, L. R., 3 Ch. 362; *Re Downing's Estate*, 60 L. T. 140.

(*i*) See *Adlington v. Cann*, 3 Atk. 152.

(*j*) *Muckleston v. Brown*, 6 Ves. 52; *Re Boyes*, 26 Ch. D. 531; *Russell v. Jackson*, 10 Hare, p. 214.

(*k*) *O'Brien v. Tyssen*, 28 Ch. D. 372.

(*kk*) Post, p. 275.

(*l*) See Chap. XXIV.

(*m*) First edition, p. 207. It will be remembered that this rule only applies in the case of testators dying before 5th August 1891. See below, sect. x.

latter party primarily to that fund from which the former is excluded; or, if he should have actually resorted to their common fund, will allow the other to stand in his place to that extent. The application of this principle has been denied to charities; and accordingly, where property which *cannot*, is combined, in the same gift, with funds which *can*, be bequeathed for charitable purposes, and the disposition embraces several objects or purposes, some charitable and others not, the Courts hold that the purposes not charitable cannot be thrown exclusively upon that part of the subject of disposition which is incapable by law of being devoted to charity, in order to let in the charitable purposes upon the remainder (n).

“ Thus, if a testator give his real and personal estate to trustees, upon trust to sell and pay his debts and legacies, and to apply the residue for charitable purposes, the Court will not throw the debts and legacies exclusively on the proceeds of the real estate, and the mortgage securities and leaseholds, in order that the charitable bequest may take effect so far as possible; nor, on the other hand, will it direct the debts and legacies to come out of the pure personalty for the purpose of defeating the charitable residuary bequest to the utmost possible extent. Steering a middle course, equity directs the debts and legacies to come out of the whole estate, real and personal, *pro rata*; for instance, supposing the real funds (including the leaseholds and mortgage securities) to constitute two-fifths of the entire property, then two-fifths of these charges would be satisfied out of such real funds, and the remaining three-fifths out of the pure personalty (o); and, after bearing the charges in these several proportions, the former would belong to the heir or next-of-kin (as the case might be), and the latter to the charity-residuary legatee. And, by parity of reasoning, it should seem that if a testator bequeath pecuniary legacies to charities, and leave a general residue to others, consisting partly of leaseholds or real securities, and partly of pure personalty, the legacies will be void

(n) *Mogg v. Hodges*, 2 Ves. 52; *Att.-Gen. v. Tyndall*, 2 Ed. 207; *Foster v. Blagden*, Amb. 704; *Middleton v. Spicer*, 1 Br. C. C. 201; *Att.-Gen. v. Earl of Winchelsea*, 3 Br. C. C. 373; *Makeham v. Hooper*, 4 ib. 153; *Hobson v. Blackburn*, 1 Kee. 273; *Williams v. Kershaw*, 5 L. J., N. S., Ch. 84, 5 Cl. & Fin. 111.

(o) *Howse v. Chapman*, 4 Ves. 542; *Paice v. Archbishop of Canterbury*, 14 Ves. 372; *Curtis v. Hutton*, ib. 537; *Currie v. Pye*, 17 Ves. 464; *Crosbie v.*

Mayor of Liverpool, 1 R. & My. 761, n.; *Re Hill's Trusts*, 16 Ch. D. 173; see also *Fourdrin v. Goudey*, 3 My. & K. 397; *Johnson v. Woods*, 2 Beav. 409; *Att.-Gen. v. Southgate*, 12 Sim. 77; and that too, though the purely personal part of the residue was alone disposed of by the will for the charitable purposes, and the remaining part was left undisposed of, *Edwards v. Hall*, 11 Hare, 22. Lapsed or void specific legacies form part of this general fund, *Scott v. Forristall*, 10 W. R. 37.

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pro tanto, i.e., in the proportion which the real funds bear to the entire property, though the pure personalty should be sufficient to pay all the legacies. The proper course, in such case, it is conceived, would be to pay the debts and funeral and testamentary expenses, (being all the prior charges to which the general residue was liable,) in the first instance, out of the whole property, pro ratâ (*p*), and then to provide for the pecuniary legacies in like manner; the effect of which would be that the charity-legacies, so far as this rateable apportionment threw them upon the leaseholds and real securities, would be void.'

General
conclusion.

When Mr. Jarman wrote, direct authority on the point last referred to was scanty (*q*), but the principle stated by him is now clearly settled, and accordingly every charitable legacy bequeathed by any testator dying before 6th August 1891, whose will does not contain the usual clause directing such legacies to be paid exclusively out of the pure personalty, and the general residue of whose property consists partly of leaseholds or real securities, is void pro tanto (*r*).

The effect of this doctrine may sometimes be to render the whole legacy void. Thus, in *Cherry v. Mott* (*s*), the testator directed his executors to purchase of the governors of Christ's Hospital a presentation to that charity for a boy, the son of a freeman of the borough of Hertford; the purchase-money to be paid out of his personal estate. The testator's personal estate not being all pure personalty, Sir C. Pepys, M. R., was of opinion that the bequest never could take effect; for if the executors had agreed for the purchase at a given sum, that sum must have been raised proportionately out of the two sorts of personalty, and the gift of so much as it was necessary to raise out of the personalty savouring of the realty, would have been void, and consequently the full purchase-money never could be raised; and the testator's intended gift failed by reason of the impossibility of making the purchase.

The same strict rule is applied where the testator directs a particular fund consisting partly of impure personalty, to be applied to several purposes, some charitable and some illegal, so that the

(*p*) In making the apportionment, the respective values of the real and personal estates are to be taken as at the time of the death of the testator, and not as at the time of apportionment, *Calvert v. Armitage*, 1 H. & M. 446, overruling *Robinson v. London Hospital*, 10 Hare, 29.

(*q*) The authorities quoted by him are *Williams v. Kershaw*, 1 Kee. 276 n., and *Hobson v. Blackburn*, 1 Kee. 273.

(*r*) *Philanthropic Society v. Kemp*, 4 Beav. 581; *Sturge v. Dimsdale*, 6 Beav. 462; *Cherry v. Mott*, 1 My. & Cr. 123; *Briggs v. Chamberlain*, 18 Jur. 56.

(*s*) 1 My. & Cr. 123.

portion applicable to the charitable purposes has to be ascertained by the Court: the amount so ascertained must abate according to the proportions which the pure and impure parts of the fund bear to one another (*t*).

Where the testator has directed a charity legacy to be paid out of his pure personalty, the testator himself has marshalled (so to speak) his own assets, and the Court only prevents the arrangement made by him from being defeated by accidental circumstances. The efficacy of such a direction to make a charity legacy payable in full out of the pure personalty, in priority to other legacies, was established by Lord Truro in *Robinson v. Geldard* (*u*). As between the charity and the other legatees, he said the case was analogous to that of a demonstrative legacy (*v*). But this was by way of illustration only, and not of definition: the direction does no more than regulate the priority of the legatees inter se; it does not exempt the charitable legacy from contribution to the payment of debts, funeral and testamentary expenses, as it would do if it made the legacy strictly demonstrative. These prior charges will still come rateably, and in the first place, out of the pure and impure personalty (*w*). Therefore, in order to make charitable legacies effectual as far as possible, the debts, funeral and testamentary expenses should be expressly and exclusively charged on the personalty savouring of realty (*x*).

And where the charitable legacies are themselves residuary, this is the most appropriate form of direction with regard also to the payment of other legacies (*y*). But of course it matters not what the form is if it sufficiently shows the testator's intention. Thus,

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Testator may himself marshal his assets.

Express marshalling where the charitable bequest is residuary.

(*t*) *Champney v. Davy*, 11 Ch. D. 949.

(*u*) 3 Mac. & G. 735; and see *Nickison v. Cockill*, 3 D. J. & S. 622, 635; *Beaumont v. Oliveira*, L. R., 4 Ch. 309. In *Sturge v. Dimsdale*, 6 Beav. 462, Lord Langdale had doubted the sufficiency of such a direction, and in *Philanthropic Society v. Kemp*, 4 Beav. 581, had decided that it was insufficient to counteract in favour of the charities some special words which he thought expressly regulated the order in which the several portions of the personal estate were to be applied in payment of debts and legacies. But as to this, see *Miles v. Harrison*, L. R., 9 Ch. 321. Even a direction that charity legacies shall be paid "exclusively out of personal estate," seems to have been held sufficient to make them payable in full out of pure personalty; *Roberts v. Jones*, W. N. 1880, p. 96.

(*v*) As to demonstrative legacies, see post, Chap. XXX.

(*w*) *Tempest v. Tempest*, 7 D. M. & G. 470; *Beaumont v. Oliveira*, L. R., 4 Ch. 309.

(*x*) A direction that a charitable legacy shall be paid free of legacy duty is a disposition for the benefit of the charity and the duty therefore cannot be paid out of impure personalty, *Wilkinson v. Barber*, L. R., 14 Eq. at p. 98.

(*y*) As in *Jauncey v. Att.-Gen.*, 3 Giff. 308; or in the more sweeping form used in *Wigg v. Nicholl*, L. R., 14 Eq. 92, that "the estate shall be so marshalled and administered as to give the fullest possible effect to" the charity legacies. See also *Gaskin v. Rogers*, L. R., 2 Eq. 284; *Re Fitzgerald*, 26 W. R. 53.

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in *Wills v. Bourne* (z), where a testator directed his debts, legacies, and funeral and testamentary expenses to be paid out of his real estate, and, so far as that was deficient, out of his personal estate, and bequeathed the residue of his personal estate to certain charities, declaring that "only such part of his estate should be comprised in the residue as might by law be bequeathed for charitable purposes": it was held by Lord Selborne that the testator had thereby excluded impure personalty from the residue: and that it followed by necessary implication that the realty and impure personalty must be applied for those purposes (debts as well as legacies) which were to be satisfied before a residue was arrived at. So, in *Miles v. Harrison* (a), where a testator directed that his personal estate should be converted, and that out of the proceeds his debts and legacies should be paid, and gave the residue to three charities in equal shares, with a direction to pay the charitable legacies out of the pure personalty, "which shall be reserved by my trustees for that purpose," it was held that the debts and other legacies were thrown wholly on the impure personalty. Lord Cairns observed, that although the testator intended creditors and those other legatees to have the security of his whole personal estate, yet that, as between them and the charities, those who had the two funds should go first on that which the charities could not take.

Again, the pure personalty may be the subject of a specific bequest to a charity, in which case it will be entitled to the privileges and exemptions that belong to a legacy of that character (b).

But if the testator directs his debts and legacies to be paid out of residue and then gives to a charity such part of the residue as can lawfully be given to charitable purposes, this does not shew an intention to marshal the assets in favour of the charity (c).

In *Miles v. Harrison* (d), there was also a particular pecuniary bequest to another charity, unaided by any direction concerning its payment; and the further question arose whether this legacy, which could in no part be satisfied out of the impure personalty, was not also debarred from the pure personalty by the direction reserving the latter for payment of the residuary bequest. "If, as I assume," said Lord Cairns, "the gift of the residue amounts

(z) L. R., 16 Eq. 487. See *Re Arnold*, 37 Ch. D. 637.

(a) L. R., 9 Ch. 317. See *Re Pitt*, 53 L. T. 113, where some of the charities were empowered to take impure personalty and the others were not. Cf. *Lewis v. Boetefeur*, W. N. 1878, p. 21, 1879, p. 11, 38 L. T. 93.

(b) *Shepherd v. Beetham*, 6 Ch. D. 597. "A legacy is not the less specific for being general," per Lord Cottenham, 1 My. & Cr. 117.

(c) *Edwards v. Hall*, 11 Ha. 22; *Re Somers-Cocks*, [1895] 2 Ch. 449.

(d) L. R. 9 Ch. 321.

to a direction that the personal estate shall be marshalled, a direction of that kind cannot operate to defeat in toto the pecuniary legacy to the charity ; that legacy will stand as if nothing at all had been said about marshalling in the residuary gift ; for the essence of marshalling is that it puts those only to marshal who have got two funds, and this charitable legatee has only one."

With regard to legacies charged on real estate, Mr. Jarman remarks (e) : " Where a charitable legacy is charged on real estate as an auxiliary fund in aid of the personalty, (and such, it will be hereafter seen, is always the effect of a mere general charge,) the legacy will be valid or not, and either wholly or in part, according to the event of the personalty proving sufficient for its complete liquidation, or not.

Effect where land is charged as an auxiliary fund.

" As the validity of a charity legacy depends on its not being to come out of a real fund, the point of construction whether the legacy is payable out of personal or real estate, is sometimes warmly contested on this account ; and in the consideration of this question, it scarcely need be observed, no disposition has been manifested by the Courts to strain the rules of construction in favour of charity (f).

" Never, indeed, was the spirit of any legislative enactment more vigorously and zealously seconded by the judicature, than the statute of the 9th of George the 2nd. This is abundantly evident from the general tone of the adjudications ; but the two points in which it is most strikingly displayed are, first, the holding a gift to charity of the proceeds of the sale of real estate to be absolutely void, instead of giving to the charity legatee the option to take it as money, according to the rule since adopted in the case of a similar gift to an alien (g) ; and, secondly, the refusal of equity to marshal assets in favour of a charity, in conformity to its general principle ; that principle being evidently founded on an anxiety to carry out, as far as possible, the intention of testators. In this solitary case, the intention has been allowed to be subverted by a mere slip or omission of the testator, which the Court had the power of easily correcting by an arrangement of the funds " (h).

Judicial treatment of act of 9 Geo. 2, c. 36.

(e) First edition, p. 210.

(f) See *Leacroft v. Maynard*, 1 Ves. jun. 279, post, Chap. XXX. But where a testator shews by his will that he uses the term " personal estate " as contradistinguished from " leaseholds," occurring in the same bequest, and he afterwards by a codicil directs a charitable legacy to be payable out of his " personal " estate, the expression is considered as used in the same restricted and peculiar sense as in his will ; and

the legacy is payable out of the pure personalty, and is therefore good, *Wilson v. Thomas*, 3 My. & K. 579.

(g) Ante, p. 91. However, the disclaimer of the heir, against which the statute is directed, is equally produced whether the land is sold or not.

(h) The first edition contains a long note by Mr. Jarman criticising the policy of the statute of 9 Geo. 2, c. 36, and urging a relaxation of its prohibitions. Mr. Jarman's suggestion that

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Charitable corporations.

IX. Exceptions from the Statutory Restraint.—Where a corporation for charitable purposes is empowered by private act of parliament (passed since 9 Geo. 2, c. 36) to acquire land by devise, this has the operation of enabling any testator to devise land or bequeath impure personalty to the corporation (*j*). But a private act passed before 1736 has not that operation, even if it is in effect re-enacted by an act passed since 1736 (*j*).

And an act of parliament which confers on a charitable corporation the right to purchase, take, hold, receive, or enjoy lands, does not enable it to acquire land otherwise than in the mode prescribed by the stat. Geo. 2, c. 36, the effect of the clause being equivalent only to a licence from the Crown to hold in mortmain (*k*), and not therefore enabling it to take by devise.

Exception in favour of two English Universities, and Eton, Winchester, and Westminster.

It will be observed that the act of Geo. 2, expressly allows gifts to the two English Universities and their colleges, and the three colleges of Eton, Winchester, and Westminster (*l*). And by the seventh section of the act of 1888 this exception is extended to the Universities of London and Durham, the Victoria University, and their colleges and houses of learning, and to Keble College, Oxford. It is clear that neither statute authorises a devise to a college in trust for other charitable objects (*m*); but it seems not to be essential that the trust should embrace the whole college; a trust for the benefit of particular members would be within the proviso; and therefore, a devise to the Master and Fellows of Christ's College, in trust that they and their successors should apply the rents for

"without entrenching on the salutary enactment which prevents the land of the country from being locked up in perpetuity," it might be provided "that wherever real estate, or the produce of real estate, is disposed of in this manner, the property should be sold or converted, and the proceeds only paid over to the charity," has at last (1891) been adopted by the legislature.

(*j*) *Perring v. Trail*, L. R., 18 Eq. 88. So trustees having a power of selecting charities to benefit by a testamentary gift may select charities empowered to acquire lands by devise: see *Re Ovey*, 31 Ch. D. 113, above, p. 256. In *Robinson v. London Hospital*, 10 Ha. 19, the power to devise lands was given by charter. The judgment of Turner, V.-C., is somewhat cryptic, and it is not easy to say what his decision was. It is clear that the gift failed as to part of the residue.

(*j*) *Luckcraft v. Pridham*, 6 Ch. D. 205.

(*k*) *Mogg v. Hodges*, 2 Ves. 52; *Bri-*

tish Museum v. White, 2 S. & St. 595; *Nethersole v. Indigent Blind School*, L. R., 11 Eq. 1; *Chester v. Chester*, L. R., 12 Eq. 444. See and consider with reference to this point, 13 & 14 Vict. c. 94, s. 23, enabling owners of appropriated tithes to annex the same to the parsonages, &c., of the parishes where they arise, *Denton v. Manners*, 25 Beav. 38, 2 De G. & J. 675.

(*l*) For an instance of such a devise, see 3 Ves. 641. It has never been decided whether this exception extended to colleges founded since the act, as *Downing College, Cambridge*. Lord Northington considered that it was confined to colleges antecedently established, see *Att.-Gen. v. Tancred*, 1 Ed. 16; but Lord Loughborough appears to have dissented from this opinion, see *Att.-Gen. v. Bowyer*, 3 Ves. 728.

(*m*) *Att.-Gen. v. Tancred*, 1 Ed. 15, 1 W. Bl. 90, Amb. 351; see also *Blandford v. Fackerell*, 4 Br. C. C. 394, 2 Ves. jun. 238; *Att.-Gen. v. Munby*, 1 Mer. 327.

some undergraduate student, has been held to be good (*n*). But the devise must be for collegiate or academical purposes; and a gift to the college, to the intent that an individual member (the senior fellow for the time being) should live in the testator's house, and entertain the poor, and distribute medicine and books among them, was held to be void on this principle (*o*). Lord Loughborough appears to have thought, that, if a devise of real estate to a college was refused by the college, as of course it may be, whether the devise be upon trust or otherwise (*p*), it might, as the lands were originally devised to a valid purpose, be executed *cy-près* (*q*).

The exception made by the act of Geo. 2 in respect of property in Scotland, has been held to apply only to the locality of the lands destined to the trust (*r*); precluding, therefore, the devise of lands in England to a Scottish charity, but admitting of English personalty being bequeathed to be laid out in lands in Scotland, so far as is consistent with the Scotch law, which permits the destination of real estate to some kinds of charity (*s*). It has been held, that the circumstances of the charity being Scotch, and Scotchmen only being eligible as trustees of it, do not conclusively show that the purchase is to be of lands in Scotland, so as to take the bequest out of the statute (*t*).

Exception in respect of Scotland.

So, of course, a bequest of money to be laid out in lands in Ireland, for charitable purposes, will be good (*u*). But by a modern statute (*v*) it is enacted that any donation, devise, or bequest, whereby any estate in lands, tenements or hereditaments in Ireland is conveyed or created for a charitable purpose, must be executed three calendar months before the death of the donor. This enactment does not, however, appear to extend to bequests of money to be laid out in land.

Purchase of lands in Ireland.

The statute 9 Geo. 2, c. 36, did not extend to the British colonies;

British Colonies.

(*n*) *Att.-Gen. v. Tancred*, 1 Ed. 10.

(*o*) *Att.-Gen. v. Whorwood*, 1 Ves. 534.

(*p*) See 2 Kee. 163.

(*q*) *Att.-Gen. v. Andrew*, 3 Ves. 633.

(*r*) Of course, a devise of land in England for charitable purposes is not made valid by the fact that the testator is a domiciled Scotchman: *Re Hewit*, [1891] 3 Ch. 568.

(*s*) *Oliphant v. Hendrie*, 1 Br. C. C. 571; *Curtis v. Hutton*, 14 Ves. 537; *Mackintosh v. Townsend*, 16 Ves. 330. And the English rule, arising out of the act, against marshalling in favour of charities, does not exist in Scotland. See *Macdonald v. Macdonald*, L. R., 14 Eq. 60.

(*t*) *Att.-Gen. v. Mill*, 3 Russ. 328, 5 Bli. N. S. 593, 2 D. & Cl. 393, Sugd. Law of Prop. 419. If the testator had been domiciled in Scotland, the bequest would have been valid: *Canterbury (Mayor, &c., of) v. Wyburn*, [1895] A. C. 89, post, p. 272.

(*u*) See *Campbell v. Earl of Radnor*, 1 Br. C. C. 272; *Baker v. Sutton*, 1 Kee. 234; *Att.-Gen. v. Power*, 1 Ba. & Be. 154.

(*v*) 7 & 8 Vict. c. 97, s. 16. A deed must also be registered within the same period, *ib.* Cases under the act are *Donnellan v. O'Neill*, Ir. R., 5 Eq. 523; *Stewart v. Barton*, Ir. R., 6 Eq. 215; *Murland v. Perry*, 3 L. R. Ir. 135; *Re Moore*, ante, p. 206.

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in its causes, its objects, its provisions, its qualifications, and its exceptions, it is a law wholly English, calculated for the purposes of local policy, complicated with local establishments, and incapable without great incongruity in the effect, of being transferred, as it stands, into the code of any other country (*w*). There is therefore nothing in the act of 1736 or 1888 to prevent a person domiciled in a British colony from leaving money for the purchase of land in England for a charitable object: unless prohibited by the law of the colony, such a bequest is valid (*x*).

Foreign land. Land situate in foreign countries outside the British Empire is obviously not within the acts. Consequently a bequest of money, to be laid out in the erection of almshouses abroad, is valid so far as the law of England is concerned (*y*).

Nor does either of the acts prevent money arising from the sale of land in a foreign country from being bequeathed to charities (*z*).

Custom of London.

By the custom of London resident freemen might devise land in mortmain (*a*). By the general act *De religiosis* (*b*) the custom would have been abolished, but that afterwards there came a general confirmation of the customs of London by statute (*c*). There is no saving of any custom in the statute of George, any more than there was in the statute *De religiosis*; and as there has been no subsequent confirmation of the customs of London (*d*), it follows, according to Lord Coke, that the statute of George was binding on the city of London (*e*). At all events it is clear that the custom of London applies only to lands in London (*f*).

Statutes allowing land to be devoted to particular charities.

The legislature has, in several instances, relaxed in favour of particular objects the restriction on disposing of land to charitable purposes (*g*). Thus, by the Land Tax Redemption Act (42 Geo. 3,

(*w*) Per Sir W. Grant, M. R., in *Att.-Gen. v. Stewart*, 2 Mer. 143; see also *Att.-Gen. v. Giles*, 5 L. J. N. S. Ch. 44; *Whicker v. Hume*, 1 D. M. & G. 506, 14 Beav. 509, 7 H. L. Ca. 124; *Mayor of Lyons v. East India Company*, 1 Moo. P. C. C. 298; *Jex v. McKinney*, 14 App. Ca. 77. The same considerations evidently apply to the act of 1888.

(*x*) *Canterbury (Mayor, &c., of) v. Wyburn*, [1895] A. C. 89. The validity of a devise of land in England for charitable purposes is not affected by the testator's domicile: see *Re Hewit*, [1891] 3 Ch. 568.

(*y*) *Re Geck*, 69 L. T. 819.

(*z*) *Beaumont v. Oliveira*, L. R., 6 Eq. 534, 4 Ch. 309. See *Re Rea*, [1902] 1 Ir. R. 451.

(*a*) 8 Rep. 129 a.

(*b*) 7 Ed. 1, c. 1, ante, Ch. V.

(*c*) Per Lord Coke, 2 Bulst. 190. And local customs are expressly saved by the statute 23 Hen. 8, c. 10, s. 5.

(*d*) The latest confirmation by statute appears to be 2 W. & M. sess. 1, c. 8, s. 3.

(*e*) See also per Sir R. P. Arden, M. R., *Highmore on Mortmain*, p. 127; and see generally as to these customs the authorities cited in *Reg. v. Mayor, &c. of London*, 13 Q. B. 1.

(*f*) *Middleton v. Cater*, 4 Br. C. C. 409. If the custom has still any force, it is saved by 51 & 52 Vict. c. 42, s. 12.

(*g*) By sect. 8 of the Mortmain and Charitable Uses Act, 1888, it is enacted that "where by any statute now in force any provision of the enactments hereby repealed is excluded either wholly or partially from application, or

c. 116, s. 50), money may, by will or otherwise, be given to be applied in the redemption of the land tax on hereditaments settled to charitable uses. So, the statute 43 Geo. 3, c. 107, authorises the devise of lands to the Governors of Queen Anne's Bounty; and again, the Gifts for Churches Act, 1803 (stat. 43 Geo. 3, c. 108), empowers persons, by will executed three months before death, to devise lands not exceeding five acres, or goods and chattels not exceeding in value 500*l.* (*h*), for erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the liturgy of the Church of England may be used, or any mansion-house for the residence of the minister, or any outbuildings, offices, churchyard (*i*), or glebe, for the same respectively; but no glebe, containing upwards of fifty acres, is to be augmented above one acre (*j*); and the promotion of these or similar objects has been further encouraged by an act (*k*) legalising the devise of lands to or in trust for (*l*) the Ecclesiastical Commissioners, in aid of the endowment and erection of district churches. Again, the Public Parks, Schools, and Museums Act, 1871, authorised gifts by will, made twelve calendar months before, and inrolled in the books of the Charity Commissioners within six calendar months after, the testator's death, of limited portions of land for any of the objects mentioned

is applied with modification, in every such case the corresponding provision of this act shall be excluded or applied in like extent and manner."

(*h*) By sect. 2, if the devise exceed the limit, the excess only is void, and the specific five acres may be allotted by the L. C. As to the case of a bequest of personalty exceeding 500*l.* see *Girdlestone v. Creed*, 10 Ha. 480. In *Sinnett v. Herbert*, L. R., 7 Ch. 232, a gift comprising pure and impure personalty, for building or endowing a church, was held to carry 500*l.* worth of the impure personalty, besides all the pure personalty, on the ground that the 500*l.* being all which could properly be spent in building (see *Re Ireland's Will*, 12 L. J. Ch. 381), it must be assumed that the trustees would apply all the rest for the other purposes. See also *Dixon v. Butler*, 3 Y. & C. 677; *Champney v. Davy*, 11 Ch. D. 949. As under this act, one may devise, he so may convey, reserving a life estate, per Sir G. Turner, L. J., *Fisher v. Brierley*, 1 D. F. & J. 664. But the act does not authorise a gift of money, even within the limit of 500*l.*, to arise by sale of land, *Church Building Society v. Coles*, 1 K. & J. 145, 5 D. M. & G. 324. A devise of land, not exceeding in extent

the prescribed limit, with a building upon it, is not invalidated by the secret trust that the devisee shall hold the land and building upon trust to convey the same as and for a parish or district church in perpetuity, *O'Brien v. Tyssen*, 28 Ch. D. 372. With regard to bequests of "goods and chattels" for purposes authorised by the act, it has been held that the limit of 500*l.* has been impliedly repealed by sect. 7 of the Mortmain, &c. Act, 1891: *Re Douglas*, [1905] 1 Ch. 279. As already noticed (*ante*, p. 59), the Gifts for Churches Act does not remove the disability of coverture: *Re Smith's Estate*, 35 Ch. D. 589.

(*i*) A bequest for maintenance of a family vault in a churchyard cannot be supported as one for repair of a churchyard under this act, *Re Rigley's Trusts*, 36 L. J. Ch. 147; *Re Vaughan*, 33 Ch. D. 187. But a bequest for keeping a churchyard in repair is within the act: *ibid.* As to a church clock, see *Re Hendry*, 56 L. T. 908.

(*j*) See also 55 Geo. 3, c. 147, and 58 Geo. 3, c. 45, s. 33.

(*k*) The New Parishes Act, 1843, s. 22.

(*l*) *Baldwin v. Baldwin*, 22 Beav. 425.

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in the title to the act (*m*). And by the Ancient Monuments Act, 1882 (*n*), any person may by will give, devise, or bequeath to the Commissioners of Works all his estate and interest in any ancient monument to which this act applies, and the Commissioners may accept the same. The Statute of Mortmain has also been repealed pro tanto in favour of the British Museum (*o*), the Department of Science and Art (*p*), the Bath Infirmary (*q*), Greenwich Hospital (*r*), the Foundling (*s*), Westminster (*t*), Middlesex (*u*), and St. George's Hospitals (*v*), the Royal Naval Asylum (*w*), the Seaman's Hospital Society (*x*), and of some other public institutions (*y*).

Mortmain,
&c., Act,
1891.

X.—The Mortmain and Charitable Uses Act, 1891.—This act applies to the wills of testators dying after 5th August, 1891. Section 3 repeals the definition of “land” in the act of 1888, and enacts that “land” in that act shall include tenements and hereditaments, corporeal and incorporeal, of any tenure, but not money secured on land, or other personal estate arising from or connected with land. Section 5 enacts that land may be assured by will to

(*m*) 34 Vict. c. 13. This act is repealed by the Mortmain and Charitable Uses Act, 1888, but in effect re-enacted by the sixth section of that act, which provides (1) that Parts I. and II. of the act shall not apply to an assurance by will of land, or of personal estate to purchase land, for a public park, school-house for an elementary school, or public museum; and (2) “that a will containing such an assurance . . . must be executed not less than twelve months before the death of the assurator, or be a reproduction in substance of a devise made in a previous will in force at the time of such reproduction, and which was executed not less than twelve months before the death of the assurator, and must be enrolled in the books of the Charity Commissioners within six months after the death of the testator.” By sub-sect. (3) the quantity of land assured must not exceed 20 acres for a park, 2 acres for a school-house, or 1 acre for a museum. The terms “public park,” “school-house,” “elementary school” and “public museum” are defined in sub-sect. (4) of this section. As to County Councils and other local authorities, see the Mortmain, &c., Amendment Act, 1892. The acts 4 & 5 Vict. c. 38 (school sites), 31 & 32 Vict. c. 44 (sites for religious, educational, literary, &c., purposes), and the Elementary Education Act, 1873, s. 13, sub-sect. 3, exclude gifts by will. The provisions of the act of 31 & 32 Vict.

here referred to, are repealed by the act of 1888, but virtually re-enacted, with the like exclusion of gifts by will, by sect. 7 (ii) of the latter act. The act 8 & 9 Vict. c. 43, empowered municipal corporations to take by devise sites for museums, &c., and also (*Harrison v. Corporation of Southampton*, 2 Sm. & G. 387) money to be laid out in such sites; but was repealed by the Public Libraries Act, 1850. See also the Technical, &c., Institutions Act, 1892 (post, p. 277), and the Working Classes Dwellings Act, 1890.

(*n*) 45 & 46 Vict. c. 73, s. 4.

(*o*) See stat. 5 Geo. 4, c. 39.

(*p*) 38 & 39 Vict. c. 68. This act does not expressly refer to 9 Geo. 2, c. 36; and according to a suggestion of James, L. J. (6 Ch. D. 212), the case is therefore not taken out of the statute Geo. 2. It is submitted that there is no foundation for the doubt. See above, p. 270.

(*q*) 19 Geo. 3, c. 23; see *Makeham v. Hooper*, 4 Br. C. C. 153.

(*r*) 10 Geo. 4, c. 25, s. 37.

(*s*) 13 Geo. 2, c. 29.

(*t*) 6 Geo. 4, c. 20 (loc. and pers.).

(*u*) 6 Will. 4, c. 7 (loc. and pers.).

(*v*) 4 Will. 4, c. 38 (loc. and pers.). See as to these hospitals, *Re Ovey*, *Broadbent v. Barrow*, 31 Ch. D. 113.

(*w*) 51 Geo. 3, c. 105.

(*x*) 3 & 4 Will. 4, c. 9, s. 1.

(*y*) See Shelf. Char. Uses, 49, and Byth. & Jarm. Conv. (4th ed. by Robbins, vol. iv. p. 22, note (j)).

or for the benefit of any charitable use, but that such land [sic] shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator, or such extended time as the Court or the Charity Commissioners may determine. Section 6 enacts that so soon as the time limited for the sale of any lands under any such assurance shall have expired without completion of the sale of the land, the land unsold shall vest forthwith in the Official Trustee of Charity Lands, and the Charity Commissioners shall take all necessary steps for the sale or completion of the sale of such land to be effected with all reasonable speed by the administering trustees for the time being thereof. Section 7 enacts that any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable uses shall, except as hereinafter provided, be held to or for the benefit of the charitable uses as though there had been no such direction to lay it out in the purchase of land. Section 8 provides that the High Court, or any judge thereof sitting at chambers, or the Charity Commissioners, if satisfied that land assured by will to or for the benefit of any charitable use, or proposed to be purchased out of personal estate by will directed to be laid out in the purchase of land, is required for actual occupation for the purposes of the charity and not as an investment, may sanction the retention or acquisition, as the case may be, of such land.

The effect of this act is to repeal sect. 4 of the Mortmain, &c., Act, 1888, so far as it applies to wills, and to allow land to be devised to charities, subject to the provisions of the act as to sale (z). It also allows "impure personalty" to be given to charities, and makes valid a bequest to a charity of money directed to be laid out in the purchase of land (a), although the direction is of itself inoperative (b). And it removes the limit of 500*l.* imposed by the Gifts for Churches Act, 1803, on gifts of personal property for the purposes of the act (c). As the act allows a legacy charged on or payable out of land to be given to a charity, it follows that it has rendered unimportant the old rule that assets are never marshalled in favour of a charity (d).

Effect of the
Act of 1891

Another effect of the act seems to be to make secret trusts of land for charitable purposes valid, because as a devise of land for charitable purposes is now lawful, there seems no reason for holding a secret trust for similar purposes to be unlawful. This conclusion

(z) *Re Hume*, [1895] 1 Ch. 422.

(a) See *Re Sutton*, [1901] 2 Ch. 640.

(b) Sect. 8.

(c) *Re Douglas*, [1905] 1 Ch. 279.

(d) *Ante*, p. 264. See *Biggar v. Eastwood*, 19 L. R. Ir. 49.

CHAPTER IX.

is in accordance with the principle on which *O'Brien v. Tyssen* (e) was decided.

The following decisions on the act of 1891 may be noted.

Construction of will made before the act.

In *Re Bridger* (f) it was decided that if a testator, by a will made before the passing of the act, gives to a charitable institution such part of his residuary estate "as may by law be given for charitable purposes," and dies after the passing of the act, the operation of the gift is not restricted to property which under the old law could be given for charitable purposes, but includes real estate, or the proceeds thereof. In *Re Hume* (g) it was held that an estate in remainder is within the act; it may, therefore, be validly devised to a charity, but must be sold within the time prescribed by the act, or the extended time, if any. In *Re Wilkinson* (h), and *Re Sidebottom* (i), it was decided that where real estate is devised to trustees upon an immediate trust to sell and pay the proceeds to a charity, the gift is one of "personal estate arising from land" within sect. 3 of the act, and is not affected by sects. 5 and 6; the trustees are not, however, at liberty to postpone the sale indefinitely. In *Re Ryland* (j) the testator gave his real and personal estate to trustees upon trust for conversion, but directed that the land should not be sold during the life of his widow without her consent in writing; the rents were payable during the life of the widow as to part to her and as to the remainder to certain charities, and the whole of the residuary estate was given to them on her death: it was held that the reversionary interest of the charities in the proceeds of sale was not "land" within the meaning of the act, but that the share of the charities in the rents during the widow's life was "land" within the meaning of the act, and ought to be sold in accordance with sect. 5.

What is "land" within sect. 3.

Bequest of money to be laid out in land, when not within sect. 7.

In *Re Sutton* (k) it was held that a bequest of personalty to be laid out in the acquisition of houses to be let to poor persons at low rents is a valid charitable gift, and not affected by sect. 7 of the act.

In *Re Church Patronage Trust* (l) it was held that the devise of an advowson, upon trusts requiring the trustees to present a fit and proper person to the living from time to time, was not a devise "to or for the benefit of any charitable use" within the meaning of sect. 5.

Extension of time.

In *Re Sidebottom* (m) it was held that the time limited by sect. 5

(e) 28 Ch. D. 372. Supra, p. 264.

(f) [1894] 1 Ch. 297.

(g) [1895] 1 Ch. 422.

(h) [1902] 1 Ch. 841.

(i) [1902] 2 Ch. 389.

(j) [1903] 1 Ch. 467.

(k) [1901] 2 Ch. 640.

(l) [1904] 1 Ch. 41, 2 Ch. 643.

(m) [1901] 2 Ch. 1. It seems that there is power to extend the time after the statutory period has elapsed: per Byrne, J., in *Re Ryland*, [1903] 1 Ch. at p. 474.

may be extended by the Court when and so often as circumstances render it desirable. CHAPTER IX.

The act does not expressly provide for the case of a devise of land for charitable purposes to a corporation not having a licence to acquire and hold land in mortmain, but as the act requires land devised to charitable uses to be sold within a certain time and thus prevents the land from being held in mortmain, it seems clear that a devise to a corporation for charitable purposes is not an assurance in mortmain within the meaning of the act of 1888. Devises to corporations.

In *Re Scowcroft* (n) a devise of land to the vicar of a certain parish and his successors was held good under the act of 1891, but the point was not taken.

It may be mentioned that devises to technical and industrial institutions, under the statute 55 & 56 Vict. c. 29, are exempt from the requirement as to sale imposed by the Mortmain, &c., Act, 1891. Technical and Industrial Institutions Act, 1892.

(n) [1898] 2 Ch. 638.

CHAPTER X.

PERPETUITY AND REMOTENESS.

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Primary
meaning of
"perpetuity."

I.—General Principle forbidding Perpetuities (a).—A perpetuity, in the primary sense of the word, is a disposition which makes property inalienable for an indefinite period.

As a general rule, every such disposition is void (b). Accordingly, a devise of land or a bequest of personalty upon trust for a purpose or institution which may last for an indefinite period (not being charitable), is void as a perpetuity, or as tending to a perpetuity. Thus, a trust for the maintenance of a private tomb (c), or a picture (d), or a private museum, library, society, or institution (e), or for the encouragement of sport (f), is invalid.

(a) The first three sections of this chapter are new, and the whole of it has been re-written. See Preface. I take this opportunity of expressing my great obligations to Mr. J. C. Gray, not only for the assistance which I have derived from his learned work on the Rule against Perpetuities, but also for his courtesy in discussing various points by correspondence [C. S.].

(b) See the general principle stated in *Re Parry and Daggs*, 31 Ch. D. 130. As this rule is founded on public policy, it applies to British Colonies: *Yeap Cheah Neo v. Ong Cheng Neo*, L. R., 6 P. C. 381.

(c) *Lloyd v. Lloyd*, 2 Sim. N. S. 255 ;

Rickard v. Robson, 31 Bea. 244 ; *Fowler v. Fowler*, 33 Bea. 616 ; *Hoare v. Osborne*, L. R., 1 Eq. 585 ; *Re Rigley's Trusts*, 36 L. J. Ch. 147 ; *Toole v. Hamilton*, [1901] 1 Ir. R. 385. If the tomb is part of the fabric of a church the gift is charitable, and therefore good : ante, p. 222.

(d) *Re Gassiot*, 70 L. J. Ch. 242.

(e) *Thomson v. Shakespear*, 1 D. F. & J. 399 ; *Carne v. Long*, 2 D. F. & J. 75 ; *Re Clark's Trust*, 1 Ch. D. 497 ; *Re Dutton*, 4 Ex. D. 54 ; *Re Good*, [1905] 2 Ch. 60 (old officers of a regiment) ; *Re Swain*, 99 L. T. 604 ; *Hoare v. Hoare*, 56 L. T. 147 (deed).

(f) *Re Nottage*, [1895] 2 Ch. 649.

If property is so given to a society or institution that the members can immediately dispose of it, then the objection of perpetuity does not arise, and the gift is valid (*g*), even where the testator adds directions as to the mode of application (*h*). But if the intention of the testator is that the property, although given absolutely to the society, shall be held and administered for the benefit of the future as well as the present members, the gift is a perpetuity, and void (*i*). The difficulty in many cases is to decide whether the testator means to benefit the present members of the society as individuals, or to benefit the society as a quasi-corporation (*j*). An unlimited gift of the income of property to a society does not amount to the gift of the corpus, but shews an intention that it is given for the benefit of future members; such a gift is therefore void (*k*).

It seems that a trust for the maintenance of a tomb or monument to the memory of the testator or his family, if restricted to the period of lives in being and twenty-one years afterwards, is valid (*l*). And if there is clause of forfeiture and a gift over in the event of non-performance of the trust, this is effectual (*m*). Whether this exception to the general rule also obtains in the case of other trusts without a cestui que trust who can enforce them, does not seem to have been decided.

In *Re Dean* (*n*), it was held that a trust for the benefit of a number of animals and the survivor of them was not bad on the score of its tending to a perpetuity, but the decision is clearly erroneous, if and so far as it is based on the theory that any animal, other than a human being, can be a "life" within the meaning of the modern Rule against Perpetuities, or any other rule of law or equity (*o*).

CHAPTER X.

Doctrine
of *Cocks v.*
Manners.

Whether
"trust"
without
cestui que
trust
can be made
valid by
restriction
as to time.

Trusts for
animals.

(*g*) *Cocks v. Manners*, L. R., 12 Eq. 574; *Re Clarke*, [1901] 2 Ch. 110; *Langham v. Peterson*, 87 L. T. 744 (gift for "the benefit or hospitality" of two ancient companies). See *Brown v. Dale*, 9 Ch. D. 78; *Re Delany's Estate*, 9 L. R. Ir. 227; *Bradshaw v. Jackman*, 21 L. R. Ir. 12.

(*h*) *Re Wilkinson's Trusts*, 19 L. R. Ir. 531.

(*i*) *Re Amos*, [1891] 3 Ch. 159. In that case the devise was void on the further ground that the society, being a trades-union, had no power to acquire land except by purchase for money.

(*j*) See *Morrow v. M'Conville*, 11 L. R. Ir. 236, where the earlier cases, including *Hogan v. Byrne*, 13 Ir. C. L. 166, and *Stewart v. Green*, Ir. R., 5 Eq. 470, are examined; *Bradshaw v. Jack-*

man, 21 L. R. Ir. 12.

(*k*) *Re Swain*, 99 L. T. 604.

(*l*) See *Re Dean*, 41 Ch. D. 552; *Pirbright v. Salwey*, [1896] W. N. 86. This doctrine is anomalous and not easy to explain. The question is referred to in Chap. XXIV. (Trusts without a Definite Object).

(*m*) *Lloyd v. Lloyd*, 2 Sim. N. S. 255. Compare the analogous case of a gift to a charity on a similar condition, post, p. 280.

(*n*) 41 Ch. D. 552.

(*o*) See the remarks of Mr. J. C. Gray on this case in *Harvard Law Review*, xv. 521 seq. (reprinted in the second edition of Gray on Perpetuities, § 905 seq.), and an article by me in the *Juridical Review* for July 1906 [C. S.]

CHAPTER X.

Charitable
gifts.

Charitable gifts are an exception to the rule which forbids the creation of perpetuities, in the primary sense of the word (*p*). Consequently, if there is an absolute immediate gift for a charitable purpose which may last for ever, the gift is good (*q*). And this is so, even although the mode in which the property is to be applied depends on a future and uncertain event; thus where a testator declares his intention of devoting a fund to charity, and directs that when and so soon as land is available for building almshouses, the money shall be employed for that purpose, this is a good charitable gift, although land may never be available for the purpose (*r*). And on the theory that when property has once been taken out of commerce by being devoted to charity, it is immaterial to what particular kind of charity it is devoted, the rule has been established that property may be given to charity A., with a gift over, in an event which may never happen, to charity B. (*s*). But if a gift to charity is future or conditional, and may not take effect within the period allowed by the Rule against Remoteness (the modern Rule against Perpetuities) the gift is void (*t*).

Conditional
gift to
charity.

The exemption of charitable gifts from the rule forbidding the creation of perpetuities makes it possible to create indirectly a perpetuity for non-charitable purposes. Thus, if a testator gives a fund to the trustees of charity A., subject to a condition that they shall keep his family vault in good repair, with a proviso that on failure to comply with the condition the fund is to go to charity B., the condition and gift over are good (*u*). So a bequest to a charitable society, on condition that the committee of the society undertake in writing to the testator's executors to keep his tomb in repair, is good (*v*).

Municipal
corporations.

Many old municipal corporations hold property for the benefit of their freemen or members; these are not charitable trusts, but any question as to their origin or legality has been obviated by sect. 2 of the Municipal Corporations Act, 1835 (*w*).

Whether
a vested
alienable
interest
can constitute
a perpetuity.

According to the older authorities, wherever property is presently

(*p*) See the cases cited above, p. 211, n. (*c*); *Att.-Gen. v. Webster*, L. R., 20 Eq. 483; *Goodman v. Mayor of Saltash*, 7 App. Cas. at pp. 650, 662.

(*q*) See ante, p. 211.

(*r*) *Chamberlayne v. Brockett*, L. R., 8 Ch. 206; *Re Gyde*, 79 L. T. 261; *Re Swain*, [1905] 1 Ch. 669; *Wallis v. Sol.-Gen. for New Zealand*, [1903] A. C. 173.

(*s*) *Christ's Hospital v. Grainger*, 1 Mac. & G. 460.

(*t*) Post, p. 367.

(*u*) *Re Tyler*, [1891] 3 Ch. 252. I venture to think that the decision in this case is based on a misapprehension of the ratio decidendi of *Christ's Hospital v. Grainger*, 1 Mac. & G. 460; see the Juridical Review for July 1906 [C. S.].

(*v*) *Roche v. M'Dermott*, [1901] 1 Ir. R. 394.

(*w*) *Prestney v. Mayor of Colchester*, 21 Ch. D. 111.

vested in A., subject to a right or interest presently vested in B., although that right or interest may not take effect in possession until the happening of an event which need not necessarily happen within a definite period, this does not constitute a perpetuity, because B. can at any time release his contingent interest, or A. can at any time sell the property subject to B.'s interest, or A. and B. together can at any time concur in disposing of the property (x). But this doctrine has been practically overruled by the dicta of the Court of Appeal in *London & S. W. Railway v. Gomm* (y), to the effect that an option of purchase in respect of land is invalid unless its exercise is restricted to the period allowed by the modern Rule against Perpetuities.

II.—The Old Rule against Perpetuities.—After estates tail were held to be barrable by common recovery, numerous attempts were made by landowners to create unbarrable entails by indirect means. One device was to insert in a settlement of land a proviso imposing a forfeiture or penalty on any tenant in tail who attempted to bar the entail; these provisos (called clauses of perpetuity) were held to be void (a), and in *Mildmay's Case* (b), where a similar question arose, the judges resolved “that all these perpetuities were against the reason and policy of the common law; for at common law all inheritances were fee simple, as Littleton saith . . . But the true policy and rule of the common law in this point was, in effect, overthrown by the statute De Donis Conditionalibus, made anno 13 Ed. I, which established a general perpetuity by act of parliament, for all who had or would make it, by force whereof all the possessions of England in effect were entailed accordingly . . . and the same continued . . . till about the 12th year of Ed. IV, when the judges on consultation had amongst themselves, resolved that an estate tail might be docked and barred by a common recovery.” Lord Bacon describes a perpetuity in the same way: “There is

Attempts to create unbarrable entails.

Clause of perpetuity.

(x) *Gilbertson v. Richards*, 4 H. & N. 277, 5 H. & N. 459; *Birmingham Canal Company v. Cartwright*, 11 Ch. D. 421; *Avern v. Lloyd*, L. R., 5 Eq. 383.

(y) 20 Ch. D. 562. In that case the option was contingent, and not vested, being exerciseable only in an event which might not happen within the limits allowed by the modern Rule against Perpetuities: it was therefore clearly void for remoteness, and the statements of the learned judges as to the validity of a vested option of purchase, exerciseable immediately, are

merely dicta. But the doctrine may be considered settled, as the principle laid down in *L. & S. W. R. v. Gomm* has been accepted without question for many years. See *Woodall v. Clifton*, [1905] 2 Ch. 257; *Edwards v. Edwards*, [1909] A. C. 275.

(a) *Corbet's Case*, 1 Rep. 83b. Compare the somewhat similar device of giving trustees a power of revocation on the birth of every tenant in tail ad infinitum, described by the Real Property Commissioners, Third Rep., p. 30.

(b) 6 Rep. 40a.

CHAPTER X.

Perpetual
freehold.

Executory
bequest
of a term.

start up a device called perpetuity, which is an entail with a proviso conditional, tied to his estate, not to put away the land from his next heir, and if he do, to forfeit his own estate" (c). Another device was to create what was called a perpetual freehold, by limiting successive estates for life to the heirs or unborn issue of a person *ad infinitum*; this device also failed, for it was held that if a feoffment was made to the use of A. for life, and after to the use of every person that shall be his heir one after another for the term of the life of every such heir, "this limitation is merely void, for the limitation of an use to have a perpetual freehold is not agreeable with the rule of law in estates in possession" (d). The rule is stated in the same way in a standard work: "Uses that are against the rules of the common law shall not be executed by this statute [the Statute of Uses], and, therefore, if a feoffment be made to the use of A. for life, and after to the use of every person that shall be his heir one after another for term of his life . . . these uses shall not be executed, because these limitations are wholly void" (e). "It is against the rules of the common law that a perpetual freehold for life only should descend, because it creates a perpetuity" (f). A third device was to create a species of estate tail by means of an executory bequest of a term of years to a person and his heirs one after another *ad infinitum*, either directly or by way of trust; if such a limitation had been held legal it would have created a "perpetuity," because it could not be barred by a common recovery (g). Accordingly this device also failed (h), for the reason stated in *Lampet's Case*: "It would be inconvenient that such manner of perpetuity should be made of a chattel, when of an inheritance neither by act executed by the common law, nor by limitation of an use, nor by devises in last wills, any perpetuity can be established" (i).

(c) Bacon Law Tracts, 145; *Duke of Marlborough v. Godolphin*, 1 Eden, 404; *Mainwaring v. Baxter*, 5 Ves. 458.

(d) *Chudleigh's Case*, 1 Rep. 138a. The general principle is recognised in *Re Parry and Daggs*, 31 Ch. D. 130.

(e) Shepp. Touch. 506. Attention was drawn to this passage and to the passage cited above from *Chudleigh's Case* in an article of mine on Perpetuities in the Law Quar. Review (xv. 71). In the second edition of his book on Perpetuities, Mr. Gray has done me the honour of referring to my article, but his comments on it are, if I may say so, in the nature of special pleading, for they evade the real question, which is—Was there a rule of the common law which

forbade the limitation of successive life estates to the unborn descendants or heirs of a person *ad infinitum*? The Real Property Commissioners (Third Report, pp. 30, 31) say that there was, and this conclusion is, it is submitted, superabundantly justified by the authorities cited in the text [C. S.].

(f) Gilbert, Uses, 77. See also the passages cited from *Humberston v. Humberston*, post, p. 288.

(g) *Grig v. Hopkins*, Sid. 37.

(h) *Sanders v. Cornish*, Cro. Car. 230; *Backhouse v. Bellingham*, Pollexf. 33; *Wood v. Saunders*, ib. 35.

(i) 10 Co. 52a. Compare *Mainwaring v. Baxter*, infra, p. 284.

CHAPTER X.

Technical
meaning of
"perpetuity."

Hence "perpetuity" came to have the special meaning of a limitation equivalent to, or in the nature of, an unbarrable entail. "A perpetuity is the settlement of an estate or an interest in tail, with such remainders expectant upon it as are in no sort in the power of the tenant in tail in possession to dock by any recovery or assignment" (j). "A perpetuity is where an estate is so designed to be settled in tail, &c., that it cannot be undone or made void" (k). "A perpetuity is the settlement of an interest descendable from heir to heir, so that it shall not be in the power of him in whom it is vested to dispose of it, or turn it out of the channel" (l).

It is necessary to dwell on this use of "perpetuity," because the meaning of the word has so completely changed that its use in this sense by Mr. Fearn and the judges and writers of the eighteenth century, and even later (m), is liable to cause misapprehension (n). The doctrine of *cy-près* is unintelligible, unless it is recognised as an indulgence granted to a testator who attempts to create an unbarrable entail (nn).

An attempt to create an unbarrable entail is ineffectual, even if it is restricted to a certain number of generations. This was the case in *Seaward v. Willock* (o), where the testator devised land to A. for life, and to his descendants down to the tenth generation during their lives (p).

Partial
perpetuity.

The law does not allow a "perpetuity" to be created by means of terms of years. This was attempted by the testators in *Somerville v. Lethbridge* (q) and *Beard v. Westcott* (r), in each of which cases successive terms of ninety-nine years, determinable on their lives, were given to the sons of A., a bachelor, and their issue male, and in

Perpetuity
by terms
of years.

(j) Per Lord Nottingham, *Duke of Norfolk's Case*, [1681] 3 Ch. Ca. 1.

(k) Jacob, *Law Dict.* 1739. The definition in *Les Termes de la Ley*, 1721, is in the same terms.

(l) Gilbert, *Uses*, 118.

(m) See Shepp. *Touch.* by Preston (1820), p. 506; Preston, *Abstr.* ii. 148, *Duke of Marlborough v. Godolphin*, cited *infra*, p. 285; *Monypenny v. Dering*, [1847] 16 M. & W. at p. 428.

(n) Even Mr. Jarman did not fully grasp the change in the meaning of the word. "The early judges," he says, "had an extreme repugnance to every disposition of property that savoured of a perpetuity, but the expressions which occasionally fell from them, demonstrative of this feeling, did not afford a specific definition of the monster which the law was stated to 'abhor'" (1st edition, p. 220). If Mr. Jarman had

referred to the cases cited above, and to *Grig v. Hopkins* (Sid. 37), he would have found that there was no ambiguity in the term "perpetuity" as used by the early judges. It is still more surprising to find so learned and accurate a writer as Mr. Gray misled by the change in the meaning of the term. He entirely misunderstands the case of *Humberston v. Humberston*, owing to his unwillingness to admit that in 1717 "perpetuity" still retained its meaning of a limitation in the nature of an unbarrable entail (*Gray Perp.*, § 193, 2nd edition).

(nn) Post, p. 288.

(o) 5 East, 198.

(p) The case is referred to below, p. 290.

(q) 6 T. R. 213, but badly reported. See Sugden's note to Gilbert on *Tenures*, 269.

(r) 5 B. & Ald. 801.

CHAPTER X.

Perpetuities
not allowed
in equity.

default of such issue to B., a living person : it was held that all the limitations after the life estate given to A.'s first son (who was unborn at the testator's death) were void as tending to a perpetuity (*s*).

A "perpetuity" cannot be created by means of a trust. "If in equity you could come nearer to a perpetuity than the rules of common law would admit, all men, being desirous to continue their estates in their families, would settle their estates by way of trust, which might indeed make well for the jurisdiction of Chancery, but would be destructive to the commonwealth" (*t*). Attempts to make entails practically unbarable by limiting long terms of years to trustees, and giving them powers of entry and raising money, &c., seem at one time to have been not uncommon, but every attempt of this kind was held void, as tending to a perpetuity (*u*). So if a testator devises land to A. B. in tail "upon special trust and confidence" that he will not bar the entail, this provision is wholly ineffectual (*v*).

Every entail
is barrable.

The general rule of law on the subject was thus stated by James, L. J.: "If there is one thing that has been settled beyond all question in the real property law of this country, it is that no condition, no restriction, no prohibition, no limitation over, can prevent a tenant in tail from suffering a common recovery with all its consequences" (*w*).

Foreign
entail.

In *Fordyce v. Bridges* (*x*), a testator bequeathed personal estate upon trusts which might result in its being invested in the purchase of land in Scotland to be settled in strict entail, according to the law of that country, which apparently did not allow such estates to be barred, and it was objected that this would create a perpetuity according to English law, and was therefore void. It was, however, held by Lord Cottenham that "the rules acted upon by the Courts in this country with respect to testamentary dispositions tending to perpetuities, relate to this country only."

Whitby v.
Mitchell.

III.—The Rule in *Whitby v. Mitchell*.—In *Whitby v. Mitchell* (*y*), land was limited to an unborn person for life, with remainder to the children of that unborn person : it was held by Kay, J.,

(*s*) See further as to these cases, *infra*, pp. 291 and 353.

(*t*) *Duke of Norfolk v. Howard*, 1 Vern. 164.

(*u*) See *Mainwaring v. Baxter*, 5 Ves. 458; *Case v. Drosier*, and *Sykes v. Sykes*, referred to below, pp. 315, 324; *Floyer v. Bankes*, *infra*, p. 315.

(*v*) *Dawkins v. Lord Penrhyn*, 4 App. Ca. 51.

(*w*) *Dawkins v. Lord Penrhyn*, 6 Ch. D. at p. 326; cited with approval s. c. in D. P. 4 App. Ca. 51.

(*x*) 2 Ph. 497.

(*y*) 42 Ch. D. 494, 44 Ch. D. 85.

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and by the Court of Appeal, that the remainder to the children was bad. Some of the authorities—*Hay v. Earl of Coventry* (z), *Monypenny v. Dering* (a), and the opinions of Mr. Charles Butler and Mr. Joshua Williams—are referred to in the judgments, but still earlier and more instructive authority is to be found. Mr. Fearne, in 1776, explained the rule thus: “Any limitation in future, or by way of remainder, of lands of inheritance, which in its nature tends to a perpetuity (b), even although there be a preceding vested freehold, so as to take it out of the description of an executory devise, is by our Courts considered as void in its creation; as in the case of a limitation of lands in succession, first to a person in esse, and after his decease to his unborn children, and afterwards the children of such unborn children, this last remainder is absolutely void” (c).

Mr. Fearne's
statement
of the rule.

Again, in 1759, in *Duke of Marlborough v. Godolphin* (d), where the testator devised lands to several persons successively for life, with remainder to their sons successively in tail male, and directed his trustees upon the birth of each son, to revoke the uses and to limit the land to such son for life, with remainder to his sons in tail male, it was held that the clause of revocation and resettlement was void, as tending to a perpetuity. Lord Northington pointed out that the law allows land to be tied up by limiting a contingent remainder to an unborn person for life, but does not permit a remainder to his issue.

The rule in *Whitby v. Mitchell* has been described as “the old common law rule against double possibilities which prevents a limitation of a legal estate in land to the unborn child of an unborn child of an existing person” (dd), but this is an inaccurate description of the rule, which is directed against limitations to two unborn generations in succession. Such a limitation as that referred to in the passage just cited is not invalid under the rule in *Whitby v. Mitchell*. For example, a limitation of land to A. for life, and after his death to the eldest grandchild of B., a bachelor, is perfectly good.

Erroneous
statement
of rule.

It is hardly necessary to say that the rule in *Whitby v. Mitchell*, being a rule applying only to contingent remainders, does not apply to limitations of personal estate; but the point was argued and decided in *Re Bowles* (e).

Rule does
not apply
to personalty,

(z) [1789] 3 T. R. 86.

(a) 2 D. M. & G. at p. 170.

(b) As to the meaning of “perpetuity” in this passage, see *supra*, p. 283, and *infra*, p. 287, n. (h).

(c) Fearne, *Cont. Rem.*, 10th edition, 502. See also Preston, *Abstr.* ii. 114.

(d) 1 Eden, 404. The law is laid down in similar terms by the Court of Exchequer in *Monypenny v. Dering*, 16 Mee. & W. 418.

(dd) Farwell on Powers, 286.

(e) [1902] 2 Ch. 650. See post, n. (h) *ad finem*.

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or to
executory
devises.

Whether
it applies
to equitable
contingent
remainders.

The rule in *Whitby v. Mitchell* applies only to contingent remainders, and therefore does not apply to executory devises.

The question whether the rule applies to equitable contingent remainders, that is, to contingent remainders of equitable estates, has been recently raised, and is believed to be now (May, 1909) sub judice (*d*). It is submitted that the rule clearly does so apply. In his work on Contingent Remainders, Mr. Fearne, after giving his statement of the rule (*ante*, p. 285), goes on to cite the case of *Humberston v. Humberston* (*post*, p. 288), in which the limitations were equitable, as an illustration of the application of the rule. And in *Monyppenny v. Dering* (*e*), where the limitations were equitable, Lord St. Leonards said that the case was governed by the rule which "forbids the raising of successive estates by purchase to unborn children, that is, to an unborn child of an unborn child," thus clearly shewing that in his opinion the rule in *Whitby v. Mitchell* applies to equitable limitations. This result is also arrived at if the question is considered historically, for in *Duke of Norfolk v. Howard*, Sir Francis North said that if perpetuities (meaning unbarrable entails) could be created by way of trust, "all men, being desirous to continue their estates in their families, would settle their estates by way of trust" (*f*).

Effect of
decision
in *Whitby v.*
Mitchell.

The effect of the decision in *Whitby v. Mitchell* is to establish the correctness of the view held by Mr. Fearne and his followers, and to demonstrate the error into which Mr. Lewis and Mr. Gray fell when they denied the existence of the rule (*g*). The point is of importance, because it follows from the decision that Mr. Fearne and his followers are right, and that Mr. Lewis and Mr. Gray are wrong, in the views which they have expressed on the question whether contingent

(*d*) Since these remarks were written the case (*Re Nash*) has been decided. See Addenda.

(*e*) 2 D. M. & G. at p. 170.

(*f*) The passage is cited *supra*, p. 284. It must be read in connection with the definition of "perpetuity" given by Lord Nottingham in the same case, cited *supra*, p. 283. The general principle was followed in *Mainwaring v. Baxter*, 5 Ves. 458.

(*g*) In the first edition of his work on Perpetuities, Mr. Gray strenuously denied that any such rule ever existed; he referred to it as "a non-existent rule based on an exploded theory." In the

second edition, published since the decision in *Whitby v. Mitchell*, he adheres to that view. He is unable to see that the rule in *Whitby v. Mitchell* is merely an example or abbreviated statement of the general principle—laid down by the author of Sheppard's Touchstone and by Chief Baron Gilbert, and recognised by Lord Chancellor Cowper, Lord Northington, the Real Property Commissioners, Lord St. Leonards, and others—that life estates cannot be limited to unborn issue in succession beyond the first generation (*supra*, p. 282, and *infra*, p. 288).

remainders are subject to the modern Rule against Perpetuities. This question is discussed post, p. 368 (*h*).

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It was stated by Mr. Preston, arguendo, in *Mogg v. Mogg* (*hh*), that a limitation which falls within the rule in *Whitby v. Mitchell* is good if there is "a limitation of the time within which it is to take effect," and the statement was adopted as correct by Wood, V.-C., in *Catlin v. Brown* (*i*) although the question did not arise in that

Dictum of
Wood, V.-C.,
in *Catlin v.*
Brown.

(*h*) The origin of the rule in *Whitby v. Mitchell* has been the subject of much debate (the principal authorities are referred to in two articles in the Law Quarterly Review, xiv. 234, xv. 71; an article in the Solicitor's Journal, vol. xlix., p. 414; and an article in the Juridical Review for July 1906. See also Encycl. Laws of England, 2nd ed. iii. 519). It is submitted that the true explanation is that given by Lord Northington and Mr. Fearn in the passages quoted above, and that the rule is merely an example or specific application of the general principle which forbids the creation of a "perpetuity" in the old-fashioned sense of the word, namely, a limitation of land to successive unborn descendants as purchasers. It has been explained above (p. 282) that a limitation of successive life estates to unborn descendants ad infinitum is void, being a "perpetuity"; and a limitation of life estates to unborn descendants for a definite number of generations is also void, because it tends to a perpetuity (*Seaward v. Willock*, supra, p. 283). That this was the ordinary meaning of "perpetuity" at the time when Mr. Fearn wrote (1776) is clear from Chief Baron Gilbert's work on Uses (1734), in which he says that a perpetual succession of life estates descendable from heir to heir is void, being a perpetuity (supra, p. 283), and from the definition of "perpetuity" in Jacob's Law Dictionary (1739) as an estate "so designed to be settled in tail, &c., that it cannot be undone or made void." Mr. Lewis does indeed suggest (Perp. Supp. 121) that in referring to a "perpetuity" in the passage above quoted, Mr. Fearn had in mind the modern Rule against Perpetuities (infra, p. 370, note (*x*)); but this view is quite inadmissible, for in the first place Mr. Fearn expressly says that the modern Rule against Perpetuities does not apply to contingent remainders (post, p. 369, n. (*j*)), and in the second place, the kind of limitation forbidden by the rule in *Whitby v. Mitchell* is not neces-

sarily bad under the modern Rule against Perpetuities: a limitation by way of executory devise to the issue of an unborn person to whom a preceding estate for life is given, is perfectly good if it is restricted to issue born within the period allowed by the modern Rule, while such a limitation by way of contingent remainder is, as Mr. Fearn tells us, "absolutely void." It is submitted that the explanation of the origin of the rule in *Whitby v. Mitchell* suggested (or rather taken for granted) by Mr. Fearn, the Real Property Commissioners, and the judges who took part in the decision in *Monypenney v. Dering*, is more simple and satisfactory than that which makes the rule in some way derived from the so-called rule against a possibility on a possibility. That no definite or intelligible rule against double possibilities ever existed, is admitted even by those who use it as some kind of explanation of the origin of the rule in *Whitby v. Mitchell*. (See the judgment of Lindley, L. J., in *Whitby v. Mitchell*, 44 Ch. D. at p. 92.) It is therefore to be regretted that the Court of Appeal in *Whitby v. Mitchell* should have referred to the so-called rule against double possibilities as the parent of the rule now under discussion. It may be said that the question of the true origin of the rule in *Whitby v. Mitchell* is an academic one, and of no practical importance, but this is not altogether true, for if the rule in *Whitby v. Mitchell* had been stated as a branch of the old rule forbidding the limitation of successive life estates in land to unborn generations, the question decided in *Re Bowles* could never have been raised. The point also has an important bearing on the question whether the rule applies to equitable contingent remainders [C. S.].

(*hh*) 1 Mer. at p. 664.

(*i*) 11 Ha. 372. In *Mogg v. Mogg* and *Catlin v. Brown* the estates were equitable.

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case. There is, however, no foundation for Mr. Preston's statement. No such qualification of the rule is to be found in any of the old authorities. On the contrary, Mr. Fearné expressly says that if land is limited to an unborn person for life, with remainder to the issue of that unborn person, this last remainder is "absolutely void." In the case cited by Mr. Preston as establishing his proposition (*i*), the land was not devised to two unborn generations in succession; the devise was to A. for life and after his death to his issue as he should appoint; he died without leaving issue, and the only question was whether the gift over was good. Mr. Gray approves of Mr. Preston's statement (*j*), but as he denies the accuracy of the decision in *Whitby v. Mitchell*, his opinion, on this particular point, can have no weight in our courts.

How far
intention to
create a
"perpetuity"
is carried into
effect.

IV.—The Doctrine of Cy-près.—Although the law does not allow a testator to devise land to successive unborn generations as purchasers, the Courts have, in certain cases, endeavoured to carry out his intention by giving effect to the devise within the limits allowed by law. This is the doctrine of cy-près, or approximation, under which the limitation to the unborn descendants is converted into an estate tail (*i*). Thus, in *Humberston v. Humberston* (*j*), a testator devised lands to a corporation upon trust to convey them to M. Humberston for life, and after his death to his first son for life, and so to the first son of that first son for life, &c., with similar elaborate limitations by way of executory trust to a large number of persons: "both Court and counsel held that to be such an affectation and tendency to a perpetuity that nothing was said in support of it," and Lord Chancellor Cowper gave judgment as follows: "Though an attempt to make a perpetuity for successive lives be vain, yet so far as it is consistent with the rules of law it ought to be complied with; and, therefore, let all the sons of these several Humberstons, that are already born, take

(*i*) *Hockley v. Mawbey*, 1 Ves. jun. p. 150. In this case the limitations were legal.

(*j*) *Perp.* § 294.

(*i*) Mr. Lewis treats the doctrine of cy-près as an exception to the modern Rule against Perpetuities (*Perp. Supp.* 142), but this is an error, arising from Mr. Lewis's inability to understand the meaning of "perpetuity" as used by judges and writers in the seventeenth and eighteenth centuries (*ante*, p. 283). No doctrine of cy-près has ever been engrafted on the modern Rule against

Perpetuities; that Rule is unflinchingly applied without regard to the intention of the testator, and the fact that its application in a given case will defeat the testator's expressed intention, is not allowed to affect the construction of the will, unless the language of the will is ambiguous, so as to be capable of a construction which will carry out, and not defeat, the intention of the testator (*post*, p. 365).

(*j*) 1 P. W. 332; s. c., s. n. *Humberston v. Humerston*, 1 Gilb. 128.

estates for their lives ; but where the limitation is to the first son unborn, there the limitation to such unborn son shall be in tail male " (k). It was at one time supposed that the ground for this decision was that, the trust being executory, "the Court was authorised to mould the limitations so as to bring them within the established limits, independently of the doctrine in question" (l). But this is not strictly accurate, for the doctrine of cy-près is based on the presumed intention of the testator (m). In the case of an executory trust, however, greater latitude is allowed in moulding the limitations in order to carry out the intention of the testator than where he has been his own conveyancer (n).

Doctrine not restricted to executory trusts.

Being an anomaly, the doctrine of cy-près ought not to be extended (o).

Doctrine not to be extended. Who takes estate tail.

In all these cases where successive life estates are given to A. and his issue, A. takes a life estate, and his first descendant in the line of succession takes an estate tail (oo). There are cases, apparently similar to these, where the estate tail is given to A. (p), but the explanation seems to be that in the latter class of cases the effect of the will is to give A. an estate of inheritance, and the words which purport to give him and his issue estates for life are either taken to be words descriptive of an estate of inheritance, or they give A. an estate of inheritance coupled with a proviso that the successive tenants shall hold for life ; consequently A. takes an estate tail, not by cy-près, but by rejecting the words which are repugnant to an estate of inheritance (q).

(k) 1 P. W. 332.

(l) Mr. Jarman, in the first edition of this work, 261, n. See *Mortimer v. West*, 2 Sim. 274, referred to post, note (q); *Williams v. Teale*, 6 Ha. 239.

(m) *Parfitt v. Hember*, L. R., 4 Eq. 443; *Hampton v. Holman*, 5 Ch. D. 190, where Jessel, M. R., pointed out that *Monypenny v. Dering* (16 M. & W. 418) was a clear decision to the effect stated in *Parfitt v. Hember*. See also *Forsbrook v. Forsbrook*, L. R., 3 Ch. 99.

(n) *Re Mortimer*, [1905] 2 Ch. 502. Compare *Miles v. Harford*, infra, p. 309.

(o) *Re Mortimer*, supra. In *Re Dennehy's Estate* (17 Ir. Ch. 97) the court refused to apply the doctrine to a will under which the appointees were put to their election: sed quære.

(oo) In *Forsbrook v. Forsbrook*, L. R., 3 Ch. 99, where successive life estates were given to the testator's two nephews and their male issue, there was a direction that "each two of the succeeding inheritors" should inherit free from

incumbrances, and this appears to have prevented the application of the cy-près doctrine; it was held that the nephews took life estates, with remainder to their eldest sons for their lives, with remainder to the nephews in tail male: the eldest sons were living at the testator's death. The L. J.J. followed the doctrine laid down in *Doe v. Gallini*, 3 Ad. & E. 340. As to the remark of Rolt, L. J., on the application of the doctrine of cy-près, see Gray, §§ 658 seq. Compare *Re Buckton*, [1907] 2 Ch. 406, post, Chap. XLVIII.

(p) *Doe v. Stenlake*, 12 East, 515; *Reece v. Steel*, 2 Sim. 233; *Hugo v. Williams*, L. R., 14 Eq. 224; *Trash v. Wood*, 4 My. & Cr. 324; *Brooke v. Turner*, 2 Bing. N. S. 422, and other cases referred to in Chap. XVII.

(q) Gray on Perp., § 656. In *Mortimer v. West*, 2 Sim. 274, a devise to A., B., and C. for their lives, with remainder to their respective children for life, and so to be continued from issue to issue for life, with gifts over in

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Devise of
successive
life estates
to "issue."

In *Parfitt v. Hember* (r), the testator devised real estate upon trust for his brother A. for life, with remainder in trust for his nephews and niece B., C., and D., and the survivor, for their lives and the life of the survivor, and for the issue of them respectively for their lives for ever, as tenants in common, with a gift over on their death without issue, or in case of the death of all their issue, and directed that "the before-stated entails to my nephews and niece and their respective issue" should be equally divided "amongst the daughters as well as the sons of them, my nephews and nieces, and their issue." It was held by Romilly, M. R., that all the children of B., C., and D. took equitable estates as tenants in common in tail, with cross remainders.

In *Re Richardson* (s), the testator devised land to his three children by name, and directed that if any of them should die leaving issue, his share should go to his children for life in equal shares, "and so to be continued and distributed in a descending line per stirpes from issue to issue for life"; there was no gift over in default of issue. It was held by Buckley, J., that the cy-près doctrine did not apply, on the ground that the persons to benefit under the devise were a class larger than those who would take under an estate tail. The limitations were such that in passing from generation to generation it was not the heir in tail who was to take, but the heir in tail and all his brothers and sisters. "That is a direction hopelessly inconsistent with an estate tail" (t).

Doctrine
not applied
where
no general
intent
to create
estate tail,

The doctrine is not applied where there is no general intent to create an estate tail. Thus, in *Seaward v. Willock* (u), the testator devised land to A. for life. "and after him to his eldest or any other son after him for life, and after them to as many of his descendants issue male as shall be heirs of his or their bodies, down to the tenth

default of issue, was held to give A., B., and C. estates tail. The V.-C. refused to adopt the doctrine of cy-près applied in *Humberston v. Humberston*, because in the case before him the devise was direct and not by way of executory trust; but this was clearly erroneous: *supra*, p. 289. As to the decision in *Wollen v. Andrewes*, 2 Bing. 126, see Gray, § 657.

(r) L. R., 4 Eq. 443. See *Hampton v. Holman*, 5 Ch. D. 183.

(s) [1904] 1 Ch. 332.

(t) The learned judge thought that *Parfitt v. Hember* was distinguishable, and that the decision in *Humberston v. Humberston* turned on the fact that the trusts were executory. But it is clear that the general rule laid down in

Humberston v. Humberston applies to direct devises as well as to executory trusts (*supra*, note (m)), and in *Parfitt v. Hember* the key-note of the judgment is to be found in the opening sentence: "I think that in this will an intention is shewn to give a series of life estates in perpetuity to the issue of the nephews and nieces." *Parfitt v. Hember* was referred to with approval by Jessel, M. R., in *Hampton v. Holman*, 5 Ch. D. 183. The test is whether the estate, if left to itself, so as to go in the precise course marked out by the testator, will devolve as an estate tail; if so, the doctrine of cy-près is applicable: see *Monypenny v. Dering* (16 M. & W. at p. 428). See also Gray, *Perp.*, § 652. (u) 5 East, 198.

generation during their natural lives": as this limitation was not to the descendants of A. ad infinitum, it was held that A. took an estate for life only.

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Nor is it applied where successive terms of years, determinable on death, are given to unborn issue (v).

nor to terms of years.

In a case where land was directed to be purchased and settled on a person and his descendants for successive life estates (such person to be ascertained on the failure of a previous estate tail), and the person so to be ascertained was not born at the death of the testator, it was held that the trust could not be executed (w). The case of *Humberston v. Humberston* was cited in argument, but the doctrine of cy-près was not referred to in the judgments.

Gift to unborn person for life, with remainder to issue in tail.

The case in which the question of the application of the doctrine most frequently arises is where an estate tail is expressly given. The doctrine of cy-près, as Mr. Jarman explains (x), "applies where lands are limited to an unborn person for life, with remainder to his first and other sons successively in tail, in which case, as such limitations are clearly incapable of taking effect in the manner intended (the remainder to the issue being, as we have seen, absolutely void), the doctrine in question gives to the parent the estate tail that was designed for the issue; which estate tail (unless barred by the parent or his issue being tenant in tail for the time being) will comprise, in its devolution by descent, all the persons intended to have been made tenants in tail by purchase. The intention that the testator's bounty shall flow to the issue, is considered as the main and paramount design, to which the mere mode of their taking is subordinate and the latter is therefore sacrificed (y). The first clear (z) authority

(v) *Beard v. Westcott*, 5 Taunt. 393, 5 B. & Ald. 801, T. & R. 25; *Somerville v. Lethbridge*, 6 T. R. 213. In the first edition of this work (p. 263) Mr. Jarman said on the authority of the three cases last cited: "It has been decided in relation to the doctrine in question . . . that it is inapplicable where an attempt is simply made to limit a succession of life estates to the issue of an unborn person, either for a definite or indefinite series of generations." It will be seen that the cases in question are not authorities for this proposition.

(w) *Tregonwell v. Sydenham*, 3 Dow 194, "a case of extraordinary difficulty" (Gray, *Perp.*, § 419). See Marsden, *Perp.* 136.

(x) First edition, p. 260.

(y) Mr. Jarman's statement of the

ground of the rule will be found confirmed by the Court of Exchequer in *Monypenny v. Dering*, 16 Mee. & W. at p. 428, and by Jessel, M. R., in *Hampston v. Holman*, 5 Ch. D. 190.

(z) After referring to the case of *Humberston v. Humberston* (supra, p. 288), Mr. Jarman remarks: "*Chapman d. Oliver v. Brown*, 3 Burr. 1626, 3 B. P. C. Toml. 269, cited Butl. Fea. C. R. 207, n., is also distinguishable (though the doctrine was much discussed), as there was an express devise in tail to the unborn son, and the only question was, whether words ought not to be supplied which would have given the estate tail to the son of such son, and thereby rendered the devise void. This was refused, and, consequently, the devise was held to be good."

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for the doctrine is *Nicholl v. Nicholl* (a), where the devise was 'to the second son of W. Nicholl (who at the death of the testator had no son) *for his life*, and after his death, or in case he should inherit the paternal estate by the death of his elder brother, to *his second son* lawfully to be begotten *and his heirs male*, remainder to the third and other sons of W. Nicholl successively, according to priority of birth, in tail male, remainder over.' The Common Pleas, on a case sent from Chancery, certified that the estate would vest in the second son [when born, of W. Nicholl] by executory devise; and that in order to effectuate the general intention of the testator, he would take *an estate in tail male*, determinable on the accession of the paternal estate.

"So, in *Robinson v. Hardcastle* (b), where, on the marriage of A. and B., lands were limited to A. for life, remainder to such of the children of the marriage as A. should appoint, and, in default, over. A. by will appointed to his son for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of such son successively in tail male, with remainder to his daughters as tenants in common in tail. Mr. Justice Buller expressed an opinion that the son, by the application of the *cy-près* doctrine, took an estate tail; but the Court was not called upon to decide the point.

*Pitt v.
Jackson.*

"The case, however, which has carried this doctrine farther than any other, is *Pitt v. Jackson* (c), where, by a settlement on the marriage of P. W., certain moneys were directed to be laid out in the purchase of lands, to be settled to the use of P. W. for life, without impeachment of waste, with remainder to his intended wife for life, remainder to the use of the children of the marriage, subject to such powers, limitations, and provisos as P. W. by deed or will should appoint, with remainders over. By will P. W. appointed trust moneys to be laid out in real estate, to be conveyed in trust for his daughter M., during her life, for her separate use, remainder to trustees to support contingent remainders, remainder *to all and every the child and children of his said daughter, as tenants in common in tail*, with remainders over. Sir Lloyd Kenyon, M. R., declared the appointment to be invalid, and that the whole of the share appointed

(a) 2 W. Bl. 1159. See post, p. 293, n. (h).

(b) 2 T. R. 241, 380, 781. See also *Parfitt v. Hember*, L. R., 4 Eq. 443; *Line v. Hall*, 43 L. J. Ch. 107.

(c) 2 Br.C.C. 51, cited 2 Ves. jun. 349. See also *Smith v. Lord Camelford*, 2 Ves. jun. 698; *Griffith v. Harrison*, 4 T. R.

737; and *Stackpoole v. Stackpoole*, 4 D. & War. 320, where (as in *Pitt v. Jackson*) the doctrine was held applicable to a testamentary appointment. As to *Line v. Hall* (where the devise included land belonging to the testator absolutely), see the remarks of Mr. Gray, *Perp.*, § 648, n.

to the daughter for her separate use was, to effectuate the testator's general intention, to be considered to vest in her an estate tail.

"In this case, the nature of the estate appointed to the children, differed widely from the mode of its devolution under an estate tail, which this doctrine gave to their parent. In all the preceding cases, the first and other sons were to take *successively*; here, all the children, female as well as male, were to take *concurrently*. Probably the authority of *Pitt v. Jackson* is not to be implicitly relied on; even the eminent judge who decided it, on a subsequent occasion, admitted that it went to the outside of the rules of construction, adding, however, that still he did not think it was wrong (d). Lord Eldon, in quoting this observation (e), intimated that it was not proper to go one step further; for those cases, in order to serve the general intent and the particular intent, destroyed both." However, *Pitt v. Jackson* was approved by Lord St. Leonards (f), and was followed by Sir J. Wigram, V.-C., under precisely similar circumstances, in *Vanderplank v. King* (g).

But although the mode and form of the provision intended by the will may be altered by the application of this rule of construction, no person or line of persons may be introduced for whom no provision whatever was intended. Therefore, in *Monypenny v. Dering* (h), it was held by Lord St. Leonards that the first son of P. M. could not be held to take an estate tail, because such an estate would in regular succession, and after failure of the eldest son and his issue, descend to the second and other sons of such first son, for whom the will made no provision (i).

In *Vanderplank v. King* (j), the question arose, whether the cy-près doctrine could be applied to some of a class and not to others. The testator devised lands to his daughter (who was living at his decease) for her life, with remainder to all her children (as it was decided) as tenants in common for their lives, with remainder to the grandchildren per stirpes in tail, with cross remainders between the grandchildren of each stock, and also (as it was held) between each stock of grandchildren. The testator's daughter

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Remarks on
Pitt v.
Jackson.

Doubted,

but
confirmed.

The mode of
provision
may be
changed, but
no new
persons pro-
vided for.

The cy-près
doctrine may
be applied to
some only of
a class.

(d) 1 East, 451.

(e) 7 Ves. 390.

(f) 4 D. & War. 320, 2 D. M. & G. 173.
See Sugden on Powers, 500.

(g) 3 Hare, 1.

(h) 2 D. M. & G. 145, 16 M. & W. 418; stated post, p. 355. In *Nicholl v. Nicholl*, ante, p. 292, the will included none of the descendants of the second son of W. N., except the second son of that second son, and the heirs male of his body: whereas the decision included

them all, and among them of course the first son of the second son of W. N., whose exclusion from the will appears to have been designed. The case is therefore overruled, so far at least as it favours a doctrine contrary to *Monypenny v. Dering*. See Gray, Perp. § 647 n.

(i) The same principle was followed in *Re Rising*, [1904] 1 Ch. 533, and in *Re Mortimer*, [1905] 2 Ch. 502.

(j) 3 Hare, 1. See also *Peyton v. Lambert* 8 Ir. Com. Law Rep. 485.

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had several children living at his death, to whom alone estates for life with remainder to their issue could be legally limited; one child named Matilda was born after the testator's decease, the remainder to whose issue was void, being an attempt to create a perpetuity, and Sir J. Wigram, V.-C., decided that the *cy-près* doctrine was to be applied to the share of Matilda, and that she took an estate tail, but that it was not necessary similarly to modify the estates limited in the shares of the other children; Matilda, in fact, was made to stand in the same position as a single child of hers would have done, under the will and apart from the perpetuity rule, she being dead.

Doctrine of
cy-près not
confined to
first set of
limitations.

The doctrine in question is not confined to the first set of limitations requiring modification, but is extended to all that follow. Thus, in *Hopkins v. Hopkins* (*k*), a testator devised lands in trust for I. H. for life, with remainder to S. H., son of I. H., for life, with remainder to the first and other sons of S. H. successively in tail male, and for want of such issue, in case I. H. should have any other son or sons, then in trust for all and every of such other son and sons respectively and successively for their respective lives, with like remainders to their several sons successively and respectively as were thereinbefore limited to the issue male of the said S. H., with remainders over. S. H. died in the testator's lifetime without issue, and I. H. never had any other son, so that it was necessary to apply the *cy-près* doctrine to the limitations to his other sons for life, with remainder to their issue, the remainder to such issue being too remote; and as the remainders over were held good, it is clear that it was considered that not only the second, but the third and every other son of I. H. would, under the doctrine in question, have taken an estate tail.

How far
doctrine
applies to
personalty.

It follows from the nature and history of the doctrine of *cy-près* that it cannot be fully applied to limitations of personal estate (*l*). But the principle of carrying out the general intention of a testator is applied to such cases as far as possible. Thus, in *Mackworth v. Hinxman* (*m*), personalty was bequeathed so as to follow a baronetcy, and it was held that, in order to accomplish the testator's intention, the first successor to the title took a quasi-entail, and that the personalty became his absolute property. So in *Re Johnson's Trusts* (*n*), the trustees of a will were directed to pay the income of personal property to the person for the time being entitled to

(*k*) Co. Lit. 272a, Butler's note 1, 3 Sim. 119.
vii. 2, 1 Atk. 581.

(*l*) *Routledge v. Dorril*, 2 Ves. jun. 365. See *Monkhouse v. Monkhouse*,
(*m*) 2 Kee. 658.
(*n*) L. R., 2 Eq. 716.

the rents and profits of the freehold hereditaments devised by the same will in strict settlement: it was held that the personal estate vested absolutely in the first tenant in tail.

Whether the doctrine applies to a mixed fund does not seem to have been decided (o). Mixed fund.

It is settled that the doctrine is not applicable where the limitation to the children of the unborn persons gives them an estate in fee simple. This was decided in *Bristow v. Warde* (p), where money directed to be laid out in land was, by the trusts of certain articles, and a settlement executed in pursuance of those articles, made subject to a power of appointment by the husband, in favour of the children of the marriage; and he appointed portions of the fund to certain of the children for life, and after their decease, among their children, as they should appoint; it was held to be real estate, and that the husband's appointment (which, if valid, would have the effect of vesting absolute interests in the grandchildren equally, in default of appointment by the children), was void as to the grandchildren, and could not, as Lord Loughborough was of opinion, be executed cy-près (q).

V.—Executory Limitations on Failure of Issue.—Under executory limitations of this kind, land could formerly be tied up for a longer period than was possible by means of an ordinary entail. Thus, under a devise to A. in fee simple, and if he die without issue living at his death then to B. in fee simple, and if he die without issue living at his death, then to C. in fee simple, and so on, it was impossible for A. to dispose of the land without the concurrence of B., C., &c., although under an ordinary strict settlement in tail, A. and his eldest son could have barred the entail at any time after the son came of age. In order to prevent this result, the Conveyancing Act, 1882, enacts (sect. 10) that where a person is entitled to land with an executory limitation over on default or failure of all or any of his issue, that executory limitation shall become void and incapable of taking effect as soon as there is living any issue who has attained twenty-one of the class on default or failure of which the limitation over was to take effect (r).

Effect of, in making land inalienable.

Conveyancing Act, 1882.

VI.—The Modern Rule against Perpetuities.—The rule now

(o) *Boughton v. James*, 1 Coll. 44. See the question discussed in Gray, Perp., § 647, n.

(p) 2 Ves. jun. 336; and see *Hale v. Pew*, 25 Bea. 335. The doctrine is not applicable to limitations by deed: *Brudenell v. Elwes*, 7 Ves. 390, 1 East,

442.

(q) See further as to the doctrine of cy-près, Sugd. Powers; Fearn, C. R., by Butler; Gray, Perp., § 643.

(r) For an example, see *Re Booth*, [1900] 1 Ch. 768.

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to be considered is of comparatively recent growth, for although the necessity of imposing some check on the creation of future interests in real and personal property, of a kind unknown to the common law, began to be felt shortly after the modern modes of settling property by means of uses, trusts, and executory devises and bequests were introduced (s), it was not until 1833 that the terms of the rule were definitely settled (t), and even at the present day the precise limits of its scope and application are a matter of doubt.

Rule stated.

(A) THE RULE STATED (v).—Subject to the exceptions to be presently mentioned, no contingent or executory interest in property can be validly created, unless it must necessarily vest within the maximum period of one or more lives in being and twenty-one years afterwards. Consequently, a devise or bequest not falling within one of those exceptions, is void if it is to take effect on the

(s) "It was soon perceived," says Mr. Jarman, "that when increased facilities were given to the alienation of property, and modes of disposition unknown to the common law arose, from the introduction of springing uses and executory devises, which no act of the owner of the preceding estate could defeat, it was necessary to confine the power of creating these interests within such limits as would be adequate to the exigencies of families, without transgressing the bounds prescribed by a sound public policy. This was effected, not by legislative interference, but by the courts of judicature, who, in this instance, appear to have trodden very closely on the line which divides the judicial from the legislative functions" (1st edition, p. 220). The origin of the Rule is somewhat obscured by the ambiguity of the word "perpetuity," but there is no doubt that the Rule was originally directed against attempts made to create unbarred entails by means of executory bequests of terms of years; these being indestructible by common recovery, feoffment, or the like, the Courts were at first disposed to hold that any bequest of a term to take effect on the failure of the issue of a given person was bad, as tending to create a perpetuity in the old-fashioned sense of the word (*supra*, p. 283), even if the failure was limited to the period of a life in being (*Child v. Baylie*, Cro. Jac. 459, Palm. 333). It was not until the *Duke of Norfolk's Case* (3 Ch. Ca. 1) that the principle expressed by the modern Rule against Perpetuities—that the validity of an executory devise or be-

quest depends upon its remoteness in time, and not upon the character of the contingency—was established. See *Gray, Perp.*, Ch. V.; also Mr. Hargrave's argument in the *Thellusson Case*, cited with approval by Mr. Butler in the note to *Fearne's C. R.* 429. But there arose this curious anomaly, that while executory bequests of terms of years became subject to the new Rule against Perpetuities, they remained subject to the old Rule, for it had long been settled that land could no more be limited to the unborn issue of a person in succession, as purchasers, for more than one generation, by means of terms of years, than by means of contingent remainders. It is not to be wondered at that this overlapping of the two Rules should have given rise to much confusion of thought.

(t) *Cadell v. Palmer*, 1 Cl. & F. 372.

(v) Mr. Gray remarks, with great truth, that the name given to the Rule has caused much confusion and misconception, because it implies that the Rule is directed against the kind of perpetuity which is forbidden by the Rules above stated (ss. I. and II. of this chapter). "It would have been better," he says, "had it been called the Rule against Remoteness" (*Perp.* § 2). It is not clear when the Rule first came to be known as the Rule against Perpetuities: Mr. Fearne carefully distinguishes between "remoteness" and "perpetuity," although he refers them both, with perfect correctness, to the general principle of law which forbids the creation of inalienable interests.

happening of an event at some indefinite future time (*w*), or within a fixed period exceeding twenty-one years; for it is not necessary that the period within which the interest is to vest should be limited with reference to a life.

Nor is it necessary that the life or lives specified in the limitation should be those of persons taking an interest in the property (*x*); and the number of lives which the testator is allowed to specify is only limited by the requirement that it must be possible to ascertain who they are, and obtain evidence of their death. It is true that in some of the cases it is laid down that an indefinite number of lives may be taken (*y*), but this must be understood to mean the lives of named persons (*z*). The true rule is laid down by Macdonald, C. B., in *Theellusson v. Woodford* (*a*), where he says that any number of lives may be taken, "the extinction of which could be proved without difficulty," and that where attempts are made to tie up property "during the lives of all the individuals who compose very large societies or bodies of men," such limitations "will be put to the usual test, whether they will or will not tend to a perpetuity, by rendering it almost, if not quite, impracticable to ascertain the extinction of the lives described, and will be supported or avoided accordingly." "The language of all the cases is, that property may be so limited as to make it inalienable during any number of lives, not exceeding that, to which testimony can be applied, to determine when the survivor of them drops" (*b*). It is submitted that the trusts in *Re Moore* (*c*) were clearly void within the Rule.

What lives
may be
taken.

It is also submitted that the form of restricted gift commonly adopted in recent years, namely, a gift to take effect at the expiration of twenty-one years from the death of the last living descendant of Queen Victoria, is of doubtful validity, for, as many of these persons are the issue of marriages in foreign countries, and live abroad, it would be practically impossible to prove when the period expires.

It is hardly necessary to say that, for the purposes of the Rule, "life" means the life of a human being (*d*). "Life" must be human.

(*w*) *Bennett v. Bennett*, 2 Dr. & Sm. 266; *Kingham v. Kingham*, [1897] 1 Ir. R. 170; *Edwards v. Edwards*, [1909] A. C. 275.

(*x*) *Cadell v. Palmer*, 1 Cl. & F. 372.

(*y*) See *Theellusson v. Woodford*, 4 Ves. at p. 341; *Pownall v. Graham*, 33 Beav. 242.

(*z*) "A man may appoint 100 or 1000 trustees, and that the survivor of them shall appoint a life estate, that would not be within the line of perpetuity":

per Lord Thurlow in *Robinson v. Hardcastle*, 2 Bro. C. C. 30.

(*a*) 11 Ves. at pp. 134, 136; cited by Gray, § 217.

(*b*) Per Lord Eldon, 11 Ves. 146.

(*c*) [1901] 1 Ch. 936, stated post, Chap. XIV.

(*d*) If and so far as *Re Dean* (41 Ch. D. 552) decided that the Rule can be extended to the lives of animals, it is submitted that the decision is erroneous (ante, p. 279)

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Commence-
ment of
period.

Every person whose life is specified as forming part of the period allowed by the Rule must be in existence at the death of the testator, a child en ventre sa mère being deemed to be in existence for the purposes of the Rule (*d*). If no life is specified, then the period of twenty-one years is calculated from the death of the testator. In any case, the period of twenty-one years is to be taken as a term in gross, without reference to the infancy of any person. A period is allowed for gestation only in those cases where gestation actually exists (*e*).

Period of
gestation.

Mr. Jarman thus states the law with reference to the period of gestation (*f*): "A possible addition of the period of gestation to a life and twenty-one years, occurs in the ordinary case of a devise or bequest to A. (a person of the *male* sex) for life, and after his death to such of his children as shall attain the age of twenty-one years, or, indeed, in the case of a devise or bequest simply to the children of A. (a male) who shall attain majority, though not preceded by a life interest; in either case A. may die leaving a wife enceinte, and, as such child would not acquire a vested interest until his majority, the vesting would be postponed until the period of twenty-one years beyond a life in being, with the addition, it might be, of nine or ten months; and if, to either of these supposititious cases, we add the circumstance that A., the parent, were (as of course he might be) an infant en ventre sa mère at the testator's decease, there would be gained a double period for gestation (namely), one at the commencement, and another at an intermediate part of the period of postponement. To treat the period of gestation, however, as an adjunct to the lives, is not, perhaps, quite correct. It seems more proper to say that the rule of law admits of the absolute ownership being suspended for a life or lives in being, and twenty-one years afterwards, and that, for the purposes of the rule, a child en ventre sa mère is considered as a life in being" (*g*).

Vesting
cannot be
postponed for
a gross term
exceeding
twenty-one
years.

Where the vesting of a gift is postponed for a fixed term exceeding twenty-one years, the gift is unquestionably void, although not preceded by a life; for the fact of the testator not having availed

(*d*) *Long v. Blackall*, 7 T. R. 100; *Blackburn v. Stables*, 2 V. & B. 367.

(*e*) *Cadell v. Palmer*, 7 Bl. N. S. 202, 1 Cl. & Fin. 372, 10 Bing. 140, 1 Sim. 173, nom. *Bengough v. Edridge*. See as to this case, Sugden, Law of Prop. 314.

(*f*) First edition, p. 222.

(*g*) The doctrine thus stated by Mr. Jarman has been established by the

decision in *Re Wilmer's Trusts*, [1903] 1 Ch. 874, 2 Ch. 411.

In *Re Wass* ([1882] W. N. 158) there was a gift to such of the children of A. as should be living at the time of the testator's decease or born in due time thereafter: it was held by Kay, J., that the words "born in due time" did not refer to the period of gestation. Sed quere.

himself of the allowance of a life does not enable him to take a larger number of years. Thus, in *Palmer v. Holford* (*h*), where a testator bequeathed a sum of stock upon trust to raise an accumulated fund, and to transfer such fund to the children of his son C. T. H., who should be living at the expiration of twenty-eight years from the testator's decease, except an eldest or only son; and in case no such child should be then living, then over; Sir J. Leach, M. R., said: "The expressed intention of the testator is that all the children of his son C. T. H., other than an eldest son, should take who were living at the expiration of twenty-eight years, and that no person should take before that period. If C. T. H. had such children born to him at any time within seven years from the testator's death, then the vesting of the interests of such children who were unborn at the death of the testator would have been suspended for more than twenty-one years, and the gift, therefore, is too remote and void; and the gifts over not being to take effect until after the same period, which is too remote, are necessarily void also."

"The principle of this case," says Mr. Jarman (*i*), "clearly would apply where any, the most inconsiderable, addition was made to the term of twenty-one years; therefore a devise to such of the grandchildren of the testator as should be living at the expiration of twenty-one years and one day from the testator's decease, would clearly be void."

But care must be taken to distinguish those cases in which the gift is limited to persons living at the testator's death. Thus in *Lachlan v. Reynolds* (*j*) the testator gave his property upon certain trusts for his wife and children, and when thirty years were expired he ordered it to be sold and two thirds to be divided amongst his children then living; it was held that the trust was good.

If vesting depends on an event which may possibly happen after the expiration of the period allowed by the Rule, the gift is void, however improbable it may be that the event should happen after that period, and even if it does in fact happen within the period. Thus, in *Hodson v. Ball* (*k*), a gift over of a share of any child of the testator, in case of failure of its issue at any time during the life of the child's husband or wife, was held void; since the husband or

Possible,
not actual,
events to be
considered.

(*h*) 4 Russ. 403; and see *Speakman v. Speakman*, 8 Hare, 180.

(*i*) First edition, p. 231.

(*j*) 9 Ha. 796. A question arose as to the meaning of the words "or

their heirs," following the gift to the children: see *Wingfield v. Wingfield*, 9 Ch. D. 658.

(*k*) 14 Sim. 558.

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wife might be a person not born at the testator's death, and might survive the child more than twenty-one years, and the gift over would thus take effect after the expiration of a life and twenty-one years. Again, a gift to such of the children and grandchildren of A. (a married woman having children living) as attain twenty-one, is void for remoteness, however old A. may be, and although in fact all her children and grandchildren attain twenty-one within the period allowed by the Rule, for the law will not assume that she may not have a child born a year after the testator's death, in which case, of course, a child of that child could not attain twenty-one within the period allowed by the Rule; consequently, evidence that A. is past the age of child-bearing is not admissible (j). So where a testator directed his trustees to carry on his business of a gravel contractor until his freehold gravel pits were worked out, and then upon trust to sell them and hold the proceeds of sale in trust for such child or children of his "then living" and such issue living of any child or children then deceased as should attain twenty-one, these trusts were held void, although it appeared that the pits were almost worked out at the testator's death, and were, in fact, worked out a few years afterwards (k).

State of things existing at testator's death to be regarded.

In deciding the question of remoteness, the state of circumstances at the date of the testator's death, and not their state at the date of the will, is to be regarded. Thus, if a testator bequeaths money in trust for A. for life, and after his death for such of his children as shall attain the age of twenty-five, the latter trust would be void if the testator were to die before A.; yet if A. should die before the testator leaving children, of whatever age, the trust will be good, since it must of necessity vest or fail within lives in being, viz., the lives of the children (l). Again, if a testator has, under a settlement, a special power of appointment among his children, and by his will appoints the property to his daughters who shall survive him and attain twenty-four, and his youngest daughter is more than three years old at the time of his death, the appointment is good (m).

(j) *Re Dawson*, 39 Ch. D. 155, following *Jee v. Audley*, 1 Cox, 324 (stated post, p. 341), and *Re Sayer's Trusts*, L. R., 6 Eq. 319. The decision of Malins, V.-C., in *Cooper v. Laroche*, 17 Ch. D. 368, may be disregarded.

(k) *Re Wood*, [1894] 3 Ch. 381, following *Lord Dungannon v. Smith*, 12 Cl. & F. 546; *Re Roberts*, 50 L. J. Ch. 265. *Thomas v. Thomas*, 87 L. T. 58, was decided on the same principle. This doctrine is considered more in detail in connection with gifts to classes (post,

p. 327).

(l) *Vanderplank v. King*, 3 Hare, 17; *Faulkner v. Daniel*, ib. 216; *Williams v. Teale*, 6 Hare, 251; *Peard v. Keke-wich*, 15 Beav. 173; *Southern v. Wol-laston*, 16 Beav. 166, 276; *Oatlin v. Brown*, 11 Hare, 382; *Wilkinson v. Duncan*, 30 Beav. 111. The point is now never contested, see e.g., *Hale v. Hale*, 3 Ch. D. 645.

(m) *Von Brockdorff v. Malcolm*, 30 Ch. D. 172; *Re Thompson*, [1906] 2 Ch. 199, stated *infra*, p. 318.

This rule is of importance where the donee of a power to appoint to children wishes to give a child a life interest, followed by a general testamentary power of appointment (*n*).

The application of the Rule to charitable gifts, and to gifts to private persons to take effect after the failure or determination of a charitable gift, is discussed post, p. 366.

Charitable gifts.

A future interest is not obnoxious to the Rule if it begins within the proper period, although it may end beyond it (*o*) ; in which case, if it is a limited interest, it may tie up the property for more than twenty-one years beyond a life in being. Thus, if property is given upon trust for the unborn children of A. until the youngest attains twenty-one, and then upon trust for all of them during their lives, this is good (*p*). So, if property is given upon trust for A. for life, and after his death upon trust to pay the income to his children equally until the youngest attains twenty-five, this trust is good (*q*). But if the trust were a discretionary one, for the maintenance of any child or children of A. until the youngest attained twenty-five, and for the accumulation of surplus income, it would be bad, because no child would take a vested interest within the period allowed by the Rule (*r*). Limitations of this kind arise chiefly in the case of gifts to unborn persons, and the subject is therefore discussed in detail in a subsequent part of this chapter (*s*), where also the question of the validity of limitations following a gift of this nature is referred to.

Future interest may extend beyond the period allowed by the Rule.

On the same principle, if a remainder or reversionary interest is vested, that is, if it is ready to take effect whenever and however the particular estate determines, it is immaterial that the particular estate is determinable by a contingency which may fall beyond a life or lives in being (*t*). Thus, if property is given to the eldest child of A., a bachelor, for life, or until he or she shall become a Roman Catholic, and subject as aforesaid to the other children of A. absolutely, and A., after the death of the testator, has three children, X., Y., and Z., here Y. and Z. take vested interests, and the gift in remainder to them is good (*u*). But if in such a case the gift over is in favour of a class which cannot be ascertained until the

Clause of cesser or forfeiture.

(*n*) *Infra*, p. 316.

(*o*) See the general principle as stated by Mr. Jarman, post, p. 348.

(*p*) *Gooch v. Gooch*, 3 D. M. & G. 366.

(*q*) *Gooding v. Read*, 4 D. M. & G. 510. As to discretionary trusts exercisable beyond the limits of the Rule, see post.

(*r*) *Re Blew*, [1906] 1 Ch. 624, explaining *Re Wise*, [1896] 1 Ch. 281, and *Re Watson*, [1892] W. N. 192.

(*s*) *Infra*, p. 348.

(*t*) Gray, § 209.

(*u*) *Wainwright v. Miller*, [1897] 2 Ch. 255 (settlement by deed).

CHAPTER X.

Gift
contingent
in form
only.

Distinction
as to
contingent
remainders.

particular estate determines, the gift over is void for remoteness (*v*). And if the gift over is dependent on a preceding gift which fails for remoteness, the gift over shares its fate (*w*).

It sometimes happens that a gift which appears to transgress the Rule is valid, because the interests created, although in form contingent, are really vested. Thus, an immediate gift to the children of A. who attain the age of twenty-five is good, if one of them has attained that age before the testator's death (*x*). So in *Fox v. Fox* (*y*), a testator directed his trustees to raise a sum of 15,000*l.*, and after the determination of certain life interests to divide and transfer one-fifth of the fund to and amongst the children of T. equally, as and when they should respectively attain the age of twenty-five years, applying from time to time the income of the presumptive share of each child, or so much thereof as the trustees might think proper, for his and her maintenance and education until such share should become payable as aforesaid; but if T. should leave no children him surviving, or if he should leave children and they should all die before attaining the age of twenty-five years, then over: it was held that, under the doctrine referred to in a subsequent part of this work (*z*), the children of T. took vested interests, and consequently that the gift to them was not void for remoteness (*a*).

Whether the modern Rule against Perpetuities does or does not apply to contingent remainders (a question discussed *infra*, p. 368), it is well settled that there is a distinction between executory devises and legal contingent remainders in this respect, that a limitation may be good as a contingent remainder, although it would have been void as an executory devise. Thus, if land is devised to A., a bachelor, for life, with remainder to such son of his as first attains twenty-five, this remainder is good, because it must vest, if at all, on A.'s death, that is, within the period allowed by the Rule. This apparent exception to the Rule is discussed in connection with gifts to classes (*b*).

(*v*) *Hodgson v. Halford*, 11 Ch. D. 959; *Re Gage*, [1898] 1 Ch. 499.

(*w*) *Post*, p. 350.

(*x*) *Picken v. Matthews*, 10 Ch. D. 264, *post*, p. 330.

(*y*) L. R., 19 Eq. 286.

(*z*) *Post*, Chap. XXXVII.

(*a*) *Fox v. Fox* has been approved by the Court of Appeal in *Re Turney* ([1899] 2 Ch. 739), also a case where the question of remoteness arose. It was

not followed in *Dewar v. Brooke* (14 Ch. D. 529) and in *Re Wintle* ([1896] 2 Ch. 711). In *Re Mervin* ([1891] 3 Ch. 197), Stirling, J., thought that the decision in *Fox v. Fox* turned on the direction to apply the income of each child's share for his or her maintenance. In *Re Gosling* ([1903] 1 Ch. 448) the shares were held to be vested, but the question of remoteness did not arise.

(*b*) *Infra*, p. 328.

Contingent remainders of trust or equitable estates are not governed by the same rule as contingent remainders of legal estates; for they do not necessarily vest or fail upon the determination of the previous estate, but await the happening of the contingency on which they are limited (*c*), and are, therefore, invalid if that contingency be too remote (*d*). But, like executory devises, they are good after an estate tail, if limited on an event which must necessarily happen at or before the determination of that estate, as in the case of a trust for a class to be ascertained at or before such determination (*e*).

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As to contingent limitations by way of remainder in equitable interests.

If a vested interest in property is given to a person, with a direction that payment or possession shall be postponed for a period beyond the limits allowed by the Rule, this direction, being inoperative, does not affect the validity of the gift. Thus, where (*f*) lands were devised to trustees and their heirs, in trust for A. for life, remainder in trust for B. for life, remainder unto and among all and every the issue, child and children of B. as should be living at the time of the decease of the survivors of A. and B., to be divided, share and share alike, when and as they should respectively attain the age of twenty-four years, and to their respective heirs, &c., and if only one, then the whole to such only or surviving child in fee upon attaining the said age: it was contended that the gift to the children was too remote; but the Court of C. P., on a case from Chancery, certified that the children living at the death of the survivor took vested interests.

Attempt to postpone enjoyment.

On the same principle, if a testator directs the income of his property to be accumulated until it produces the sum of "3000*l*. or thereabouts," and then to hold it in trust for A., B., C., and D. during their lives, and after the death of the survivor upon trust for their issue, these trusts are not void for remoteness, because

Trust for accumulation.

(*c*) *Hopkins v. Hopkins*, Ca. t. Talb. 44, 1 Atk. 581; *Chapman v. Blisset*, Ca. t. Talb. 150; *Astley v. Micklethwait*, 15 Ch. D. 59; *Marshall v. Gingell*, 21 Ch. D. 790; *Re Brooke*, [1894] 1 Ch. 43. As to gifts to classes, see *infra*, p. 327; and as to the effect of an equitable contingent remainder being converted into a legal one by the re-conveyance of the legal estate, see *Re Freme*, [1891] 3 Ch. 167.

(*d*) *Monypenny v. Dering*, 7 Ha. 568, 590; *Garland v. Brown*, 10 L. T. 292; *Abbiss v. Burney*, 17 Ch. D. 211.

As to the distinction between equitable contingent remainders and executory interests, see *Richardson v. Harrison*, 16 Q. B. D. 85.

(*e*) *Heasman v. Pearse*, L. R., 7 Ch. 275.

(*f*) *Farmer v. Francis*, 9 J. B. Moo. 310, 2 Bing. 151; see also *Murray v. Addenbrook*, 4 Russ. 407; *Jackson v. Marjoribanks*, 12 Sim. 93; *Milroy v. Milroy*, 14 ib. 48; *Greet v. Greet*, 5 Beav. 123; *Harrison v. Grimwood*, 12 ib. 192.

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the issue take vested interests on the death of the last tenant for life, and if the fund has not then reached 3000*l.*, they can stop the accumulation (*g*).

Question whether gift is contingent, or vested subject to being divested.

Where, however, there is a direction that payment or possession shall be postponed, "it is often," as Mr. Jarman points out (*gg*), "a matter of no inconsiderable difficulty, from the ambiguity of the testator's language, to determine whether the postponement applies to the vesting or only to the enjoyment; and if the original gift is followed by a clause disposing of the shares of objects dying under the specified age, a further and still more perplexing question arises; namely, whether the vesting is originally deferred until the prescribed age, or the shares are immediately vested, with a liability to be divested; in other words, whether the specified age is the period of vesting or the period of the shares becoming absolute, in case of the objects dying before such age (*h*). This question, which is fully discussed in a future chapter (*i*), is most important in reference to the application of the Rule against Perpetuities, for if the shares are immediately vested, and the remoteness affects only the clauses of accruer, or other the gifts engrafted on or limited in derogation of the original gift, the effect of the Rule is not to invalidate such original gift, but to render it absolute, by relieving it from the clauses which qualified or divested the interests of its objects" (*j*).

The question whether a gift is contingent on the happening of a remote event, and therefore void under the Rule, or whether it is vested subject to being divested, and therefore good, most frequently arises in the case of gifts to children and other classes (*k*).

(*g*) *Oddie v. Brown*, 4 De G. & J. 179. As to trusts for accumulation, see post, p. 308.

(*gg*) First edition, p. 253.

(*h*) The latter construction was the one adopted in *Re Turney*, shortly stated above; the wording of the will was peculiar.

(*i*) "As these cases are dealt with on the ordinary and general principles of interpretation, which are unsparingly applied without regard to consequences, and the fact of any proposed construction rendering the intended gift void for remoteness is not allowed to exert any influence, it is obvious that the cases referred to in the text, have no peculiar connection with the subject of the present section, but belong rather to

the chapter which treats of the vesting of estates, where, accordingly, they will be found. Vide *Doe d. Roake v. Nowell*, 1 M. & Sel. 327, 5 Dow, 202; and other cases, post; also *Vaudry v. Geddes*, 1 R. & My. 203; *Blease v. Burgh*, 2 Beav. 221" [Note by Mr. Jarman]. See also *Ring v. Hardwick*, 2 Beav. 352.

(*j*) See the cases cited above, p. 303. As to the invalidity of modifying and qualifying clauses, see post, p. 361. A modifying or qualifying clause may be void on the ground that it is repugnant to the nature of an absolute interest: see Chap. XVII.

(*k*) See sub-sect. (E) of this chapter, and Chap. XLII.

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If a future interest is vested, it is immaterial that the particular interest which precedes it is determinable by a contingency which may happen beyond the limits allowed by the Rule. Thus, if property is given to an unborn person until he dies or changes his name, and then to B., a living person, B. has a vested interest, for he will take the property whether the tenant for life dies or changes his name, although the determination of his life interest is contingent on an event which may not take place within the period allowed by the Rule (*l*).

Where vested interest may not come into possession until after period allowed by Rule.

If the persons to whom a gift is made may not be ascertained within the required limits, the gift is too remote, although all the persons who can possibly claim under the gift must be determined within those limits, and a conveyance by them would, therefore, pass the entire interest (*m*). It was indeed formerly supposed, that if property were limited in such a way that all the persons in whom it must ultimately vest were ascertained within the period allowed by the Rule, so that they could together dispose of it absolutely before the expiration of that period, the limitation would be good, although their individual interests might possibly not be ascertained within the period; but it is now settled that this consideration does not prevent the application of the Rule (*n*).

Interests must be ascertained within period.

A contingent gift of a transmissible interest to a living person is bad if it may not vest within the period allowed by the Rule (*o*). But a gift to a living person, if living at the end of forty-nine years, or to his issue if he be then dead leaving issue, must take effect, if at all, within the limits allowed by the Rule, and is therefore good (*p*). Whether a gift to an existing person for his life is good, although preceded by interests which are void for remoteness, is discussed later (*q*).

Gift to living person may be too remote.

It has been decided that the Rule applies to restrictions on alienation; as, for example, where property is given to an unborn woman with a restraint on anticipation (*r*). Thus, in *Re Teague's*

Restrictions on alienation.

(*l*) Gray on Perp., § 209; *Re Roberts*, 19 Ch. D. 520.

(*m*) Gray, Perp., § 268.

(*n*) See *Avern v. Lloyd*, L. R., 5 Eq. 383; *Edmondson's Estate*, ib. 389; *Hobbs v. Parsons*, 2 Sm. & G. 212; and the cases referred to in *London & S. W. Ry. v. Gomm*, supra; *Curtis v. Lukin*, 5 Bea. 147, post, p. 350; *Re Hargreaves*, 43 Ch. D. 401.

(*o*) *Grey v. Montagu*, 3 Br. P. C. 314; *Re Brown and Sibby's Contract*, 3 Ch. D. 156.

(*p*) *Re Daveron*, [1893] 3 Ch. 421.

(*q*) Post, p. 352.

(*r*) This extension of the Rule, as Mr. Gray points out (§§ 118a seq.), has arisen from a mistaken theory of the true nature of the Rule, but it is too firmly established to be shaken.

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Settlement (s), a widow having under her marriage settlement a power of appointment among the children of the marriage, appointed a share of the fund to one of her daughters without power of anticipation: it was held that the appointment was good, but that the restraint upon anticipation was void for remoteness.

The cases in which a gift has been held to be absolute, and therefore good, notwithstanding a subsequent direction that it shall be held upon trusts which are too remote, are referred to in a subsequent part of this chapter (*t*).

Where gift
divisible.

Where property is given to a class, with a direction that the share of each member shall be subject to a restraint on alienation, the restraint may be good in the case of some members of the class, and bad in the case of the others. The cases in which a direction to settle the shares of members of a class has been held good as regards those who are in esse at the death of the testator, are referred to in a subsequent part of this chapter (*u*). So in a gift of property to a class, a restraint on anticipation may be good as regards those members of the class who are in esse when the gift takes effect (*v*). In *Re Millward (w)*, a restraint on anticipation imposed on the members of a class consisting of the testator's grandchildren, was held good during the existence of the prior life interests.

Defeasible
interest may
be made
absolute
by operation
of Rule.

If property is given to A., with a proviso that on the happening of an event which need not necessarily happen within the limits of the Rule, the property shall go over to B., the proviso is void, and A. takes absolutely. Thus, in *Harding v. Nott (x)*, the testator devised a term of years to his son R., subject to a proviso that if R. or his issue male should become entitled to a certain estate, the term should go over to X.; R.'s issue male became entitled to the estate, but it was held that the term did not go over, the proviso being bad for remoteness. So in *Hobbs v. Parsons (y)*, there was a gift to the children of A. and B., with a gift over on death under twenty-two: it was held that the divesting clause was void. *Re Edmondson's Estate (z)* is a similar decision. But if the gift over must take effect,

(s) L. R., 10 Eq. 565. Followed by *Malins, V.-C.*, in *Re Cunynghame's Settlement*, L. R., 11 Eq. 324, and (reluctantly) by *Jessel, M. R.*, in *Re Ridley*, 11 Ch. D. 645; but the actual decision in the latter case was wrong, as both daughters were born in the testator's lifetime. See *Fry v. Capper*, Kay 163, *Armitage v. Coates*, 35 Bea. 1, *Re Michael's Trusts*, 46 L. J. Ch. 651, and *Re Ferneley's Trusts*, [1902] 1 Ch. 543, post, p. 363.

(t) *Infra*, p. 361.

(u) Post, p. 334. The latest is *Re Russell*, [1895] 2 Ch. 698.

(v) *Herbert v. Webster*, 15 Ch. D. 610; *Cooper v. Laroche*, 17 Ch. D. 368; *Re Ferneley's Trusts*, [1902] 1 Ch. 543, post, p. 364.

(w) 87 L. T. 476.

(x) 7 E. & B. 650. See this case referred to, *infra*, p. 363.

(y) 2 Sm. & G. 212. See also *Re Baxter's Trusts*, 10 Jur. N. S. 845; *Re Brown and Sibly's Contract*, 3 Ch. D. 156.

(z) L. R., 5 Eq. 389.

if at all, within the period allowed by the Rule, it is good. Thus, in *Re Turney* (a), where a testator bequeathed a fund to A. for life, and after his death to his children absolutely on their attaining twenty-five, with a proviso that if any child died under twenty-five the share of that child should go to B., it was held (on the principle stated elsewhere (b) that the children took vested interests, subject to their being divested in the case of any children who did not attain twenty-five.

On the principle that vested interests are beyond the scope of the Rule, it is submitted that there is no foundation for the view, which appears to be held by some text-writers and practitioners, that the gift of a term of years, to commence at a fixed date beyond the period allowed by the Rule, is void for remoteness. A term of years to commence in futuro is a vested interest. Such a term was certainly not open to objection on the score of remoteness in the year 1837 (c), and nothing has happened since then to alter the law. The case of *Beard v. Westcott* (cc) is sometimes cited as bearing on this point; but in that case reversionary terms of years were devised to the male issue of A. in succession, with the intention of creating an unbarrable entail; the limitations to the issue after the first generation were void under the old Rule against Perpetuities (supra, p. 281).

Reversionary
term of years.

(B) TRUSTS AND POWERS.—The operation of the Rule is not confined to beneficial interests, but extends also to trusts and powers. Thus if lands are devised in strict settlement, with a direction to the trustees in certain events to revoke the limitations and resettle the lands in favour of persons beyond the limits of the Rule, this direction is void (d). So a trust for sale is bad if it cannot (or may not) arise until after the period allowed by the Rule (e). But an immediate trust for sale (if the beneficiaries to take under it must be ascertained within due limits of time) is not void for remoteness, although no limit is put to the time within which it may be

Trusts.

Trust for
sale.

(a) [1899] 2 Ch. 739.

(b) See p. 302.

(c) *Smith v. Day*, 2 M. & W. 684. This and other cases are referred to in an article in 50 Sol. J. p. 760. See also *Redington v. Browne*, 32 L. R. Ir. 347.

(cc) 5 B. & Ald. 801.

(d) See *Duke of Marlborough v. Earl Godolphin*, 1 Ed. 404. The real ground of the decision in that case was that as the object aimed at by the settlor could

not have been effected by a limitation of the legal estate (which would admittedly have been void under the old rule forbidding the creation of perpetuities, supra, pp. 283-5), it could not be effected by means of a trust or power. *Mainwaring v. Baxter*, 5 Ves. 458, was decided on the same principle.

(e) *Hale v. Pew*, 25 Bea. 335; *Goodier v. Edmunds*, [1893] 3 Ch. 455; *Re Wood*, [1894] 3 Ch. 381, ante, p. 300.

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Discretionary trust.

exercised; as soon as the beneficiaries attain vested interests they can insist on the trust being carried out, unless they elect to take the property in specie (*f*).

A discretionary trust seems to be similar to a power of appointment; that is to say, if it can only be exercised within the limits of the Rule it is good, but if it can be exercised beyond those limits it is bad (*g*). Thus, a discretionary trust for the benefit of the unborn children of A. during their lives, with a trust to accumulate the unapplied income, is bad, because, until the discretion is exercised, no child has a vested right, and if the discretion were exercised beyond the limits of the Rule, an infringement of it would necessarily result (*h*).

But if there is a gift to a class of unborn persons not in itself too remote, with a separate power giving the trustees a discretion as to the application of the income during a period beyond the limits of the Rule, it seems that the original gift would be good, and only the discretionary trust bad (*i*).

Trusts for accumulation.

Trusts for accumulation of income are subject to special restrictions and exemptions. As a general rule, a trust for accumulation beyond the limits allowed by the Rule is bad (*j*), independently of the Thellusson Act (*k*). But trusts for accumulation to pay debts or mortgages are not within the mischief of the Rule (*l*). And where property is given to a person absolutely, with a superadded direction to accumulate the income beyond the limits allowed by the Rule, the direction may be disregarded, on the ground that it is an illegal restraint on ownership (*m*). But, of course, this principle does not apply where the vesting is postponed until the expiration of the period of accumulation (*n*).

Failure of trust need not affect beneficial interests.

It may happen that a trust is bad, and that the persons intended to be benefited by it are, nevertheless, entitled to the property. Thus, in *Re Daveron* (*o*), a testator devised a freehold house to

(*f*) *Biggs v. Peacock*, 22 Ch. D. 284; *Re Douglas and Powell*, [1902] 2 Ch. 296. See *Re Tweedie and Miles*, 27 Ch. D. 315, cited in Chap. XXIV.

(*g*) Post, p. 309. Gray, § 246.

(*h*) *Re Blew*, [1906] 1 Ch. 624. The decisions in *Re Wise*, [1896] 1 Ch. 281, and *Re Watson*, [1892] W. N. 192, seem to be based on a misapprehension of *Gooding v. Read*, 4 D. M. & G. 510, ante, p. 301. The decision in *Pride v. Fooks*, 2 Bea. 430, with reference to the power of advancement, also seems contrary to principle.

(*i*) Gray, § 439.

(*j*) *Curtis v. Lukin*, 5 Bea. 147; *Lord*

Southampton v. Hertford, 2 V. & B. 54; *Scarisbrick v. Skelmersdale*, 17 Sim. 187; *Smith v. Cuninghame*, 13 L. R. Ir. 480.

(*k*) *Infra*, p. 377.

(*l*) *Infra*, p. 367.

(*m*) *Infra*, p. 368; *Phipps v. Kelynge*, 2 V. & B. 57, n.; *Oddie v. Brown*, 4 De G. & J. 179; ante, p. 304.

(*n*) See cases cited in note (*j*).

(*o*) [1893] 3 Ch. 421. See also *Goodier v. Edmunds*, [1893] 3 Ch. 455; *Re Appleby*, [1903] 1 Ch. 565. In *Re Wood*, [1894] 3 Ch. 381, the whole gift was void for remoteness: ante, p. 300.

trustees, subject to a lease which had forty-nine years unexpired, upon trust to pay the rent arising therefrom, so long as the lease should run, to certain named persons: and, "upon the expiration of the lease," he directed that the freehold should be sold, and the proceeds thereof distributed in thirds among certain other named persons, ascertainable within the limits of the Rule. It was held that, notwithstanding the invalidity of the trust for sale, the legatees of the proceeds of sale were entitled to the benefits intended for them by the testator, by taking the property as real estate. If, however, an immediate trust is created, but it is possible that no equitable interest under it may arise within the limits of the Rule, the whole trust is bad (*p*).

In executing an executory trust, the Court will, if possible, mould the limitations in such a way as to avoid infringing the Rule against Perpetuities (*q*).

Executory trusts.

If an executory trust must be executed, if at all, within the required limits, and the trust, when executed, is such as would have been good if executed by the testator, it is valid. The possibility that it may not be capable of such execution does not render it wholly void (*r*). Where an executory trust relating to leaseholds is created by reference to a trust relating to freeholds, and would, if applied verbatim to the leaseholds, be bad for remoteness, it ought to be so modified as to render it free from that objection (*s*). As to the cases where executory trusts will be executed *cy-près*, see above, p. 289.

With regard to powers, the general rule is that if a power can be exercised at a time beyond the limits of the Rule (which happens where the donee of the power and the occasion on which it can be exercised, may both be in existence beyond the limits of the Rule) the power is bad (*t*). Thus, a power which is to take effect on a general failure of the issue of a marriage, or a power to appoint by will given to a person who may not be ascertained within the limits of the rule, is bad (*u*). On the other hand, a power which must be

When power is too remote.

(*p*) *Mainwaring v. Baxter*, 5 Ves. 458; *Re Wood*, *supra*.

(*q*) The principal cases are, *Duke of Newcastle v. Lincoln*, 3 Ves. 387; *Bankes v. Le Despencer*, 10 Sim. 576 (more fully in 7 Jur. 210); *Sackville-West v. Holmesdale*, L. R., 4 H. L. 543; *Miles v. Harford*, 12 Ch. D. 691. As to executory trusts, see Chap. XXIV.

(*r*) Gray on Perp., §§ 419 seq., citing *Tregonwell v. Sydenham*, 3 Dow, 194.

See further as to this case (which Mr. Gray calls "a case of extraordinary difficulty") *supra*, p. 291, and post, pp. 324, 343; *Marsden*, Perp., 138.

(*s*) *Miles v. Harford*, 12 Ch. D. 691, quoted below in Chap. XX.

(*t*) Gray, Perp., § 475.

(*u*) *Bristow v. Boothby*, 2 S. & St. 465; *Wollaston v. King*, L. R., 8 Eq. 165; *Morgan v. Gronow*, L. R., 16 Eq. 1; *Re Hargreaves*, 43 Ch. D. 401.

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exercised, if at all, during the period allowed by the Rule, is not rendered bad by the fact that within its terms an appointment could be made which would be too remote; as, where a power is given to A. to appoint to the issue of himself or another person (*v*). The mere existence of such a power does not affect the validity of the subsequent limitations. Thus, if a testator gives property upon trust for his daughter for life, with power to appoint a life interest to any husband she may marry, and then upon trust for a class not ascertainable until the determination of the previous trusts, the power is capable of being exercised in favour of a husband born after the testator's death, and, if it is so exercised, both the appointment and the subsequent limitations are bad for remoteness. But if it is not so exercised, the subsequent limitations are good (*w*).

Other
examples.

And a trust or power which is unlimited in point of form may be good if an intention appears that it is to be exercised within the period allowed by the Rule (*x*). So if the existence of a collateral power depends on an estate which can be defeated by a tenant in tail, the power is good (*y*).

Where donee
is a living
person.

A power of appointment given to a living person cannot be void for remoteness, because it must be exercised, if at all, during his lifetime. But it may be inoperative if it is a special power, and if the objects are not ascertainable within due limits of time (*z*). Thus, a power given to A. to appoint to his first grandchild who shall be born five years after his death, and shall attain twenty-one, cannot be exercised at all, and is, therefore, ineffectual. And it seems that the efficacy of a power may depend on events which happen after its creation.

Blight v.
Hartnoll.

In *Blight v. Hartnoll* (*a*), a testatrix directed the surplus income of certain landed property to be accumulated for the purpose of paying off the mortgages thereon, and when that had been done, she directed her executors to sell the property and divide the proceeds among such of her grandchildren as might "then be surviving," and in such proportions as C. H. might appoint. C. H. made a will by which she purported to exercise the power in favour of certain grandchildren of the testatrix. When C. H. died, the property was still unsold. Fry, J., held that the appointment was

(*v*) *Routledge v. Dorril*, 2 Ves. jun. 357; *Slark v. Dakyns*, L. R., 10 Ch. 35. This subject is referred to in the next section, p. 318.

(*w*) *Re Bowles*, [1905] 1 Ch. 371, post, p. 356.

(*x*) *Re Lord Sudeley and Baines*, [1894] 1 Ch. 334, post, p. 312.

(*y*) See *Briggs v. Earl of Oxford*, 1 D.

M. & G. 365; *Lantsbery v. Collier*, 2 K. & J. 709, post, p. 311.

(*z*) Gray, *Perp.*, § 476. Mr. Gray gives as an example the case of a non-exclusive power to A. to appoint to all his grandchildren who are living twenty-five years after his death.

(*a*) 19 Ch. D. 294.

bad, on two independent grounds : first, on the ground that it was made before the property was sold, and, secondly, on the ground that the " gift " was void for remoteness because the class of grandchildren living at the time of the sale could not be ascertained within the limits allowed by the Rule against Perpetuities. But, as Mr. Gray points out (*b*), if the first ground was good, it followed that the power could not be exercised unless the sale took place in the lifetime of C. H., and was therefore not objectionable on the ground of remoteness. Mr. Marsden (*c*) suggests that the trust for sale was itself void for remoteness, although no reference to the point is made in the judgment of Fry, J. It is submitted that the first ground given by Fry, J., is unsound and that the case was rightly decided on the second ground. If, however, the property had been sold during the lifetime of C. H., it seems clear that she might have made a valid appointment to any of the testatrix's grandchildren. If so, it follows that a power of appointment may be effectual or ineffectual according to the events which happen after its creation.

A power may be divisible, as regards the donee, so as to be equivalent to two powers, and if one of them is good, it is not affected by the badness of the other. Thus, a power for A. or the trustees for the time being of the testator's will to raise a certain sum of money for purposes not necessarily within the proper limits, may be good as to A. and bad as to the trustees (*f*).

Divisible
powers.

Limitations in default of appointment under a power which is void for remoteness are good, unless they are themselves obnoxious to the Rule against Perpetuities (*g*).

As to the validity of appointments under powers, see the next section (p. 316).

Mr. Jarman remarks (*h*) that " at one period it was much doubted whether a power of sale introduced into a deed or will containing limitations in strict settlement, and which was not in terms restricted in its exercise to the period allowed by law, was valid. The affirmative has now been decided in several instances (*i*) ; and in *Boyce v. Hanning* (*j*) the same rule was applied where the indefinite

As to validity
of indefinite
powers of
sale.

(*b*) Perp., § 476, n.

(*c*) Perp., 238.

(*f*) *Attenborough v. Attenborough*, 1 K. & J. 296.

(*g*) *Re Abbott*, [1893] 1 Ch. 54.

(*h*) First edition, p. 250.

(*i*) *Biddle v. Perkins*, 4 Sim. 135 ; *Powis v. Capron*, ib. 138, n. ; *Wallis v.*

Freestone, 10 ib. 225 ; *Waring v. Coventry*, 1 My. & K. 249 ; and see 1 Hayes's Introd. 5th edition, 497 ; *Cole v. Sewell*, 4 D. & War. 32 ; *Lantsbery v. Collier*, 2 K. & J. 709.

(*j*) 2 Cr. & J. 334 ; see also *Wood v. White*, 4 My. & Cr. 482 ; *Nelson v. Callow*, 15 Sim. 353.

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power occurred in a settlement containing limitations to A. for life, with remainder, subject to a jointure rent charge, to the children of A. *in fee*, with a cross executory limitation, in case of any of the children dying under age and without issue. These cases seem to have dispelled the alarm which was created by Lord Eldon's remarks in *Ware v. Polhill* (*k*); and it is observable that, in several of the cases referred to, the validity of the power was considered to be so clear, that a title derived under it was forced upon the acceptance of a purchaser. In practice, it often occurs that a sale is made under a will which empowers the testator's trustees, and the survivor and the heirs of the survivor, to sell his real estate (most commonly his copyholds, in order to avoid the necessity of the trustees being admitted previously to a sale), without any restriction in point of time. . . . The manner in which the objection to the validity of indefinite powers of sale in settlements was disposed of in the recent cases, leaves no room for doubt on this point. Indeed, it is observable that, in the early case of *Holder v. Preston* (*l*), the Court of King's Bench granted a mandamus to compel the lord of a manor to admit the purchaser of copyholds, claiming under the bargain and sale of trustees of a will, whose power was wholly unrestricted, and the validity of which does not appear to have been called in question."

Cesser of
power of sale.

The reason for holding such a power to be valid is not, as is sometimes said, that it facilitates alienation; the true reason is that when, by the death of a tenant for life, or (in the case of a strict settlement of land) by the coming of age of a tenant in fee or in tail, the power is no longer needed, it naturally ceases (*m*). But even where, on the death of a tenant for life, the property becomes absolutely vested in persons *sui juris*, the power of sale is not put an end to if it appears to be the intention of the testator that it should still be exerciseable in order to effect a division of the property: such a power is good, because it must be exercised within a reasonable time after the death of the tenant for life, and it can at any time be put an end to by the beneficiaries (*n*). So an unlimited power of sale may be good, if it is intended to be exercised (if at all)

(*k*) 11 Ves. 257; as to which, see some observations, 1 Jarm. Pow. 248, n.

(*l*) 2 Wils. 400. "The prudent draughtsman, however, will not allow his confidence in the validity of indefinite powers of sale to induce him to omit an express restriction, confining the power to the period prescribed by the Rule against Perpetuities." [Note

by Mr. Jarman.]

(*m*) *Cole v. Sewell*, 4 Dr. & War. 32; *Lantsbery v. Collier*, 2 K. & J. 709; *Wolley v. Jenkins*, 23 Bea. 53, 3 Jur. N. S. 321; *Tait v. Swinstead*, 26 Bea. 525; *Peters v. Lewes & East Grinstead Rail. Co.*, 16 Ch. D. 703, 18 Ch. D. 429.

(*n*) *Re Cotton's Trustees and School Board for London*, 19 Ch. D. 624.

within a reasonable time after the testator's death: e.g., to pay debts and legacies (o). CHAPTER X.

With regard to the validity of trusts and powers of management and accumulation inserted in strict settlements of land, the following statement, with the accompanying notes, is taken from the third edition of this work, by Messrs. Wolstenholme and Vincent: "In all cases where under a deed or will a strict settlement is created, and (as is usually done) power is given to the trustees during the minority of any person entitled under the settlement to manage and let the property and receive the rents and profits (p), or to cut timber and sell it (g), and invest the moneys arising thereby in the purchase of other lands to be settled to the same uses, the exercise of these powers must be carefully restricted to the period of the minorities of tenants in tail *by purchase*, else the powers will be altogether void (r)."

Trusts and powers during minorities of tenants in tail.

(o) *Re Lord Sudeley and Baines*, [1894] 1 Ch. 334; *Re Jump*, [1903] 1 Ch. 129; *Re Dyson and Fowke*, [1896] 2 Ch. 720.

(p) "*Lade v. Holford*, 1 W. Bl. 428, Amb. 479, Fearn, C. R. 530, n.; *Browne v. Stoughton*, 14 Sim. 369; *Scarisbrick v. Skelmersdale*, 17 Sim. 187; *Turvin v. Newcome*, 3 K. & J. 16. See also *Floyer v. Bankes*, L. R., 8 Eq. 115, where the powers were annexed to an anterior term."

(g) "*Ferrand v. Wilson*, 4 Hare, 373."

(r) "Mr. Lewis, in the supplement to his work on Perpetuities, doubts the correctness of the decision in *Browne v. Stoughton*, conceiving that such trusts are, like executory limitations engrafted on an estate tail, barrable along with the estate tail, and therefore not void for remoteness. But the trustees clearly have an actual estate in the lands, which estate is not subsequent or collateral, but anterior to the estate tail, and the trusts declared cannot therefore be affected by any act of the tenant in tail. This is clear from *Marshall v. Holloway*, where there was no term anterior to the estate tail, nor was the destination of the accumulated fund (if made) too remote, being identical with that of the general personalty, the gift of which was held good. The sole ground of the determination therefore was, that the trust for accumulation could not be split or severed, so as to place part before the first estate tail (which would be neither too remote nor barrable), and part after (which would

be too remote if it were not barrable). The whole was an entire limitation, and must stand or fall together (see *Pickford v. Brown*, 2 K. & J. 426). If in *Browne v. Stoughton* the trust had been barrable along with the estate tail, some startling results would follow. Suppose, for instance, that instead of an accumulation being directed during minority, it had been directed during the first twenty-one years after the testator's death to raise money for payment of legacies, it must follow that the tenant in tail, if of full age, could bar the trust, and deprive the legatees of their legacies. The case of *Browne v. Stoughton* cannot therefore be distinguished from that of *Lord Southampton v. Marquis of Hertford*, 2 V. & B. 54, on the ground that, in the latter, a term was created anterior to the estate tail; indeed, Lord Eldon, in *Marshall v. Holloway*, 2 Sw. 445, expressly said that that made no difference. See also 3 Jur. N. S., pt. ii. 181. Mr. Sanders, the well-known writer on Uses, went even further than Mr. Lewis: in an opinion of his (*Sanders on Uses*, 5th edition, p. 203, n.) he says, with respect to *Lord Southampton v. Marquis of Hertford*, 'It is not easy to discover the ground of the decision, but it is to be observed that the term of 1000 years preceded the limitations in tail; and it seems to be inferred that a recovery by tenant in tail, subject to the term, did not destroy the preceding trusts of the term. If this be the case, there is a great fallacy in the inference; for the trusts of a term created for the purposes

CHAPTER X.

Trusts for
management,
&c., of settled
land.

The question of the validity of trusts and powers of the nature above referred to has given rise to considerable discussion. It is explained, in another section of this chapter, that where a term vested in trustees is precedent to the estate tail, and is, therefore, not barrable, the trusts annexed to the term will be void for remoteness if they exceed the limits allowed by the Rule against Perpetuities (s), and the same principle, of course, applies if the trusts are annexed to a fee simple estate vested in the trustees. It may, however, happen that the trusts are of such a nature that they must necessarily cease to exist if the entail is barred, and it has been suggested that in such a case a different principle ought to be applied. In *Lade v. Holford* (t), land was devised to trustees to the use of B. and his sons in tail in strict settlement, with a proviso directing the trustees, whenever any tenant for life or in tail should be under the age of twenty-six years, to enter and take the rents and profits, and after paying certain sums to apply the residue in the purchase of lands to be settled in the same way: it was held that these trusts were void. In *Browne v. Stoughton* (u), land was devised to trustees in trust for A. for life, and on his death in trust for his sons in tail male, with a declaration that so long as any person beneficially entitled in possession should be under twenty-one, the trustees should accumulate the rents and invest the same in the purchase of land to be settled on the same trusts: it was held by Shadwell, V.-C., that the trust was void for remoteness. In *Ferrand v. Wilson* (v), land was devised to the use of the testator's executors upon the trusts after declared and subject thereto to the use of certain persons and their sons in tail male, and power was given to the executors until some person entitled to an estate tail or some greater estate attained twenty-one years (w), to cut timber and

of a settlement, must follow the ultimate devolution of the inheritance, and not the inheritance the trusts of the term. A recovery by tenant in tail would acquire the fee simple, and render the term attendant on the inheritance discharged of the trusts for accumulation.' The reader will, however, have seen from the decision in *Case v. Drosier*, that Mr. Sanders' opinion cannot now be taken as a correct view of the law on this point.' (This note, as mentioned above, is taken from the third edition of this work by Messrs. Wolstenholme and Vincent.)

(s) *Case v. Drosier*, 2 Kee. 764; 5 Myl. & Cr. 246; post, p. 324; *Lord Southampton v. Marquis of Hertford*, 2

V. & B. 54; *Marshall v. Holloway*, 2 Swanst. 432. As to the case of *Ferrand v. Wilson* (4 Ha. 373), see Farwell on Powers, 111. As to the case of *Lade v. Holford* (1 W. Bl. 428), see Fearne, Cont. Rem. 530: Gray, Perp. § 464 (n.).

(t) 1 W. Bl. 428.

(u) 14 Sim. 369. Followed by Wood, V.-C., in *Turvin v. Newcome*, 3 K. & J. 16, and Chatterton, V.-C., in *Cochrane v. Cochrane*, 11 L. R. Ir. 361.

(v) 4 Ha. 344.

(w) In the statement of the will (p. 352) the age is given as twenty years, but this is obviously a misprint: see p. 373.

apply the proceeds in the payment of debts and legacies, and the surplus in the purchase of lands to be settled. Wigram, V.-C., held the power to be too remote. In *Floyer v. Bankes* (x), a power to enter and manage settled estates during minorities was given to the trustees of an overriding term of 500 years, the surplus proceeds to be employed in improving the estates: Romilly, M. R., said the right of entry was clearly too remote.

Again, in *Sykes v. Sykes* (y), land was settled in tail subject to a term vested in trustees upon trust, in the event of any of the testator's younger sons or their issue becoming seised in possession of the estate by virtue of the will, to raise certain sums: it was held by Wickens, V.-C., on the authority of *Case v. Drosier*, that the trust was void for remoteness (z). On the other hand, in *Longfield v. Bantry* (a), a gift of personal property upon trust to purchase land and settle it on the testator's son in strict settlement, and in the meantime to apply the income in improving other estates settled by the will, "and for the benefit of the inheritance in the said estates, so long as the same shall be enjoyed by my said son or his descendants," was held good, principally, as it seems, on the ground that the trust was of a temporary character. The reason does not appear to be satisfactory, for in applying the

(x) L. R., 8 Eq. 115.

(y) L. R., 13 Eq. 56.

(z) These cases have been much discussed. See Lewis on Perp., Suppl. 174 seq.; 3 Jurist N. S. (pt. 2) 181; Messrs. Wolstenholme and Vincent's note in the earlier editions of this work, ante, p. 313; 3 Davids' Prec. 465, n.; Gray on Perp., § 456 seq. It is suggested by Mr. Lewis and Mr. Gray that *Browne v. Stoughton* was wrongly decided, because the tenant in tail had a vested interest in the accumulated fund, and that by barring the entail he could put a stop to the accumulation; and Mr. Gray thinks that *Ferrand v. Wilson* and *Sykes v. Sykes* were wrongly decided, because barring the entail would in *Ferrand v. Wilson* have destroyed the power, and in *Sykes v. Sykes* have made it impossible to carry the trusts into effect. But I cannot help thinking that there is a certain amount of confusion in the application of the modern Rule against Perpetuities to limitations and trusts annexed to an estate tail. Limitations subsequent to estates tail existed at common law before the modern Rule against Perpetuities was heard of, and no objection could be taken to them on the score of

their tending to a perpetuity in the old sense of the term (supra, p. 283), because they were always liable to be destroyed by the entail being barred; and the same principle applied to limitations subsequent to or in defeasance of an estate tail created by way of use or trust. In other words, such limitations were not within the mischief which the modern Rule against Perpetuities was invented to prevent. But trusts for management, accumulation, and purchase of lands to be settled, stand on a totally different footing: such trusts do not in any way resemble any estate recognised by the common law; on the contrary, they are an interference with the normal incidents of an estate tail, and their effect may be to alter the interests of persons taking under the settlement at some remote date. As Shadwell, V.-C., said in *Browne v. Stoughton*, if there were a succession of minorities, the trusts might continue for an indefinite time. They are, therefore, within the mischief of the modern Rule against Perpetuities, and are void unless restricted within its limits [C. S.].

(a) 15 L. R. Ir. 101.

CHAPTER X.

Rule against Perpetuities, possibilities, not probabilities, must be regarded.

The correctness of the principle laid down in *Lade v. Holford*, *Browne v. Stoughton*, and *Sykes v. Sykes* is now generally recognised, and powers of management, accumulation, &c., in a strict settlement are therefore always restricted to tenants by purchase (*b*).

Rule against Perpetuities does not apply to accumulations for payment of debts.

The invalidity of such trusts admits, however, of one exception, namely, where the fund arising therefrom is to be applied in discharge of incumbrances affecting the estate (*c*), for then they only prescribe a particular mode of paying the incumbrances, which, in case of a mortgage, the incumbrancer himself might adopt by entering into receipt of the rents and profits, and may at any time be put an end to, either by the owner paying the incumbrance, or the incumbrancer enforcing his claim against the corpus of the property; thus, there is no restraint on alienation. As the payment of all the debts of a testator can now be enforced out of his real as well as his personal estate, there seems, on the principle above noticed, no reason at the present day to doubt the validity of a trust for the accumulation for any period, however long, of the income of all or any part of a testator's property, whether real or personal, for the purpose of paying his debts (*d*).

Appointee under a special power must be competent to have taken immediately from the donor.

(C) APPOINTMENTS UNDER POWERS.—Mr. Jarman remarks (*e*) that “in the case of appointments, testamentary or otherwise, under powers of selection or distribution in favour of defined classes of objects, the appointees must be persons competent to have taken directly under the deed or will creating the power (*f*). The test, therefore, by which the validity of every such gift must be tried is, to read it as inserted in the deed or will creating the power, in the place of the power. Attention is often called to this doctrine in practice, where a power having been reserved by an ante-nuptial settlement to one or both of the marrying parties, to appoint an

(*b*) 3 Davids, Conv. 464.

(*c*) *Lord Southampton v. Marquis of Hertford*, 2 V. & B. 54, see p. 65; *Bateman v. Hotchkiss*, 10 Beav. 426; *Briggs v. Earl of Oxford*, 1 D. M. & G. 363, and see *Bacon v. Proctor*, T. & R. 40. In the two first cited cases there was a preceding term, so that it is absolutely necessary to refer them to this special ground. See also *Gilbertson v. Richards*, 5 H. & N. 453, and the observations of Kay, J., and Jessel, M. R., thereon in *London & South-Western Rail. Co. v. Gomm*, 20 Ch. D. at pp. 573, 577, citing Sugd. Pow., 8th edition, p. 16.

(*d*) *Tewart v. Lawson*, L. R., 18 Eq. 490.

(*e*) First edition, p. 248.

(*f*) *Crompton v. Barrow*, 4 Ves. 681; *Robinson v. Hardcastle*, 2 T. R. 241, 380, 781. Similarly where a post-nuptial settlement is made in pursuance of an agreement on marriage, the date of the agreement, not of the settlement, must be considered on the question of perpetuity, *Cooke v. Cooke*, 38 Ch. D. 202. In *Brudenell v. Elwes*, 1 East, 442, the appointment was void for excess, not for remoteness or perpetuity.

estate or fund among the issue generally of the marriage, the donee wishes to exercise it by making a settlement of the property on the children of the marriage for life, with remainder to their children or issue; this, it is obvious, cannot be done; for, as the grandchildren of the marrying persons could not have been made objects of gift immediately under the limitations of the settlement, since they do not (like children) necessarily come in esse during the lives of either of the parties then in being, they cannot take under the appointment founded on such settlement (*h*). In order to bring the appointment within the prescribed limit, it must be confined to such issue as shall be born in the lifetime of the marrying parties, or one of them, or of some other person living at the time of the execution of the settlement, and during the period (as the case of *Cadell v. Palmer* allows us to say (*i*)) of twenty-one years afterwards, unless the vesting is

(*h*) *Bristow v. Warde*, 2 Ves. jun. 336; *Crompe v. Barrow*, 4 Ves. 681. See also *Robinson v. Hardcastle*, 2 T. R. 241, 380, 781; *Re Brown and Sibly*, 3 Ch. D. 156; *Re Warren's Trusts*, 26 Ch. D. 208. The decision in *Hutchinson v. Tottenham*, [1898] 1 Ir. R. 403, is criticised by Mr. Gray, 404, n. The cases of *D'Abbadie v. Bizoin*, Ir. R., 5 Eq. 205, and *Whitby v. Mitchell*, 44 Ch. D. 85, rest on a different principle: the appointments in these cases were void under the old Rule against Perpetuities, ante, p. 281.

The first edition of this work contained the following note by Mr. Jarman: "It frequently happens that a parent, having a power of appointment, is desirous, on the marriage of a child, one of the objects of the power, to make a settlement in favour of such child, and also of the intended husband or wife, and the issue of the marriage. The purpose may be accomplished, if the child is of age and the power authorises an appointment by deed, by making an absolute appointment in favour of the child; who then, by the same (or more usually by a separate) deed, settles the appointed property upon the several objects of the intended marriage; and in such case it is conceived that, even if it could be shewn that the appointment was made with the express previous understanding that it should be followed by such a settlement, the validity of the appointment would not be affected; though equity certainly is very jealous of all such transactions, and if there is any previous contract for benefiting the donee himself, even though only extending to a loan of the appointed

sum, the appointment would clearly be bad. Of course it is desirable, even in making such a settlement as is above suggested, to avoid shewing that it was the result of a previous arrangement between the appointor and appointee. If the marrying child is a minor, the appointment might be made in favour of any other child, being adult, who would then make the intended settlement. Where the power in question is exerciseable by will only, the donee's desire to embrace the issue of the appointee, or any other persons who are not objects of the power, of course cannot be attained by any such means; and the nearest approach which can be made to the scheme is, in the first instance, to appoint the property to the child absolutely, and then, to enjoin him to execute the desired settlement of the appointed property; and, as an inducement to his doing so, to make it the condition of some other benefit which he is to derive under the will." Some caution should be observed before adopting the suggestion of Mr. Jarman that on the marriage of a minor an appointment under a power to appoint to children might be made to an adult child who would then settle the fund. See *Pryor v. Pryor*, 2 De G., J. & S. 205; *Birley v. Birley*, 25 Beav. 299; and see *Re Turner's Settled Estates*, 28 Ch. D. 205, at pp. 216, 217. [Note by Mr. Robbins in the fifth edition of this work.]

(*i*) It will be remembered that the exact terms of the modern Rule against Perpetuities were not settled until the decision in *Cadell v. Palmer*, in 1833. The first edition of Mr. Jarman's book was published in 1844.

CHAPTER X.

Limits of the principle.

Effect of power and appointment, or one of them, embracing too wide a range of objects.

postponed (as it commonly is) to majority, which would absorb the twenty-one years; and even in regard to the children of the marriage, the vesting of the shares must not be protracted beyond the decease of the surviving parent, and the attainment of majority" (j), or beyond the period of twenty-one years from the decease of the surviving parent.

But Mr. Jarman's test requires some qualification, for "it is not meant that the precise language of the instrument exercising the power is to be read into the instrument creating it" (k). If the appointment is made by will, it does not, owing to the ambulatory nature of the instrument, take effect until the testator's death, and it follows that the persons intended to take under the appointment are not ascertained until that time. Thus under a power to appoint to the testator's issue, an appointment to A., a daughter of the testator, for life, and after her death to her next of kin, is good if A. is born in the testator's lifetime, and if her next of kin are issue of the testator (kk). In a case in which a question of this nature arose, the testator gave property upon such trusts for the benefit of C. T. and his present and future issue as A. B. should appoint; A. B. by her will appointed it in trust for C. T. for life, and after his death for all his children who had attained or should attain twenty-five if born in her lifetime, or twenty-one if born after her decease. All of C. T.'s children attained twenty-five before A. B.'s death. It was held that upon the appointment taking effect, namely, at A. B.'s death, the shares of the appointees were vested and ascertained, and that the appointment was therefore good (l).

This principle seems to have been overlooked in *Re Wright* (m).

Where a power does in terms authorise an appointment to issue only who are born within due limits, an appointment to a more extensive range of issue would be totally void if made to the whole as a class to take as tenants in common, for the shares of the issue who are within the line could not be ascertained (n). But in the converse case, viz. that of the power embracing issue generally

(j) *Massey v. Barton*, 7 Ir. Eq. 95.

(k) Per Joyce, J., in *Re Thompson*, [1906] 2 Ch. 199.

(kk) *Re Coulman*, 30 Ch. D. 186.

(l) *Re Thompson*, supra.

(m) [1906] 2 Ch. 288. According to a note in the *Law Quarterly Review* (xxiii. 9), the invalidity of the limitations in this case resulted from a number of complicated provisions not referred to in the report.

(n) In the first edition Mr. Jarman stated that such an appointment would be good pro tanto, on the ground that "as the issue who are beyond the line are also strangers to the power, the instrument would be simply nugatory quoad the shares of the remote appointees." But this opinion is clearly unsound, for the reason given in the text. See the third edition of this work, p. 272; Gray on Perp., § 538.

and the appointment being duly restricted to issue within the prescribed boundary, there can be no doubt that the appointment would be good (*o*). If the power and appointment both embrace too wide a range of objects, and the appointment is made to the children or issue as a class, it will, according to the general principle before adverted to, be void in toto, as well as to members of the class who are within, as to those who are not within, the line (*p*).

If, however, a separate sum is appointed to each member of the class independently of the others, the appointment is good as to those who come within the limits allowed by the Rule, and bad as to the others (*q*). And if the power and the appointment are so limited that the shares of all the appointees can be ascertained within the proper limits, no question of remoteness arises; the appointment is good as to the appointees who are objects of the power, and void as to the others (*r*). In *Re Farncombe's Trusts* (*s*), A. had a power to appoint to her issue, "such issue to be born before any such appointment"; A. by deed appointed to her daughter B. for life and after her death to her children, at twenty-one, with a clause of accruer; at the date of the appointment B. had three children living, and she had three born afterwards; one of the children attained twenty-one after the death of B.; the rest were minors: it was held by Hall, V.-C., that the appointment was good as to the three children of B. living at the date of the appointment, and that the share of each of them would be determined by the number of all the children who attained twenty-one; consequently, if all attained twenty-one, each of the three children who were objects of the power would take one-sixth.

Separate and severable appointments.

Again, although under a special power to appoint to children, a life estate may (as we have seen) be limited to a child unborn at the time of the creation of the power, the limitation to such child of a power to appoint by will would be void, since it would tie up the property until the death of the unborn child (*t*). But such a power may be limited to a child born at the time of the creation of the

Unborn child.

(*o*) *Attenborough v. Attenborough*, 1 K. & J. 296; *Slark v. Dakyns*, L. R., 10 Ch. 35.

(*p*) *Routledge v. Dorril*, 2 Ves. jun. 357; *Thomas v. Thomas*, 14 Sim. 234.

(*q*) *Wilkinson v. Duncan*, 30 Bea. 111 (better reported in 7 Jur. N. S. 1182); *Re Hallinan's Trusts*, [1904] 1 Ir. R. 452. In *Von Brockdorff v. Malcolm*, 30 Ch. D. 172, Pearson, J., professed to follow *Wilkinson v. Duncan*, but the two cases rest on different

principles. See post, p. 330.

(*r*) *Harvey v. Stracey*, 1 Dr. 136; Sugden on Powers, 507.

(*s*) 9 Ch. D. 652.

(*t*) *Wollaston v. King*, L. R., 8 Eq. 165; *Morgan v. Gronow*, L. R., 16 Eq. 1; *Hutchinson v. Tottenham*, [1898] 1 Ir. R. 403; *Tredennick v. Tredennick*, [1900] 1 Ir. R. 354. Apart from remoteness, such a limitation would be within the original power: *Slark v. Dakyns*, L. R., 10 Ch. 35.

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power (*u*). And the limitation of a power to appoint by deed of will would be valid even in the case of a child unborn at the time of the creation of the original power, since a power to appoint by deed or will confers an absolute and immediate power of disposition (*v*), although it would be void if a condition precedent (not necessarily to be fulfilled within the limits) were attached to it (*w*). A determinable life interest, however, may be appointed to an unborn child (*x*). So, an appointment to a child (unborn at the creation of the power) for life, with remainder to his executors or administrators as part of his personal estate, is good (*y*). The validity of limitations to unborn persons is discussed below, pp. 348 seq.; many of the cases there cited arose on appointments under special powers.

Appointment
to an
unknown
class.

In *Blight v. Hartnoll* (*z*), Fry, J., laid down the rule that where a person has power to appoint among a class, he must know the class at the time he exercises the power; if, for example, A. had power to appoint among his children who should be living at the return of B. from Rome, and the power were exercised by A. before B. returned from Rome, Fry, J., thought that that would be a bad exercise of the power. But there seems to be no foundation for this doctrine (*a*), and in *Re Coulman* (*b*), where A. had a power to appoint to issue, and she appointed to an object of the power for life, with remainder to his next of kin, Pearson, J., said: "To my mind there is no reason why they [the next of kin] should not take if at the time when the tenant for life dies his next of kin happen to be issue," that is, objects of the power. "The question," he said, "is a very curious one."

Appointment
by reference.

An appointment may be made by reference. And accordingly, if under a special power a testator appoints to the uses or trusts of an existing deed, "or such of them as are capable of taking effect," the phrase "capable of taking effect" may be construed as meaning what the law allows to take effect, so that if some of the uses or trusts fail by reason of the Rule against Perpetuities being infringed, they may be treated as excluded from the appointment (*c*).

Absolute
appointment
followed by
qualifications
void for
remoteness.

The doctrine that where a gift is absolute in the first instance, and is followed by qualifications or restrictions which are void for remoteness, the original gift prevails, applies to appointments

(*u*) *Phipson v. Turner*, 9 Sim. 227; *Slark v. Dakyns*, *supra*.

(*v*) *Bray v. Hammersley*, 3 Sim. 513; *s. c. nom. Bray v. Bree*, 2 Cl. & F. 453; *Re Meredith's Trusts*, 3 Ch. D. 757.

(*w*) *Webb v. Sadler*, *infra*; *Morgan v. Gronow*, L. R., 16 Eq. 1.

(*x*) *Wainwright v. Miller*, [1897] 2

Ch. 255; *Re Gage*, [1898] 1 Ch. 498.

(*y*) *Webb v. Sadler*, L. R., 8 Ch. 419.

(*z*) 19 Ch. D. 294, stated above, p. 310.

(*a*) Farwell, Powers, 146.

(*b*) 30 Ch. D. 186.

(*c*) *Re Finch and Chew's Contract*, [1903] 2 Ch. 486.

under powers. In fact, many of the leading cases on the doctrine are cases of appointments (*d*).

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The test of the validity of appointments under special powers above alluded to is, of course, not applicable to appointments under general powers, because such powers are, in point of alienation, equivalent to absolute ownership: the donee can dispose of the property as he pleases. It follows that the period for the commencement of limitations under such appointments in point of remoteness is the time of the execution of the power, and not of the creation of it. And it has been held that the same principle applies where the power, though general in its objects, is to be exercised by will only, in which case the period allowed by the Rule will run from the testator's death (*e*).

Under general powers time is computed from the appointment.

(D) LIMITATIONS AFTER FAILURE OF ISSUE.—An executory limitation to arise on an indefinite failure of issue (*f*) of any person living or dead, is, of course, void for remoteness (*g*).

An executory limitation to arise on an indefinite failure of issue, void.

This rule, however, does not apply if the original gift itself fails to take effect on the death of the testator. Thus, if leaseholds are bequeathed to A. for life, with remainder to his sons in tail, with remainder to B. in tail, and A. dies without issue during the lifetime of the testator, the gift to B. is good, and gives him an absolute interest in the leaseholds. If A. were to survive the testator, the gift over to B. would be absolutely bad (*h*).

Exception where previous gift fails.

In the case of real estate, moreover, if an executory devise is so limited that it must necessarily take effect either during the

Exception in case of executory devise engrafted on an estate tail.

(*d*) *Infra*, p. 361. *Cooke v. Cooke*, 38 Ch. D. 202, and *Re Boyd*, 63 L. T. 92, are recent cases on the subject, in which the earlier authorities are cited. See also *Hutchinson v. Tottenham*, [1898] 1 Ir. R. 403.

(*e*) By *Chitty, J.*, in *Rous v. Jackson*, 29 Ch. D. 521, followed by *North, J.*, in *Re Flower*, 55 L. J. Ch. 200 (disapproving *Re Powell's Trust*, 39 L. J. Ch. 188), and in *Stuart v. Babington*, 27 L. R. Ir. 551; *Mr. Gray*, however, thinks that the principle laid down in *Re Powell's Trusts* is correct (*Gray on Perp.*, § 526 seq.).

(*f*) It will be remembered that under s. 29 of the Wills Act, words importing an indefinite failure of issue of A. *primâ facie* mean a failure of issue during the lifetime or at the time of the death of A. See Chap. LIII. Even under the old law a gift in default of issue might

bear a restricted meaning, so as to avoid any question of remoteness; *Murray v. Addenbrook*, 4 Russ. 407.

(*g*) *Badger v. Lloyd*, 1 Salk. 232; *Moore v. Parker*, 1 Ld. Raym. 37; *Lady Lanesborough v. Fox*, Ca. t. Talb. 262; *Att.-Gen. v. Hird*, 1 Br. C. C. 170; *Lepine v. Ferard*, 2 R. & My. 378; *Carter v. Bentall*, 2 Bea. 551; *Harding v. Nott*, 7 E. & B. 650; *Webster v. Parr*, 26 Bea. 236.

(*h*) *Re Lowman*, [1895] 2 Ch. 348, following *Brown v. Higgs*, 4 Ves. 708; *Donn v. Penny*, 1 Mer. 20; *Mackinnon v. Peach*, 2 Keen. 555; and *Williams v. Lewis*, 6 H. L. C. 1013, and overruling *Harris v. Davis*, 1 Coll. 416; *Hughes v. Ellis*, 20 Bea. 193; and *Great v. Great*, 26 Bea. 621. The doctrine established by these decisions is referred to in Chaps. XIII. and XVII.

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continuance, or immediately after the determination, of an estate tail, it will be good, because the power which resides in the owner of that estate to destroy all posterior limitations, executory as well as vested, takes the case out of the mischief which the Rule against Perpetuities was designed to prevent (*i*). Thus, if a person, by deed or will, creates an estate tail, and annexes to it a proviso divesting the estate in favour of another in case the devisee, or his issue in tail, should at any time thereafter neglect to assume the name and bear the arms of the testator, or in case another property should at any future time devolve to him or them, or on any other such event: this executory limitation, though it would have been clearly void if engrafted on an estate in fee simple, is good as applied to an estate tail (*j*). So a trust for sale and division of the proceeds, to take effect on the failure of an estate tail, is good (*k*).

Equitable
estates tail.

The rule above stated applies not only to legal but also to equitable estates tail, because the latter can be barred in the same way as if they were legal.

Distinction
as to legal
contingent
remainders.

If, however, the event on which a limitation after an estate tail is to take effect may not happen until after the estate tail has determined, there is a difference between a legal contingent remainder on the one hand, and an equitable contingent remainder or an executory devise on the other. For if the limitation is equitable or executory, so that there may be an interval during which it is indestructible, it is void *ab initio* (*l*). If, on the other hand, the limitation after the estate tail is a legal contingent remainder, the remoteness of the event upon which it is to vest is immaterial, since it is always barrable as long as the estate tail continues; and if, being unbarred, it is not vested when the latter determines, it fails for want of a particular estate. Thus, in *Jack v. Fetherstone* (*m*), estates were limited by settlement to T. S. W. for life, with remainder to his first and other sons in tail male, and for default of such issue male, and in case of issue female only of T. S. W., to T. S. W. in fee, and in case of failure of issue of T. S. W., then further limitations were made. It was argued that the ultimate limitations being deferred till a general failure of issue of T. S. W., while previous

A remainder
may be good
though
limited upon
an event
too remote.

(*i*) *Gulliver v. Ashby*, 4 Burr. 1929; *Att.-Gen. v. Milner*, 3 Atk. 112; as to a charge subsequent to an estate tail, *Goodwin v. Clark*, 1 Lev. 35; *Faulkner v. Daniel*, 3 Hare, 199; *Morse v. Ormonde*, 1 Russ. 382; *Bristow v. Boothby*, 2 S. & St. 465.

(*j*) *Nicolls v. Sheffield*, 2 Br. C. C. 215; *Carr v. Earl of Erroll*, 6 East, 58; *Earl of Scarborough v. Doe d. Savile*, 3 Ad. &

Ell. 897; *Bennett v. Bennett*, 2 Dr. & Sm. 266.

(*k*) *Heasman v. Pearse*, L. R., 7 Ch. 275.

(*l*) Gray, § 451, citing *Hartopp v. Carbery*, 1 Sand. Uses, 205 (rent-charge limited by way of use). See *Banks v. Holme*, 1 Russ. 394, n., post, p. 325. *Abbiss v. Burney*, 17 Ch. D. 211.

(*m*) 2 Huds. & Br. 320.

estates were limited to his issue male only, were too remote; but Bushe, C. J., said that this objection was in some degree founded on a misapprehension of Mr. Fearne's meaning, and in not distinguishing the limitation from the event: the event might be such that it might happen either before or after the future estate was to vest, and yet the possibility it might happen after did not affect the nature of the limitation. So that the remoteness of the event is immaterial, if the estate is not too remote.

In *Cole v. Sewell* (n), the same question arose as to the validity of estates limited by deed, to take effect in case of a general failure of issue, by way of remainder after previous estates tail limited to some only of such issue. Lord St. Leonards (then L. C. Ir.) held the remainder to be good. *Cole v. Sewell.*

This decision was affirmed in the House of Lords (o). Lord Cottenham observed: "It is said that this last limitation is too remote, because, there being no previous limitation to issue generally, there might be a failure of all the prior limitations, and yet issue, as in the case of a son of a daughter, might exist, so that this last limitation would not take effect. But if this be a remainder, it would be barrable, and the objection, therefore, would not arise." He then went on to shew that the limitation in question was a remainder limited on a contingency, and therefore good.

So in *Doe d. Winter v. Perratt* (p), where the devise was to I. C. in tail male, with remainder to the first male heir of the branch of R. C.'s family who lived at H., the branch of R. C.'s family who lived at H. might have consisted for an indefinite time of females only; so that the gift to the first male heir who should come into existence was too remote, had it not been limited by way of contingent remainder; but being so limited, no doubt of its validity was expressed on this ground; the only question was, who was meant by "first male heir." *Doe v. Perratt.*

A term of years (like any other estate) may be made expectant by way of remainder on an estate tail; but sometimes it happens that the term is so limited as to render it hard to say whether it is ulterior or precedent to the estate tail. If the term is precedent to the estate tail, of course it cannot be defeated by the acts of the tenant in tail (q): and in such case, if the trusts of the term are not to arise until the failure of issue under the entail, those trusts are necessarily

Term of years, whether ulterior or precedent to estate tail.

(n) 4 D. & War. 1, corrected by the judge himself, and differing in some material passages from 2 Con. & L. 344.

(o) 2 H. L. C. 186.

(p) 9 Cl. & Fin. 606.

(q) *Eales v. Conn*, 4 Sim. 65.

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void. As in *Case v. Drosier (r)*, where a testator devised his estates at M. and T. to trustees for 500 years, upon the trusts after declared, and he then devised the M. estate, subject to the term, to A. for life, with remainder to his sons and daughters in tail, in strict settlement, in the usual manner, with remainder to B. and his sons and daughters in like manner. He then devised the T. estate in a similar manner, except that B. was put in the place of A. And the testator declared the trusts of the term of 500 years to be for the purpose (among others) of raising portions for two granddaughters, payable at twenty-one, and further portions, in case either A. or B. should die without issue, and all which were to sink in case they died under age and unmarried. Lord Langdale, M. R., thought that the words "without issue" meant without issue who were objects of the prior limitations; but as this might be a remote event, and as there were no means by which the charges could be barred, the trusts could not be supported. "They depend," he observed, "on a term, and that term is precedent to the estates tail, so that after a recovery there would remain a term and a trust to be performed: a trust which could not be defeated, and a term which cannot be destroyed."

Of course, it is not the mere limitation of an estate tail—as, to the first son of A., who never has a son,—but the vesting of it in the devisee, which protects the trusts of the subsequent term. On the death of A. without having had a son, the trusts will be good or bad or (if severable) some good and some bad, according as they are within or without the limits set by the Rule against Perpetuities (s).

Executory
limitation,
whether
precedent or
subsequent.

The question whether an executory limitation was precedent or subsequent to an estate tail, was much discussed in *Doe d. Lumley v. Earl of Scarborough (t)*, where lands were devised to A. for life, with remainder to his first and other sons in tail, remainders over, with a proviso that if the earldom of S. should descend upon A. or any of his sons, within the period of certain lives, or within the term of twenty-one years after the decease of the survivor, his or their estate should cease, and the lands remain over as if he or they were dead without issue. The eldest son of A. suffered a common recovery, and A. joined in the conveyance for the purpose of making

(r) 2 Kee. 764, affirmed by Lord Cottenham, 5 My. & Cr. 246. See *Sykes v. Sykes*, L. R., 13 Eq. 56, ante, p. 315, and see Hayes's Introd. vol. 1, p. 135, vol. 2, p. 170, n., 5th edition.

(s) *Tregonwell v. Sydenham*, 3 Dow, 194, where all the trusts were held void

except the trust to raise the money, and the money was held to result to the heir. See as to this case (which is somewhat obscure), Marsden, Perp. 136; Gray, § 419 seq., ante, p. 309.

(t) 3 Ad. & Ell. 2, 897; *Milbank v. Vane*, [1893] 3 Ch. 79.

a tenant to the præcipe. The earldom afterwards devolved upon A. It was held in the Exchequer Chamber (*u*) (reversing a decision in B. R.), that the executory limitation was barred; the Court being of opinion that this was a mere proviso for the cesser of the old estates created by the will to which it applied, so as to accelerate and let in the enjoyment of the remainders over, and not (as had been considered in the Court below) the creation of any new estate. The Judges in B. R. were of opinion that the proviso operated, not by way of determining or defeating the estate tail of the son of A., but antecedently to that estate, by preventing the estate tail from ever taking effect; and that the persons entitled in remainder had two distinct estates, one of which was antecedent, and the other posterior to the estate tail, and consequently, that the former could not be affected by the recovery.

The question of the validity of trusts and powers to take effect during a strict settlement of land has been already discussed (*v*).

The devise of an estate in reversion may, it seems, be void for remoteness when a devise of an estate in remainder would not (*w*). A reversion is, in fact, a present interest, since it carries the services and rent (if any) during the subsistence of the particular estate (*x*); and a devise of it, therefore, contingently on a future event is, like a similar devise of any other estate in possession, an executory limitation which need not vest eo instanti that the particular estate determines, and is void if the event be too remote. Thus, in *Bankes v. Holme* (*y*), where a settlor, having the reversion in fee expectant on a failure of issue male of his sons and issue general of his daughters, devised it on the contingency of there being no child or children of his wife by him begotten, or (as eventually happened) there being such, all of them should die without issue; it was held that the devise was too remote and void (*z*). If the devise in this case had been such as to create a remainder in fee, such remainder could only

A devise of a reversion may be void when a similar devise of a remainder would be good.

(*u*) 3 Ad. & Ell. 897.

(*v*) Ante, p. 313.

(*w*) This paragraph is an addition to Mr. Jarman's text by Messrs. Wolstenholme and Vincent, and is taken verbatim from the third edition of this work. The special rule as to the vesting of devises of reversions and remainders is treated of in Chap. XXXVII.

(*x*) Preston on Merger, 246; *Badger v. Lloyd*, 1 Ld. Raym. 523; Bac. Uses, 45, 46, cited Sand. Uses, Ch. 2, v. 2.

(*y*) 1 Russ. 394, n.; Sugd. Law of Prop. 351; and see *Doe v. Fonnereau*, Dougl. 487; and see the remarks on *Bankes v. Holme*, post, Chap. LII.

(*z*) See *Lewis v. Templer*, 33 Bea. 625, where a trust for sale on failure of the issue of A. generally was held, by reference to a settlement, to mean failure of issue living at A.'s death, and to be valid. It is possible that the devise in *Bankes v. Holme* might have been upheld on this ground.

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have taken effect in case the general failure of issue had happened simultaneously with the determination of the estates tail to the sons and daughters (*a*), and up to that time would have been barrable, and therefore not too remote. The devise of the reversion, on the other hand, though barrable during the subsistence of the estates tail, would not necessarily have always been barrable, since, taking effect as it did by way of executory devise, it must, if held valid, have awaited the time when the issue general failed; an indefinitely long period might thus elapse between the determination of the estates tail and the failure of issue general, during which the reversion would have descended in fee to the testator's heir, who could not have barred the executory gift, and the rules against perpetuity would have been infringed (*b*).

Equitable
contingent
remainders.

Equitable contingent remainders in land are not governed by the same rule as contingent remainders of legal estates; for they do not necessarily vest or fail upon the determination of the previous estate, but await the happening of the contingency on which they are limited (*c*), and are, therefore, invalid if that contingency be too remote (*d*). But, like executory devises, they are good after an estate tail, if limited on an event which must necessarily happen at or before the determination of that estate, as in the case of a trust for a class to be ascertained at or before such determination (*e*).

Personal
property.

A gift of personal property to a person in tail gives him, as is well known, an absolute interest. The result of this rule may be to make a gift valid which would otherwise be too remote. In a recent case (*f*), a testator gave personalty to A. for life, with remainder to his first and other sons in tail male, with remainder to the first and other sons of B., a spinster, in tail male, with remainder to the first and other sons of C., a spinster, in tail male, with remainder to the first son of D., a married woman, in tail male, and in default

(*a*) The case would then have been similar to *Cole v. Sevell*.

(*b*) *Bristow v. Boothby*, 2 S. & St. 465; and see *Morse v. Ormonde*, 1 Russ. 382.

(*c*) *Hopkins v. Hopkins*, Ca. t. Talb. 44, 1 Atk. 581, West, 606; *Chapman v. Blisset*, Ca. t. Talb. 150.

(*d*) *Momyppenny v. Dering*, 7 Hare, 568, 590. See *Astley v. Micklethwait*, 15 Ch. D. 59, where the testator had only the equity of redemption in part of his lands, and the remainder, being within due limits, was saved as

regards that part by the legal estate outstanding in the mortgagees; and *Abbis v. Burney*, 17 Ch. D. 211, where the devise was to trustees during the life of A., and at his death to convey to such son of B. (a person who survived testator) as should first attain twenty-five, and the remainder was held void.

(*e*) *Morse v. Ormonde*, 1 Russ. 382; *Heasman v. Pearse*, L. R., 7 Ch. 275.

(*f*) *Re Lowman*, [1895] 2 Ch. 348. On the question of B. being past the age of child-bearing, see *Re Hocking*, [1898] 2 Ch. 567; *Re White*, [1901] 1 Ch. 570.

of such issue to the second and other sons of D. in tail male; A., B., C., and D. survived the testator; A. and C. died unmarried; B. was past the age of child-bearing; D. had had two sons, the elder of whom died before the testator: it was held that the gift to the second son on failure of issue of the first son was not void for remoteness.

(E) GIFTS TO CLASSES.—A gift to a class of persons is void if the time at which the class is to be ascertained is not within the period allowed by the Rule (g). Thus, in *Lett v. Randall* (h), the testator gave his residuary estate to his children in equal shares, with a proviso that if any of his daughters should marry, and die in her husband's lifetime, her share should go to her husband for life, and after his decease to the children of his daughter "then living": it was held that, as the husband of any daughter might be a person not in existence at the testator's death, the class to take on the husband's death would not necessarily be ascertained within due limits, and that the gift to the children of the daughters was void for remoteness. So, in *Re Gage* (i), a gift to a class including such of a number of unborn persons as should marry, was held void for remoteness.

Class not to be ascertained within due limits.

A gift to such of a number of persons living at the death of the testator as shall be living at the end of thirty years is good (j).

It has been already mentioned that a child en ventre sa mère is, for the purposes of the Rule, considered to be a living person (k).

Posthumous child.

"The most frequent instances of the transgression of the Rule against Perpetuities," as Mr. Jarman remarks (l), "occur in devises or bequests to classes comprising either individuals who may not come into existence at all during a life in being and twenty-one years afterwards, or persons who may not be in esse at the death of the testator, and the vesting of whose shares is postponed beyond majority. In the former case the Rule is fatally violated, even though the gift to the unborn objects is so framed as to confer on them vested interests immediately on their birth."

Gifts to classes of unborn persons.

(g) As to what constitutes a "class," see below, p. 334, and Chap. XIII. As to powers to appoint to a class, see ante, p. 320.

(h) 3 Sm. & G. 83; *Buchanan v. Harrison*, 1 J. & H. 665; *Re Merricks' Trusts*, L. R., 1 Eq. 551; *Gooch v. Gooch*, 3 D. M. & G. 366.

(i) [1898] 1 Ch. 498.

(j) *Lachlan v. Reynolds*, 9 Ha. 796.

(k) Ante, p. 298, where the case of *Re Wass*, [1882] W. N. 158, is referred to.

If that case was rightly decided, it seems to follow that a gift to such of the children of A. as shall be living at the time of the testator's decease or born in due time thereafter and shall attain the age of twenty-five years, would be void for remoteness. The point, however, did not arise in *Re Wass*, and when the case occurs the Court may possibly give effect to the obvious intention of the testator.

(l) First edition, p. 226.

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An example of the latter kind is supplied by the case of *Dodd v. Wake* (*m*), where a testator bequeathed a sum of 8000*l.* unto and amongst the children of his daughter M. M. "who shall be living at the time the eldest shall live to attain the age of twenty-four years, and the issue of such of the children of my said daughter as may then happen to be dead leaving issue," per stirpes and not per capita, as tenants in common, and to be paid as and when they should attain twenty-four, but without interest in the meantime. M. M. had three children living at the testator's death; but the question was, whether the bequest was not void for remoteness, inasmuch as all these children might die under twenty-four, and then the legacy could not vest in any child, until the expiration of twenty-four years and upwards after the testator's decease. Sir L. Shadwell said: "The testator appears clearly to have intended that only those children of his daughter should take who should be alive when the eldest child for the time being should attain the age of twenty-four, and therefore the bequest is void for remoteness."

Distinction
in regard to
remainders.

"It is proper to remark," says Mr. Jarman (*n*), "that, in the class of cases under consideration, a limitation which would as an executory devise be void for remoteness, may be good as a contingent remainder, on account of the necessity, which the rules applicable to contingent remainders impose, of its vesting, if at all, at the instant of the determination of the preceding estate for life. Such an estate, therefore, if limited to a person who was in existence at the death of the testator, necessarily restricts the devise within proper bounds. Thus, if lands of which the testator had the legal inheritance be devised to A. for life, with remainder in fee to the children of A. who shall attain the age of twenty-two, the devise in remainder will be good, because if at the death of A. no child has attained the vesting age, the remainder will fail under the doctrine in question (*o*); and if any child has attained that age, the devise will take effect in favour of such child, to the exclusion of any child or children afterwards attaining the prescribed age" (*p*).

(*m*) 8 Sim. 616; and see *Boughton v. James*, 1 Coll. 28, 1 H. L. C. 406; *Griffith v. Blunt*, 4 Bea. 248; *Leake v. Robinson*, 2 Mer. 363, and other cases cited post, p. 331.

(*n*) First edition, p. 229.

(*o*) See *Fearne*, Cont. Rem. 4; *Festing v. Allen*, 12 Mee. & W. 279; *Alexander v. Alexander*, 16 C. B. 59.

(*p*) This appears to be the passage referred to with approval by Hall, V.-C.,

in *Brackenbury v. Gibbons*, 2 Ch. D. 419; the reference to the page, however, would indicate the third edition (by Messrs. Wolstenholme and Vincent), in which the passage in question, although attributed to Mr. Jarman, is materially altered. The operation of the rule thus stated by Mr. Jarman is considered in connection with the Contingent Remainders Act, 1877, post, Chap. XXXVIII.

The doctrine does not, of course, apply to equitable contingent remainders (*pp*). CHAPTER X.

Difficult questions frequently arise as to whether a limitation of this kind is a contingent remainder or an executory devise; the question is of importance in connection with gifts to classes, because it regulates the manner in which the class is ascertained (*q*). Ascertain-
ment of class.

It has been already mentioned that a gift which is apparently contingent and void for remoteness, is valid because it confers an interest which is vested subject to being divested (*r*). The distinction is sometimes fine. Thus, in *Re Mervin* (*s*), the testator gave his property upon trust for the children of his son J. as and when they should respectively attain the age of twenty-five years, and gave his trustees power in the meantime to apply the whole or any part of the income for the maintenance of such grandchildren during their minority, and to apply for the advancement of them or any of them one-half of the capital to which they or he might be entitled expectant on their, his, or her attaining the age of twenty-five years. It was held that the grandchildren did not take vested interests, and that the gift was void for remoteness. On the other hand, in *Re Turney* (*t*), a testator gave a fund upon trust for his daughter for life, and after her death in trust for all her children when they should attain twenty-five, but not before, and gave a moiety of the residue of his estate upon trust for his son for life, and after his death for his child or children absolutely upon their attaining twenty-five; the will contained references to the "shares" and "portions" of the grandchildren, and provisions for their maintenance, and the Court of Appeal held, on the construction of the whole will, that the grandchildren took immediate vested interests, subject to being divested in case they did not attain twenty-five, and that the trusts were not void for remoteness (*u*). Where
interests
are vested.

Again, if there is a gift to the children of A., followed by a direction to postpone payment of the respective shares until the children attain twenty-five, this direction is disregarded, and the children of A. living at the testator's death take vested interests (*v*). Postpone-
ment of
payment of
vested shares
beyond age of
twenty-one.

An apparent exception to the doctrine that vested interests are not open to the objection of remoteness, occurs in those cases where property is given to a class which is liable to fluctuation after the Class capable
of enlarge-
ment or
diminution.

(*pp*) *Abbiss v. Burney*, 17 Ch. D. 211.

(*q*) See *Dean v. Dean*, [1891] 3 Ch. 150, post, Chap. XXXVIII.

(*r*) Ante, p. 302.

(*s*) [1891] 3 Ch. 197.

(*t*) [1899] 2 Ch. 739.

(*u*) Post, Chap. XXXVII.

(*v*) See *Kevern v. Williams*, 5 Sim. 171; *Elliott v. Elliott*, 12 Sim. 276 (commented on post, Chap. XLII); *Re Coppard's Estate*, 35 Ch. D. 350; *Re Barker*, 92 L. T. 831, infra, note (*z*).

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period allowed by the Rule. Thus, suppose property to be given to A., a bachelor, for life, with remainder to his eldest son for life, remainder to those children of B. who attain twenty-five: at the testator's death B. is living, and one of his children, C., has attained twenty-five. Here C.'s interest is vested, and yet the gift to B.'s children is too remote, for although the maximum size of each child's share will be fixed at B.'s death, the minimum may not be determined until twenty-five years afterwards (*w*).

Class
ascertained
at testator's
death.

A gift to a class may be good, because although it is, in form, a gift to a class which may not be ascertained within due limits, it is, in fact (having regard to the state of things existing at the testator's death (*x*)), a gift to a class which must be ascertained within due limits. Thus, in *Picken v. Matthews* (*y*), a testator gave his real and personal property upon trust for such of the children of his daughters as should live to attain twenty-five. At his death one of his daughters had a child who had attained twenty-five: there were other children under that age. It was held that the class consisted of the daughter's children who were living at the death of the testator, subject to their attaining twenty-five. But if a proviso is added that in the event of any child dying under twenty-five, his or her children who attain twenty-five shall take their parents' share, the whole gift is bad for remoteness (*z*).

Von
Brockdorff v.
Malcolm.

Again, in *Von Brockdorff v. Malcolm* (*a*), property was settled upon A. for life, and after his death upon such of his issue born in his lifetime as he should appoint: by will, he appointed it to all his daughters who should survive him, and should, during his lifetime, or after his death, attain twenty-four. A. left four daughters, of whom the youngest was over three years old at his death. The appointment was held to be good. Pearson, J., seemed to think the case was governed by *Wilkinson v. Duncan* (*b*), but that was a case of independent gifts (*c*), and the real reason why the appointment in *Von Brockdorff v. Malcolm* was good is that given by Mr.

(*w*) Gray on Perp., §§ 110a, 205a.

(*x*) Ante, p. 300.

(*y*) 10 Ch. D. 264. If no child of either daughter had attained twenty-five at the testator's death, the gift would have failed: *Re Mervin*, [1891] 3 Ch. 197.

(*z*) *Re Whitten*, 62 L. T. 391. In *Re Barker*, 92 L. T. 831, there were gifts of two moiety of the property, each followed by a substitutional gift to the issue of any child who predeceased its parent, although no life interest was

given to that parent, part of the clause having been apparently struck out without altering the other part: it was held that as to one moiety the gift was good, as one of the children had attained twenty-five before the testator's death; in the case of the other moiety no child had attained that age, and the gift therefore failed.

(*a*) 30 Ch. D. 172.

(*b*) 7 Jur. N. S. 1182, ante, p. 319.

(*c*) Post, p. 333.

Gray (*d*), namely, that the class of daughters surviving the testator was closed when the will took effect, and the appointment was to such of them as should attain twenty-four; the ultimate class, therefore, would necessarily be ascertained within twenty-one years after his death.

"It is to be observed," says Mr. Jarman (*e*), "that where a gift to a class extends to objects too remote, the fact that *some* of the objects eventually composing the class were actually born within the period allowed by the rule of law, will not render the gift valid, quoad those objects. Thus, in *Leake v. Robinson* (*f*), where certain stock and moneys were bequeathed to W. R. R. for life, and after his decease, to the child or children of the said W. R. R. who, being a son or sons, *should attain the age of twenty-five*, or being a daughter or daughters, attain that age, or be married with consent; and in case the said W. R. R. should happen to die without leaving issue living at the time of his decease, or leaving such, they should all die before any of them should attain twenty-five, if sons, and if daughters, before they should attain such age, or be married as aforesaid, then to the brothers and sisters of the said W. R. R., on their attaining twenty-five, if a brother or brothers, and if a sister or sisters, on such age or marriage as aforesaid. It appeared that five of the brothers and sisters of W. R. R. were born before the testator's death, and it was contended, therefore, that the bequest, though confessedly void as to those born afterwards, was good as to these objects; for that no case had gone the length of deciding that persons who are capable of taking under a will should not take, merely because they are joined in a bequest with others who are incapable; but Sir W. Grant, M. R., held that the bequest was void as to the whole, observing, with his usual felicity: 'The bequests in question are not made to individuals, but to classes; and what I have to determine is, whether the class can take. I must make a new will for the testator, if I split into portions his general bequest to the class, and say that, because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests what he never intended them to be, viz. a series of particular legacies to particular individuals; or, what he has as little in his contemplation, distinct bequests, in each instance, to different

Gift of personal estate to a class which may comprise objects too remote, void as to all.

(*d*) Perp. Addendum (1st edition); §§ 523c, d (2nd edition). The decision was followed in *Re Hallinan's Trusts*, [1904] 1 Ir. R. 452, and in *Re Thompson*,

[1906] 2 Ch. 199.

(*e*) First edition, p. 231.

(*f*) 2 Mer. 363.

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classes, namely, to grandchildren living at his death, and to grandchildren born after his death' (g).

"And even if all the members of the class had happened to be born during the life of the tenant for life, or even in the lifetime of the testator himself, the gift would nevertheless have been absolutely void, as it is an invariable principle in applying the Rule under consideration, that regard is had to possible, not actual events, and the fact that the gift *might* have included objects too remote is fatal to its validity, irrespectively of the event."

In a simple case like *Leake v. Robinson*, it is easy to see how the gift to persons within the proper limits is so mixed up with the gift to those who are not, that the whole must fail, for it is clear that unless we wait beyond the allowed period, the precise shares of those within the proper limits could never be ascertained. Other cases have, however, occurred in which there has been much controversy as to what constitutes such a blending of the two gifts as will prevent the gift to the persons who are within the proper limits from taking effect.

Class of
children and
grand-
children.

The question has been much discussed in cases where there is a gift to a class composed of the children and grandchildren of a person. Thus, suppose property to be given to A. for life, and after his death to all his children who attain twenty-one, and such of the children as attain twenty-one of any children of A. who die under that age leaving issue, the grandchildren taking their parent's shares; here the number of shares is fixed at the death of A., but there is a possibility that A. may leave a child under age, and if that child died under twenty-one, leaving children, some of them might not attain twenty-one within the limits fixed by the Rule against Perpetuities (h), so that the shares to be ultimately taken could not be ascertained within due time, and the whole gift is consequently void (i). It was at one time considered that in such a case the gifts

(g) The doctrine of *Leake v. Robinson* was discussed in *Hale v. Hale* (3 Ch. D. 643) and *Pearks v. Moseley* (5 App. Ca. 714). The books abound with cases in which the decision in *Leake v. Robinson* has been followed; it will be sufficient to refer to some of them: *Judd v. Judd*, 3 Sim. 525; *Newman v. Newman*, 10 ib. 51; *Comport v. Austen*, 12 ib. 218; *Ring v. Hardwick*, 2 Beav. 352; *Bull v. Pritchard*, 1 Russ. 213, 5 Hare, 567; *Vawdry v. Geddes*, 1 R. & My. 203; *Blagrove v. Hancock*, 16 Sim. 371; *Walker v. Mower*, 16 Beav. 365; *Southern v. Wollaston*, 16 Beav. 166;

Merlin v. Blagrove, 25 Beav. 125; *Pickford v. Browne*, 2 K. & J. 426; *Read v. Gooding*, 21 Beav. 478; *Rowland v. Tawney*, 26 Beav. 67; *Smith v. Smith*, L. R., 5 Ch. 342, referred to below.

(h) If the gift were "to all the children of A. who attain twenty-one and the issue of such of them as shall die under that age, leaving issue at their decease," it would, of course, be good: per Lord Selborne in *Pearks v. Moseley*, 5 App. Ca. 719.

(i) Another example of the same principle will be found in *Blight v. Hartnoll*, 19 Ch. D. 294, ante, p. 310.

might be severed, so that the gift to the children might be held good as an original gift, the gift to the grandchildren being treated as substitutional, apparently on the ground that effect ought to be given to the testator's intention as far as possible (*j*). But in applying the Rule against Perpetuities, the effect of the Rule is not allowed to influence the construction of the will, and it is now established that if the gift is to a class it cannot be severed (*k*).

If, however, the gift to the children is really original, and the gift to the grandchildren substitutional, the gift to the children is good (*l*). Thus, if a fund is bequeathed to the daughters of A. (a person living at the testator's death), with a proviso that if any of them die under the age of twenty-one, leaving issue, the share of the daughter so dying shall go to such of her children as attain twenty-one; here the gift to the daughters of A. is good, and if one of them is born after the testator's death and dies under twenty-one, leaving issue, the substitutional gift is clearly bad, and the original gift to the daughter is undisturbed. It seems also to follow that if a daughter of A., born in the testator's lifetime, dies under twenty-one, leaving children who attain twenty-one, the substitutional gift to those children will take effect. In *Goodier v. Johnson* (*m*), the testator directed his trustees, at a period which might possibly exceed the proper limits, to sell his real estate and divide the proceeds equally among the children of W. and M., "and the lawful issue of such of them as may be then dead, leaving issue," per stirpes. The trust for sale was bad (*n*), but the substantive gift of the property to the children of W. and M. was good, because, having regard to some peculiar clauses in the will, the Court held that the gift to the children was an original gift to them, with a substitutionary gift to their issue in certain events. "That will leave untouched the gift to the children who die without leaving issue, and if by rule of law the substitutionary gift in favour of the issue of any of the children cannot take effect, then the original gift to the children will take effect. The corpus is then effectually given, because it is given to a class to be ascertained within the limits of perpetuity, and to take

Original and substitutional gifts—some may be valid.

(*j*) Per Malins, V.-C., in *Re Moseley's Trusts*, L. R., 11 Eq. 499. See the decision of the same judge in *Smith v. Smith*, shortly reported in L. R., 5 Ch. 342. It was overruled by the C. A.

(*k*) *Pearks v. Moseley*, 5 App. Ca. 714. The older cases are, *Seaman v. Wood* (22 Bea. 591), *Webster v. Bodington* (26 Bea. 128), *Stuart v. Cockerell* (L. R., 5 Ch. 713), *Hale v. Hale* (3 Ch. D.

643), *Bentinck v. Portland* (7 Ch. D. 693).

(*l*) Gray on Perp., § 386. *Packer v. Scott*, 33 Bea. 511, may have been decided on this ground, but the accuracy of the decision seems doubtful.

(*m*) 18 Ch. D. 441.

(*n*) See *Goodier v. Edmunds*, [1893] 3 Ch. 455.

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a vested interest within those limits, subject to gifts over, which, if they are beyond the limits, fail, and leave the original gift unaffected" (o).

The question whether a gift is original or substitutional is discussed elsewhere (p).

Independent gifts.

Another difficult class of cases is where the question arises whether the testator has made an independent gift to each member of the class. Where he gives a fixed sum to each member of the class the gifts are separable, and will take effect or fail according to the event. Thus, in *Storrs v. Benbow* (q), where the testator bequeathed 500*l.* to each child that might be born to either of the children of either of his brothers, it was decided by Lord Cranworth that the gift was valid as to the children of nephews who were born in the testator's lifetime, and void as to the children of the other nephews. He said it was a mistake to compare the case with *Leake v. Robinson*. The legacy given to one of the former set of children could not be bad because there was a legacy given under a similar description to a person who would not be able to take because the gift was too remote.

Separable gifts.

Griffith v. Pownall.

And even where a fund is given among a number of unascertained persons, so that the share of each depends on the number of the class, yet if this number must be ascertained within the limits of the Rule against Perpetuities the gifts are separable. Thus, in *Griffith v. Pownall* (r), A. had a power to appoint among all the children of B., begotten and to be begotten, and their issue; and in default to the children equally. All the children that B. ever had (six in number) were born at the time of the creation of the power, and A. appointed that the share which each child of B., begotten and to be begotten, was entitled to in default of appointment, should be held in trust for that child for life, and after its death for its children. Sir L. Shadwell, V.-C., held the appointment valid. He said that, if the gift be of the bulk of the property amongst a set of persons collectively, some of whom are within the rule of law as to perpetuity, but the rest of them are not, the gift is void

(o) Per Cotton, L. J., 18 Ch. D., p. 448. See also *Speakman v. Speakman*, 8 Ha. 180; *Taylor v. Frobisher*, 5 De G. & Sm. 191; *Gooch v. Gooch*, 3 D. M. & G. 366; *Baldwin v. Rogers*, 3 D. M. & G. 649.

(p) Chap. XXXVI.

(q) 3 D. M. & G. 390; *Boughton v.*

Boughton, 1 H. L. C. 406; *Wilkinson v. Duncan*, 30 Bea. 111.

(r) 13 Sim. 393. The remarks on the cases of *Griffith v. Pownall*, *Greenwood v. Roberts*, *Catlin v. Brown*, *Wilson v. Wilson*, and *Knapping v. Tomlinson* are taken verbatim from the fourth edition of this work, by Mr. Vincent.

in toto. That in the case before him the gift was not of the bulk of the fund, but the testator merely directed how the share of each daughter should go after her death. If there had been a seventh or eighth daughter, the gift would have been bad as to their children ; nevertheless, the gift to the elder children would have been good.

The distinction was disregarded in *Greenwood v. Roberts* (s), *Greenwood v. Roberts, contra.* where the testator bequeathed personal property upon trust, among other things, to pay his brother Thomas an annuity of 200*l.* a year, and after his decease to pay the same to and amongst *such of his children as might be then living* in equal shares during their respective lives, and at the decease of any of them, he ordered that so much of the principal or capital stock as had been adequate to the payment of the annuity to which the child so dying had been entitled during his or her life, should be sold, and the produce thereof divided equally amongst the children of him or her so dying, when they should severally attain the age of twenty-one years ; he gave them vested interests therein ; and further directed that if any of the children of his brother Thomas should at his (Thomas's) death be dead and have left issue, such issue should be entitled among them to the same sum as they would eventually have been entitled to had their parents survived Thomas. Thomas survived the testator, and left a son Richard, who was alive at the death of the testator ; but it was held by Sir J. Romilly, M. R., that the children of Richard could not take. He said, " The gift is, in the first instance, distinctly to a class, namely, to such of the children of his brother Thomas as may be then living, and Richard takes a life interest in that bequest solely in his character of one of those children. The gift over after the decease of those children is not confined to such of the children of his brother as should be alive at the testator's decease, and nothing points to Richard more than any other child of Thomas, who might be born after the death of the testator. I am of opinion that I must, upon the expression used by the testator, treat ' the children of him or her so dying ' as another class, and that I cannot, because the testator has directed that on the death of Thomas the fund is to be equally divided between such of his children as shall be then alive, treat the bequest as if it had been a separate set of bequests to each of such children as eventually constituted the class ; and therefore, in my opinion, he has given this annuity to a class to be ascertained at a future period, and after the death of each of the persons constituting that class *to another class*, some of whom are prohibited by law from taking, by reason of the Rule against Perpetuities. If I

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am correct in this view, the rule in *Leake v. Robinson* must apply. I am of opinion that Richard is neither mentioned nor individually described in the will as a person taking (to use Lord Cottenham's expression, in *Roberts v. Roberts* (t)) a separate and individual portion of the annuity bequeathed to Thomas, but that he takes it as one of a class, and that his children intended by the testator to take after his decease, are persons forming part of a class, some of whom are precluded from taking, and consequently that the gift over after his decease is void."

Remarks on
Greenwood v.
Roberts.

But *Leake v. Robinson* appears not to justify the use here made of the word "class." The grandchildren were not all of one class ; there were as many separate classes of grandchildren as there were children of Thomas, and although to save repetition the gifts to all these classes was included in one set of words, the gift to each of them was wholly independent of the gifts to the others, its amount having been finally ascertained at the death of Thomas, when the number of his children who survived him or predeceased him leaving issue was known. A number of persons are popularly said to form a class when they can be designated by some general name, as "children," "grandchildren," "nephews ;" but in legal language the question whether a gift is one to a class depends not upon these considerations, but upon the mode of gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons. Thus, a bequest of 1000*l.* to the children of A., the eldest child to take one moiety, the younger children the other moiety, is, in ordinary language, a gift to one class of persons, namely, children ; in the legal acceptance of the words it is a gift partly to an individual, namely, the eldest child of A., and partly to a class, namely, his younger children. On the other hand, a gift to A., B., and C., and the children of D., share and share alike, may, legally speaking, be a gift to a class (u), but yet these persons

What consti-
tutes a gift
to a class,

(t) 2 Phill. 534.

(u) " *Porter v. Fox*, 6 Sim. 485. See also *Clark v. Phillips*, 17 Jur. 886 ; *Re Stanhope's Trusts*, 27 Beav. 201 ; *Knap- ping v. Tomlinson*, 34 L. J. Ch. 7 ; *Aspinall v. Duckworth*, 35 Beav. 307. *Re Ann Wood's Will*, 31 Beav. 323 (as to the lapsed share), and *Drakeford v. Drakeford*, 33 Beav. 46, are contra : sed qu., and as to the last-named case, see 9 Jur. N. S., Pt. 2, 301. In *Re Chaplin's*

Trusts, 33 L. J. Ch. 183, it was admitted by Wood, V.-C., that naming some of a class did not make it less a class ; yet he held that the named person having died before the testator, his share lapsed ; which seems contradictory." As mentioned above (p. 334), the remarks in the text and the foregoing note are an addition by Mr. Jarman's editors (see the fourth edition of this work, by Mr. Vincent, p. 268). In *Re Moss* ([1899]

would not in the ordinary acceptation of the term form a class. Moreover, under a gift to a class, if any of the class take, they take the whole; the subject of gift can never, therefore, be partly disposed of and partly undisposed of; this shews that the grandchildren in *Greenwood v. Roberts* did not take as a class, for supposing the gift valid, the children of one child of Thomas would have taken part of the fund, while another part would have been undisposed of if another child of Thomas had no children (v).

The principle of *Griffith v. Pownall* prevailed in *Cattlin v. Brown* (w), where a testator entitled to the equity of redemption in lands, subject to a mortgage in fee, devised them to T. B. C. for life, with remainder to all and every his child and children during their natural lives if more than one; and after the decease of any or either of such child or children then the part or share of him, her or them so dying was given to his, her or their child or children lawfully begotten or to be begotten, and to his, her or their heirs as tenants in common. T. B. C. left several children, some born in the testator's lifetime, some after his death; and it was held by Sir W. P. Wood, V.-C., that the shares of the children born in the lifetime of the testator were well given to their children though the gift to the other grandchildren failed. He thought *Greenwood v. Roberts* was distinguishable because "the children of the brother who were born and in esse at the death of the testator, might all have been dead at the death of the brother, and the case, therefore, fell within the rule in *Leake v. Robinson*. It was a gift to a class, and all the members of the class might be persons without the limits. The children born at the testator's death might take no interest whatever. On this ground the decision in *Greenwood v. Roberts* was no doubt perfectly right." And he intimated that the case before him might have been similar if the devise had been to the sons of T. B. C. living at his decease, with remainder to their sons in fee.

Cattlin v. Brown.
Gift held void in part only.

Explanation of *Greenwood v. Roberts* by Wood, V.-C.

2 Ch. at p. 317) they were attributed by Lindley, L. J., to Mr. Jarman. As to *Drakeford v. Drakeford*, see post, p. 435. The principle on which *Re Chaplin's Trusts* was decided is that a gift to a class is not the less a class gift because some members of that class are named: thus, a gift "to my son George and all sons of mine who may hereafter be born" is a good class gift. But a gift to a class and an individual who is not a member of that class, is not *primâ facie* a class gift, though it may have the same effect as a gift to a class if the testator expresses an intention to that effect (*Kingsbury v.*

Walter, [1901] A. C. 187). The question is discussed in Chap. XIII., in connection with the doctrine of lapse. The decision in *Re Chaplin's Trusts* was followed by Jessel, M. R., in *Re Allen* (or *Re Atter*), [1881] W. N. 6, 44 L. T. 240, 29 W. R. 480; and would apparently have been followed by Kay, J., in *Re Featherstone's Trusts*, 22 Ch. D. 111; and by Chitty, J., in *Re Jackson*, 25 Ch. D. 162, if the language of the wills had not been different. See also *Re Mervin*, [1891] 3 Ch. 197.

(v) *Greenwood v. Roberts* is also discussed in Gray, Perp. § 391.

(w) 11 Hare, 372. See also *Vanderplank v. King*, 3 Hare, 1.

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Remarks thereon by Kindersley, V.-C.	<p>Sir R. Kindersley said (x) he was unable to see the distinction here referred to: it appeared to him that in <i>Cattlin v. Brown</i> precisely the same observation would arise, and that it would be equally true that all the children of T. B. C. that were born and in esse at the death of the testator might die in the lifetime of T. B. C. He did not see how the observation or the ground of distinction applied; and it struck him that the same reason which was given in support of <i>Greenwood v. Roberts</i> would have required <i>Cattlin v. Brown</i> to be decided in the same way. It must also be observed</p>
Explanation of <i>Greenwood</i> v. <i>Roberts</i> by Romilly, M.R.	<p>that the M. R. himself declared (y) that the gift to grandchildren in the latter case would undoubtedly have been good if the class was to be ascertained at the death of Thomas; and he referred his decision to the clause which substituted the issue of any child of Thomas who should die before Thomas, in the place and to take the share of their parent, and to the fact that such issue took no vested interests until they attained twenty-one, so that if the children of Thomas who were living at the date of the will died before Thomas and left children who died under twenty-one leaving remoter issue, it would not be until these remoter issue attained twenty-one that the class would be ascertained, or the number of shares ascertained into which the fund would be divisible, and this would be too remote. This was a new ground. It was not taken in the case itself; doubtless because the substitution clause said nothing about the age of twenty-one. But if this clause is to be understood as so referring to the previous gift to grandchildren in remainder, as to import into itself the mention of that age, so also must it be deemed to import the declaration that the interests given were "vested." Besides, the intermediate interest was given for the benefit of the grandchildren during minority.</p>
Remarks thereon.	<p>The distinction already noticed as having been taken by Sir W. Wood regarding <i>Greenwood v. Roberts</i>, was disregarded by him in <i>Wilson v. Wilson</i> (z). The bequest there was of a sum of money upon trust to pay the income to the testator's wife during her life, and after her death in trust for the then present and future children of I. L. <i>who should be living at the death of the testator's wife</i>, and who should attain the age of twenty-one or marry, in equal shares; and the testator directed that the shares of each daughter should be settled upon trust for her for life, and after her death for her children. Sir W. Wood decided that the trust in favour of a child of a daughter</p>
<i>Wilson v. Wilson.</i> Gift held void in part only.	

¹ (x) *Knapping v. Tomlinson*, 34 L. J. Beav. 136.

Ch. 3.

(z) 4 Jur. N. S. 1076, 28 L. J. Ch. 95.

(y) See *Webster v. Boddington*, 26

who was living at the death of the testator was valid. He said, "I can conceive no ground why in respect of a child of I. L. in esse at the time of the testator's decease there should not be a direction that her share should be settled on her children. In *Porter v Fox* (a) and that class of cases the difficulty arises from there being a gift to a class of persons some of whom can take whilst others cannot. In these cases it cannot be ascertained what is the share of each, and hence the gift is held void as to all. Here, however, the children of each child of I. L. form a separate class, and the share of each class is separately ascertainable."

**Cattlin v. Brown* was followed by Sir R. Kindersley in *Knapping v. Tomlinson* (b), where the devise was identical in its terms with that in the former case. The V.-C. reviewed all the cases, and expressed his entire concurrence with Sir W. Wood's decision, Sir J. Romilly having also declared (c) his approval of that decision, and having referred his own decision in *Greenwood v. Roberts* to grounds which at all events remove it from apparent opposition to the other authorities (d), it must be taken as settled that where the shares of all the separate stocks can be ascertained within legal limits, as in those authorities, the rule in *Leake v. Robinson* is not applicable so as to defeat limitations, otherwise valid, of the separate shares.

Knapping v. Tomlinson, in part only.

Accordingly, in *Re Russell* (e), where a testator gave his residuary estate in trust after the death of M. and her husband, for all the daughters of M. who should attain twenty-one or marry under that age, with a proviso that the share of any daughter should be held upon trust for her for life, and after her death upon similar trusts for her children as were thereinbefore provided for the children of M.: it was held that the proviso for settlement of the shares was applicable to each share separately, and that although it would have been void for remoteness in the case of daughters of M. born after the testator, it was valid in the case of daughters born in his lifetime.

Re Russell.

"Where the testator has combined with the remote class a living person, in such a manner as to constitute him a member of the class, the gift to him cannot be distinguished from, and therefore shares the fate of, the gift to the other intended objects, with which it

Gift to a class including a named person.

(a) 6 Sim. 485.

(b) 34 L. J. Ch. 3, 10 Jur. N. S. 626.

(c) In *Webster v. Boddington*, 26 Beav. 137, 138.

(d) *Arnold v. Congreve*, 1 R. & My.

205 (where the point was not taken), is overruled.

(e) [1895] 2 Ch. 698. See *Re Fernley's Trusts*, [1902] 1 Ch. 543, post, p. 364.

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stands blended and associated" (f). This conclusion was questioned by a learned judge (g), who thought the gift to the living person, when associated with a gift to a "class" (all to take as tenants in common), ought not to fail any more than it would if it had been associated with a gift to other named individuals to take with him as tenants in common. But the conclusion seems inevitable: for in the former case the share of the living person could not be ascertained but by reference to the number of members ultimately included in the class; and this could not be known within due limits. This it was that made the living person one of the class, subject to all the conditions that appertained to that character. *Leake v. Robinson* shows that it is not the description of the legatees as children or grandchildren that constitutes them a class, but the mode and conditions of the gift. Sir W. Grant there observed (h) that, supposing the distinction made (as was there attempted) between persons capable and persons incapable, there was still the difficulty of adjusting the proportions in which the capable children were to take, and in determining the manner and the period of ascertaining those proportions (i).

Whether the result would be the same if the gift were in joint tenancy, does not seem to have been decided. In the third edition of this work (by Messrs. Wolstenholme and Vincent) (j) the opinion was expressed that in such a case "the result would have been in accordance with the learned judge's [Stuart, V.-C.] dictum: because the gift, so far as it was to others than the individual, being void, the whole fund would accrue to the individual."

As to
provisions
for grand-
children.

Mr. Jarman remarks (k) that "a testator is in less danger of transgressing the perpetuity rule, whilst providing for his own children and grandchildren, than when the objects of his bounty are the children and grandchildren of another; since, in the former case, he has only to avoid protracting the vesting of the grandchildren's shares beyond their ages of twenty-one years, and then the fact of the gift extending to after-born grandchildren would not

(f) Thus Mr. Jarman, in the first edition of this work, p. 233, citing *Porter v. Fox*, 6 Sim. 485. See *Re Mervin*, [1891] 3 Ch. 197.

(g) Stuart, V.-C., in *James v. Lord Wynford*, 1 Sm. & Giff. 58, 59.

(h) 2 Mer. 390.

(i) The question might have been raised in *Webster v. Boddington*, 26 Bea. 128, but the point seems to have been taken for granted. As to gifts to

classes, see further, Chap. XIII.

(j) P. 252. Mr. Vincent seems subsequently to have entertained some doubt on the point, for in the fourth edition the passage above quoted is omitted, and there is substituted (in a footnote) the question: "If the gift were in joint tenancy, would the whole fund accrue to the individual?" The present editor shares this doubt.

(k) First edition, p. 233.

invalidate it, because all the children of the testator must be in esse at his decease, and *their* children must be born in *their* lifetime, so that they necessarily come into existence during a life in being. On the other hand, a gift embracing the whole range of the unborn grandchildren of another living person would be clearly void, though the shares should be made to vest at majority or even at birth, for the grandfather might have children born after the testator's decease, and as the gift would extend to the children of such after-born children, it would be absolutely void for remoteness, and that, too, according to the principle already laid down, without regard to the fact of there being any such child or not."

"It is clear," as Mr. Jarman also remarks (*kk*), "that, in order to render a gift to a class of persons valid, the Court will not depart from the established rule of construction, which fixes its range of objects; for though it is probable that the testator, if interrogated on the point, would have consented to restrict the class for the purpose of bringing it within due limits, yet, as the will intimates no such intention, its judicial expositor is not warranted in so dealing with its contents.

Rules of construction not to be strained to render gift valid.

"As in *Jee v. Audley* (*l*), where a testator bequeathed 1000*l.* to be placed out at interest, which interest he gave to his wife during her life; and at her death he gave the 1000*l.* to his niece Mary Hall, and the issue of her body lawfully begotten and to be begotten; and in default of such issue, he gave it to be equally divided between the daughters then living of John Jee and Elizabeth Jee his wife. It was objected that the limitation to the daughters of John and Elizabeth Jee was void, as being too remote, being to take effect on a general failure of issue of Mary Hall, and was not confined to the daughters living at the death of the testator. On the other side, it was said that, though the late cases had decided that, on a gift to children generally, such children as should be living at the time of the distribution of the fund would be let in, yet it would be very hard to adhere to such a rule of construction so rigidly as to defeat the evident intention of the testator in this case, especially as there was no real possibility of J. and E. Jee having children after the testator's death, they being then seventy years old; and

Jee v. Audley.

(*kk*) First edition, p. 253.
(*l*) 1 Cox, 324. See also *Re Sayer's Trusts*, L. R., 6 Eq. 319; *Re Dawson*, 39 Ch. D. 155. Malins, V.-C., in *Cooper v. Laroche*, 17 Ch. D. 368, 373, held that he could have regard to the fact that a woman was past the age of child-bearing

in determining whether or not a gift was void for remoteness. But the V.-C.'s decision in that case, so far as regards this point, is contrary both to principle and to the current of authority, and not to be relied upon. See *Re Dawson*, 39 Ch. D. at p. 163.

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if there were two ways of construing words, that should be adopted which would give effect to the disposition made by the testator; that the cases which had decided that after-born children should take, proceeded on the implied intention of the testator, and never meant to give effect to words which would totally defeat such intention. But Sir Lloyd Keynon, M. R., observed that it had been decided by several cases, that, in bequests to children, all those born before the interest vested in possession were entitled." It followed that the limitation in the will was void in its creation, and he declined to vary this construction, or to assume that John and Elizabeth would not have any more children, in order to give validity to the limitation.

Gift to unborn person answering a particular description.

(F) GIFTS TO CONTINGENT PERSONS—LIMITATIONS TO A SERIES.—

As Mr. Jarman points out (*m*), "The doctrine that the validity of a gift is to be tried by possible, not actual events, is, of course, applicable no less to gifts to individuals than to gifts to classes. If, therefore, the devise or bequest be in favour of an unborn person, who may not answer the required description within a life and twenty-one years, it will be void, although a person should happen to answer the description within such period. Thus, if a testator give real or personal estate to an unborn person, who shall thereafter happen to acquire some personal qualification, which is attainable at *any* period of life, and is not *necessarily* confined to minority, as in the case of a gift to the first son of A. who shall obtain a commission in the Army, take a degree at the university, or marry, it is conceived that the gift would be void, even though A. should happen to have a son who should answer the required qualification before the age of twenty-one."

Thus, in *Proctor v. Bishop of Bath and Wells* (*n*), there was a devise in fee to the first or other son of A. that should be bred a clergyman and be in holy orders, but in case A. should have no such son. then to B. in fee. A. died without ever having had a son, and it was held that the gift to B. was void.

So in *Ibbetson v. Ibbetson* (*o*), the testator bequeathed chattels to the first tenant in tail of the age of twenty-one years, who should be in possession of a certain mansion house: as there might be successive tenancies in tail without any tenant in tail attaining twenty-one, the bequest might remain suspended for an indefinite number of years, and was, therefore, void for remoteness.

(*m*) First edition, p. 233.

(*n*) 2 H. Bl. 358.

(*o*) 10 Sim. 495, 5 My. & C. 26. Other

cases on settled chattels are referred to post, p. 347, and in Chapter XX.

Ker v. Lord Dungannon (p), *Lord Dungannon v. Smith* (q), and *Wainman v. Field* (r), were decided on the same principle. CHAPTER X.

Questions of this kind frequently arise where property is attempted to be limited to a series of persons answering a certain description. In such cases, as Mr. Jarman remarks (s), "there is no principle of law preventing a testator from so framing and moulding his disposition, as to make its validity depend on subsequent events; or, in other words, from availing himself of the course of circumstances posterior to the making of his will, in order to get as wide a range of postponement as possible; for instance, he may convert the intended estate tail of a person then unborn, into an estate for life, in case of his happening to come in esse in his (the testator's) lifetime. In all cases of failure under circumstances of this nature, the deficiency is one not of power but of expression; and the question in every instance is, whether the testator had clearly shewn an intention to take the most ample range or period of postponement, which subsequent circumstances admit of. A point of this kind was much canvassed under the will of Lord Vere (t), who bequeathed to trustees all his household goods, furniture, pictures, books, linen, &c., upon trust to permit his wife to have the use of them during her life, and, upon her death, to permit his son A. B. to have the use of the same goods, &c., for his life, and, upon the decease of the

Limitation
to a series.

Testator
may mould
his disposition
according
to subsequent
events.

*Tollemache v.
Earl of
Coventry.*

(p) 1 Dr. & War. 509.

(q) 12 Cl. & F. 546. This case is stated below with reference to the question of separable limitations.

(r) Kay, 507. See also *Harding v. Nott*, 7 E. & B. 650; *Patching v. Barnett*, 51 L. J. Ch. 74 (gift to youngest grandson of A., living at decease of testator's wife, who should attain twenty-five).

(s) First edition, p. 234.

(t) "*Lord Deerhurst v. Duke of St. Albans*, 5 Mad. 232; s. c. in D. P. nom. *Tollemache v. Earl of Coventry*, 2 Cl. & Fin. 611, 8 Bli. N. S. 547. Compare this case with *Tregonwell v. Sydenham*, 3 Dow, 194, where a testator, after devising lands (subject to certain terms for years which he created for the purposes thereafter mentioned) to A. for life, remainder to his first and other sons in tail male, with remainder to the eldest daughter of A. in tail general, with remainders over, directed that when a certain sum of money should be

raised out of the rents of his lands under a term of sixty years,* the same should be settled to the use for life of the person who happened then to be entitled in possession under the limitations in his will, with remainder (in effect) to his issue in strict settlement.† When the time arrived for laying out the money, it happened that the person entitled in possession under the limitation in question was not in esse at the testator's death, and therefore could not be made tenant for life with remainder to his issue, so that the trust for laying out the money had failed in event; but the grounds on which Lord Eldon rested the decision of the House shew, that if the person entitled in possession had happened to be a person in esse at the testator's death, the trust for laying out the money would in his Lordship's opinion have been legal." [Notes by Mr. Jarman.]

* "This was prior to the stat. 40 Geo. 3, c. 98, stated post [Chap. XI]."

† "This was the effect, though not the precise language."

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Devise to a person who *might* not answer a certain qualification within allowed period, held void, irrespectively of event.

survivor of his (the testator's) wife and son, in trust for such person as should *from time to time* be Lord Vere, it being his will that the goods, &c., after the decease of his wife, should from time to time go and be held and enjoyed with the title of the family, as far as the rules of law and equity would permit. At the death of the testator, the title of Lord Vere descended upon his son, the legatee for life, upon whose decease it descended to his son (the testator's grandson, who was also living at the death of the testator), and, upon the death of the grandson, it descended to the testator's great grandson, who was born after the death of the testator. The chief struggle was between the personal representatives of the grandson and those of the great grandson. As the former was born in the testator's lifetime, it was clear, that he *might* have been made legatee for life, with remainder absolutely to the person next in succession, and the question, therefore, was, whether the will authorised such a construction. Sir J. Leach, V.-C., before whom the case was originally brought, decided in the affirmative." His Honour said that by the rules of law and equity every person living at the death of the testator, who should become Lord Vere, might be limited to the use and enjoyment only. The son and grandson of the testator were living at his death, and both, therefore, were limited to the use and enjoyment only, but the child who succeeded the grandson as Lord Vere and Duke of St. Albans, was not living at the death of the testator, and could not, therefore, by the rules of law and equity, be limited to the use and enjoyment only; he took, therefore, an absolute interest, which was vested in his personal representative.

This judgment was affirmed by Lord Lyndhurst, but was reversed in D. P. on the advice of Lord Brougham, C. He admitted that the testator might lawfully have limited the chattels to go according to the decree of the V.-C. if he had used the proper words; but first he said there was no authority for putting that construction on the words used; and secondly he took a new objection, founded on the bequest being an attempted annexation of chattels to an honour; which he described as an attempt to create a new species of limitation in succession, unknown to the law, to spring up with the person, that is, to the Lords Vere whoever they might be; and he mentioned certain contingencies, especially a possible abeyance of the honour, which, in his opinion, shewed that there might be no one to answer that description within the allowed period; and although none of those contingencies had happened, the soundness of the limitations could not depend on the event.

Lord St. Leonards has criticised this judgment (*u*), and has adduced authorities to shew that chattels may be limited to go along with an honour; and with regard to the question of construction (which is of the greatest interest here), he distinguishes between a compendious limitation to several persons successively, where the legal limit can clearly be marked, as in Lord Vere's will, and a limitation like that in *Lord Dungannon v. Smith*, where only one person was to take, and it depended on the event whether the person who lived to answer the description would or would not come in esse within the legal period. He thought *Tregonwell v. Sydenham* a grave authority for giving effect to such a limitation as that in Lord Vere's will as far as the events would allow, keeping within the legal boundary.

There has been much discussion as to the ultimate decision in *Tollemache v. Coventry*. According to some of the common law judges in *Lord Dungannon v. Smith* (*v*), although all that was decided in *Tollemache v. Coventry* was that the great grandson did not take, yet the reasoning on which this decision proceeded was equally unfavourable to the claim of the grandson, and undoubtedly this would have been the logical result of Lord Brougham's reasoning. But he did not go so far, and it seems clear from the concluding words of his judgment, and from the headnote, that the decision was in favour of the grandson. This is now generally accepted as the result of the case (*w*).

Point decided in *Tollemache v. Coventry*.

The principle to be deduced from these authorities is, that where there is a gift to a series of persons answering a certain description, it is good so far as concerns the first member of that series, if he must take on the death of a living person, although the gift may be bad as regards the second and all the later members of the series, because otherwise they might possibly take beyond the limits fixed by the Rule against Perpetuities (*x*).

Result of the authorities.

It will, of course, be remembered that according to the doctrine settled by recent decisions (*y*), a child en ventre sa mère is considered a living person, and consequently if there is a devise upon trust for each son of A. successively for life, with remainder to his sons in

Children ventre.

(*u*) Law of Prop. 336; Gray on Perp. § 401 seq. See the observations of Hall, V.-C., in *Re Roberts*, 19 Ch. D. 525. See also *Re Viscount Exmouth*, 23 Ch. D. 158.

(*v*) 12 Cl. & F. 546.

(*w*) *Re Viscount Exmouth*, 23 Ch. D.

158; *Re Johnston*, 26 Ch. D. 538; *Re Hill*, [1902] 1 Ch. 807.

(*x*) Gray, Perp. § 406 seq. As to the nature of the interest taken by the first member of the series, see Chap. XXXIII.

(*y*) See post, Chap. XLII.

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tail, and a son of A. is en ventre sa mère at the testator's death, then if this son becomes tenant for life by the failure of the prior limitations, the limitations after his life estate are valid, although it may be to his interest to contend that they are void under the Rule against Perpetuities (z).

Shifting
clause or
gift over
on breach
of condition.

It is hardly necessary to say that a shifting clause, or a gift over on breach of a condition (e.g., a name and arms clause) is void unless it must necessarily take effect within the period allowed by the Rule against Perpetuities (a), or unless it is annexed to an estate tail (b).

In *Bacon v. Proctor* (c), land was devised in trust to pay the rents to such person of the testator's own name as for the time being should succeed to his title of a baronet, to the end that his said estate might be continued in his name, blood, and family, and be enjoyed and go along with his title, so long as the rules of law and equity should permit: it was held that the testator's eldest son took a life interest in the estate.

The case of *Mackworth v. Hinxman* (d) has been already referred to. The decision is questioned by Lord St. Leonards (e) and by Mr. Gray (f).

Gift to
survivor
of class.

It is clear that a gift to the survivor of a class of persons is bad if he will not necessarily be ascertained within the period allowed by the Rule, although a gift to the whole class might be good. Thus, if property is given upon trust for A. for life, and after his death upon trust for his children during their lives, and after the death of all the children, except one, upon trust for that one absolutely, this ultimate gift is bad for remoteness (g). Cases of this kind must be distinguished from those in which successive life interests are given to a class of unborn persons. These are discussed in the next section.

A gift of property to persons answering a certain description at the testator's death, is free from objection on the score of

(z) *Re Wilmer's Trusts*, [1903] 2 Ch. 411.

(a) *Bennett v. Bennett*, 2 Dr. & Sm. at p. 276. The introduction of these executory limitations, of a kind unknown to the common law, was the reason which led to the establishment of the Rule against Perpetuities in its present form: ante, p. 296.

(b) Ante, p. 321. See further as to

shifting clauses, post, Chap. XXXVIII.

(c) T. & R. 31.

(d) 2 Keen, 658.

(e) Law of Property, 341.

(f) Perp. § 399, n.

(g) *Garland v. Brown*, 10 L. T. 292; *Courtier v. Oram*, 21 Bea. 91. See the remarks on *Re Ashforth*, [1905] 1 Ch. 535, post, p. 372.

remoteness, and sometimes a gift which suggests an intention on the part of the testator to give property to persons in succession has been held to be a gift to individuals living at his death (*h*).

In *Re Roberts* (*i*), the testatrix bequeathed a fund upon trust for her brother J. R. G., for life, and after his death for his son, A. R. G., for life, and after the decease of both of them, upon trust to pay the income "for life unto any immediate or direct descendants of my said brother and nephew who shall bear the name of R. G. only, and from and after his or her decease, or in case of failure of any such immediate or direct descendant of my said brother or nephew who shall bear the name of R. G. only," then upon trust for certain charities. Hall, V.-C., thought that the trust was intended to include a series of persons answering the description of descendants, and was, therefore, void for remoteness. The Court of Appeal, however, held that the gift after the death of the brother and nephew was to a class consisting of their descendants then living and bearing the name of R. G. for their lives, and was, consequently, a valid gift.

The cases of *Brett v. Sawbridge* (*j*), and *Pelham v. Gregory* (*k*), are referred to in a subsequent part of this work.

Where freehold lands are limited in strict settlement, and leasehold or other personal property is vested in trustees, upon corresponding trusts, but so as not to vest absolutely in any tenant in tail till he shall attain the age of twenty-one years, but on his death under age to devolve as the freeholds, this trust, so far as it is limited in favour of tenants in tail, is void, since by the death of successive tenants in tail under age and leaving issue, the vesting of the leaseholds might be deferred beyond the period allowed by law. Care should therefore be taken that the vesting is only deferred till some tenant in tail by purchase attains the age of twenty-one years (*l*).

Vesting of personal property given in strict settlement must not be deferred till any tenant in tail attains twenty-one.

(*h*) *Comm. of Donations v. De Clifford*, 1 Dr. & War. 245; *Lidley v. Hey*, 1 Ha. 580; ante, p. 219.

(*i*) 19 Ch. D. 520.

(*j*) 3 Bro. P. C. 141.

(*k*) 3 Bro. P. C. 204. See post, Chap. XXXIII.

(*l*) This is the common form, 3 Davidson's Prec. 602, 627. If the clause stops short with the proviso against absolute vesting, and omits the concluding gift over, remoteness is avoided without help of the words "by purchase." For then there is no gift of the personalty except in the primary trust, and under this trust it vests

absolutely in the first tenant in tail by purchase: and the proviso, being but an accessory to that, must be construed also to relate only to tenants in tail by purchase: *Christie v. Gosling*, L. R., 1 H. L. 279; *Martelli v. Holloway*, L. R., 5 H. L. 532. (It should be mentioned that this somewhat forced construction was not approved by Lord St. Leonards, L. R., 1 H. L. at p. 293, or, apparently, by Lord Cairns, L. R., 5 H. L. at p. 103). According to this construction, however, the intention to keep the two species of property together as long as possible fails. The concluding gift over is required to

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The authorities on this subject are discussed in a subsequent chapter (*m*).

Gift to
unborn person
for life valid.

(G) GIFTS TO UNBORN PERSONS FOR LIFE, AND SUBSEQUENT LIMITATIONS (*n*).—As Mr. Jarman points out (*o*), “If the objects of a future gift are within the line prescribed by the Rule against Perpetuities, of course it is immaterial what is the nature of the interest which such gift confers (*p*). It would be very absurd that persons should be competent to take an estate in fee in land, or an absolute interest in personalty, and nevertheless be incapable of taking a temporary or terminable interest (for the larger includes the less), and yet it would not be difficult to cite dicta (*q*), nay, even to adduce a decision (*r*), propounding the doctrine that a life interest cannot be given to an unborn person.” The fallacy probably arose, as Mr. Jarman suggests, from the terms in which the rule in *Whitby v. Mitchell* (*s*) has been often laid down, namely, that you cannot give an estate for life in land to an unborn person, with remainder to his issue, which has been read as two distinct propositions, the one affirming the invalidity of a limitation for life to an unborn person, and the other the invalidity of a limitation to the issue; though in fact, all that is meant to be averred is, that a limitation of land by way of remainder to the children or issue of an unborn person, following a gift for life to such unborn person, is bad, which it clearly is, under the rule which has been already considered (*t*).

effectuate this intention, and as this gift contains trusts for tenants in tail taking by descent, the rule of construction established in *Christie v. Gosling* is inapplicable, and the words “by purchase” are needed to obviate remoteness; see *Gosling v. Gosling*, 1 De G. J. & S. 16. In *Harrington v. Harrington*, L. R., 5 H. L. 87, where chattels were directed to go with settled land “so far as the rules of law or equity would permit,” the person next in succession became entitled to the chattels, whether the trust was effectual or whether it was void for remoteness, and the question as to the effect of those words was not decided: see Chap. XXXIII.

(*m*) Chap. XXXIII. sect. 42 of the Conveyancing Act, 1881, which empowers trustees of land to which an infant is entitled in possession to accumulate the surplus rents, applies to tenants in tail by descent.

(*n*) As to children en ventre, see ante, p. 298.

(*o*) First edition, p. 239.

(*p*) *Cotton v. Heath*, 1 Roll. Ab. 612,

pl. 3; *Marlborough v. Godolphin*, 1 Ed. 415; *Doe d. Tooley v. Gunniss*, 4 Taunt. 313; *Doe d. Liversage v. Vaughan*, 1 D. & Ry. 52, 5 B. & Ald. 464; *Ashley v. Ashley*, 6 Sim. 358 (cross remainders between unborn persons for life); *Denn v. Page*, 3 T. R. 87, n., 11 East, 603; *Hay v. Earl of Coventry*, 3 T. R. 83; *Foster v. Romney*, 11 East, 594; *Bennett v. Lowe*, 5 M. & Pay. 485, 7 Bing. 535; *Routledge v. Dorrit*, 2 Ves. jun. 366; *Burley v. Evelyn*, 16 Sim. 290; *Hampton v. Holman*, 5 Ch. D. 183; and see *Fearne*, C. R. 503. See, however, the criticism of Malins, V.-C., in *Stuart v. Cockerall*, L. R., 7 Eq. at p. 370, on the decision of Shadwell, V.-C., in *Ashley v. Ashley*, sup. as to cross remainders for life to unborn persons.

(*q*) *Deerhurst v. St. Albans*, 5 Madd. at p. 278.

(*r*) *Hayes v. Hayes*, 4 Russ. 311; see as to this case, 6 Hare, 250, 1 Coll. 37, 5 Ch. D. 188.

(*s*) See above, p. 284.

(*t*) See above, p. 285.

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As to gifts in remainder expectant on estate for life to unborn person, generally.

“As a gift for life to an unborn person is valid, so it is clear is a remainder expectant on such gift, provided it be made to take effect in favour of persons who are competent objects of gift (*u*); though here also a fallacy prevails; for it is not uncommon to find it stated in unqualified terms, that, though you may give a life interest to an unborn person, every ulterior gift is necessarily and absolutely void; and some countenance to this doctrine is to be found in the judgment, as reported, of an able judge (*v*), though the adjudication itself, rightly considered, lends no support to any such doctrine, as the ulterior gift, which was there pronounced to be void, was nothing more than a declaration that the property should go according to the Statute of Distribution; so that the claim of the next of kin, who was held to be entitled, was perfectly consistent with the will, unless, indeed, it applied to the next of kin at the death of the unborn legatee for life, which would have been clearly void, as embracing persons who would not have been ascertainable until more than twenty-one years after a life in being; but for this construction there seems to have been no ground” (*w*).

And as a gift to an unborn person for life is good, so the gift of a life interest to an unborn person, determinable on a certain event happening during his lifetime, is good, although the event may not happen within the period of a life in being and twenty-one years afterwards (*x*).

It is clear that successive life interests may be given to a number of unborn persons, provided they vest within the period allowed by the Rule: as in the case of a gift to A. for life and then to his children successively for their lives; here all the children living at A.'s death take vested interests, although the time of their enjoyment is uncertain (*y*). For the same reason, cross-remainders for life can be given to unborn persons (*z*).

Successive or cross life interests to unborn persons.

A trust for the testator's brothers for their lives, and then for the benefit of their children, from year to year, “as the law admits,”

(*u*) *Routledge v. Dorril*, 2 Ves. jun. 366; *Evans v. Walker*, 3 Ch. D. 211; *Wainwright v. Miller*, [1897] 2 Ch. 255; *Re Roberts*, 19 Ch. D. 520.

(*v*) See *Cooke v. Bowler*, 2 Kee. 54.

(*w*) Mr. Jarman, in the first edition of this work, p. 241.

(*x*) *Wainwright v. Miller*, [1897] 2 Ch. 255, following the dicta of Knight Bruce, V.-C., in *Boughton v. James*, 1 Coll. C. C. 26, and distinguishing *Hodgson v. Halford*, 11 Ch. D. 959.

(*y*) *Gooch v. Gooch*, 3 D. M. & G. 366; *Garland v. Brown*, 10 L. T. 292; *Re Hargreaves*, 43 Ch. D. 401; *Re*

Ashforth, [1905] 1 Ch. 535. The decision in *Whitby v. Von Luedecke*, [1906] 1 Ch. 783, seems erroneous, being inconsistent with the doctrine laid down by Lord Cranworth, C., in *Gooch v. Gooch* (3 D. M. & G. p. 383), that a gift to unborn children for life, with benefit of survivorship among them, is “a perfectly good trust.” The question whether the gift to the survivor was good, being a contingent remainder, was not argued.

(*z*) *Ashley v. Ashley*, 6 Sim. 358; ante, note (*p*); as to this case, see Gray, § 207.

CHAPTER X. was held to cease twenty-one years after the decease of the surviving brother (x).

But if the ultimate gift is to a person, or class of persons, who cannot be ascertained within the period allowed by the Rule, it is void for remoteness (y).

It was at one time supposed that a gift of this kind would be good, if the intervening interests could be destroyed by alienation or release. Thus, in *Avern v. Lloyd* (z), where personalty was bequeathed to the issue of A., a living person, share and share alike for their lives, and for the survivors and survivor, and after the decease of the survivor, to the executors, administrators, and assigns of the survivor, Stuart, V.-C., held the ultimate limitation valid, on the ground that "each of the tenants for life had as much right to alien his contingent right to the absolute interest as to alien his life estate." But the notion that the power of alienation is of itself sufficient to exclude the Rule is now exploded (a), and *Avern v. Lloyd* is overruled (b).

Limitations
dependent
on a remote
gift, void.

(H) EFFECT OF THE RULE ON ULTERIOR LIMITATIONS.—Where a gift is void for remoteness, all limitations ulterior to and dependent on such remote gift are also void, though the object of the prior gift should never come into existence. Thus, in the often-cited case of *Proctor v. Bishop of Bath and Wells* (c), there was a devise to the first or other son of T. P. that should be bred a clergyman and be in holy orders, and to his heirs and assigns, but if the said T. P. should have no such son, then to T. M. his heirs and assigns. T. P. died without ever having had any son. As by the canons of the Church no person can be admitted into deacon's orders before the age of twenty-three, or be ordained priest before twenty-four, it was clear that this qualification postponed the devisee's interest until he attained the age of twenty-three at the least. The Court of C. P., therefore, held that the first devise was void for remoteness, and that the devise over, as it depended on the same contingency, was also void; observing, that there was no instance of a limitation after a prior devise, which was void for the contingency's being too remote, being let in to take effect (d).

(x) *Pownall v. Graham*, 33 Bea. 242.

(y) *Re Gage*, [1898] 1 Ch. 498.

(z) L. R., 5 Eq. 383.

(a) *Supra*, p. 305. See *Curtis v. Lukin*, 5 Bea. 147.

(b) *Re Hargreaves*, 43 Ch. D. 401. See *Re Brown and Sibly*, 3 Ch. D. 156.

(c) 2 H. Bl. 358; also referred to

post, p. 356. The principle of course applies to appointments under powers: *Routledge v. Dorril*, 2 Ves. jun. 357; ante, p. 319.

(d) In *Robinson v. Hardcastle*, 2 Br. C. C. 22, 2 T. R. 241, 380, 781, it is not clear on what ground the decision proceeded.

On the same principle, if there is a gift of personal property upon trust for all the children of A., a living person, who are living at the expiration of twenty-eight years from the testator's death, and in default of such children to X., the gift over is void (*e*). So if there is a gift of personal property to A. for life, and after his death to his children who attain twenty-five, and in default of such children to B., the gift over is void (*f*). In *Re Abbott* (*g*), Stirling, J., said: "It is settled that any limitation depending or expectant upon a prior limitation which is void for remoteness is invalid. The reason appears to be that the persons entitled under the subsequent limitation are not intended to take unless and until the prior limitation is exhausted: and as the prior limitation which is void for remoteness can never come into operation, much less be exhausted, it is impossible to give effect to the intentions of the settlor in favour of the beneficiaries under the subsequent limitation." It is submitted, however, that the true reason is that in applying the Rule against Perpetuities the Courts do not regard the intention of the testator, and that they regard possible, and not actual, events; under such a gift as that in *Palmer v. Holford*, A. might have a child under seven years of age at the testator's death, and in that case B.'s interest would not vest within the period allowed by the Rule; the gift over is, therefore, bad ab initio (*i*). If the intention of the testator were regarded, then in the event of A. never having a child, the gift over would be given effect to. But this is not the rule (*j*).

But a limitation following one which is too remote may be good, if it can take effect independently of the void limitation. For example, a gift over in default of appointment may be good, although the preceding power of appointment is bad for remoteness (*k*). So, where a testator devised property to trustees upon trust to sell it after the expiration of forty-nine years from his death, and to divide the proceeds of sale among persons ascertainable within the limits of the Rule, it was held that although the trust for sale was void, the legatees were entitled to the property (*l*). More difficult

Independent
limitations.

(*e*) *Palmer v. Holford*, 4 Russ. 403, ante, p. 299. It does not appear whether the persons to take under the gift over were living at the testator's death: see Gray, § 252, n. See *Burley v. Evelyn*, 16 Sim. 290, post, p. 352, n. (*o*).

(*f*) Per Jessel, M. R., in *Miles v. Harford*, 12 Ch. D. at p. 703, quoted post, p. 357.

(*g*) [1893] 1 Ch. at p. 57.

(*i*) See per Leach, M. R., in *Palmer v. Holford*, supra.

(*j*) See *Miles v. Harford*, and other cases cited post.

(*k*) *Webb v. Sadler*, L. R., 8 Ch. 419; *Williamson v. Farwell*, 35 Ch. D. 128; *Re Abbott*, [1893] 1 Ch. 54.

(*l*) *Re Davenport*, [1893] 3 Ch. 421.

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questions arise when the gift over is to take effect on an alternative contingency : these are considered in the next section.

Where life interest follows interests void for remoteness.

Mr. Gray remarks (*m*) : " As all life interests to persons now in being must take effect, if at all, within lives in being, all such interests would seem to be good, although preceded by interests that are too remote." Mr. Gray's reasoning is unanswerable, so far as the general principle is concerned, but whether it would succeed if the question came before our Courts seems doubtful. No such exception to the general rule above stated (*n*) seems to be recognised, and in *Re Thatcher's Trusts* (*o*), where trusts which were void for remoteness were followed by a trust for A., a living person, for her life, it was held by Romilly, M. R., that the trust for A. was void, although the previous trusts failed during her lifetime. He relied on the decision in *Beard v. Westcott* (*p*), as explained by Lord St. Leonards in *Monypenny v. Dering* (*q*). As the decision in *Beard v. Westcott* relates to an entirely different rule, it may be well shortly to explain the true principle on which it rests.

Vested remainder following contingent remainders which fail.

It will be remembered that legal contingent remainders are subject to two special rules, one requiring that every remainder shall vest on or before the determination of the preceding estate of freehold, and the other forbidding the limitation of remainders to two or more unborn generations in succession (*r*).

As regards the former rule, it is clear that if land is devised to A. for life, with remainder to unborn persons for particular estates (such as estates for life or in tail), with remainder to B., a person in esse, B. takes a vested remainder, and if the intermediate contingent remainders fail, B.'s remainder takes effect (*s*).

And the same rule, it seems, generally applies where the particular estates are void ab initio. Thus, in *Avelyn v. Ward* (*t*), Lord Hardwicke remarked : " I know no case of a remainder or conditional limitation over of a real estate, whether by way of particular estate so as to leave a proper remainder, or to defeat an absolute

(*m*) Perp. § 252.

(*n*) By Jessel, M. R., and Stirling, J., ante, p. 351.

(*o*) 26 Bea. 365. Mr. Gray treats *Burley v. Evelyn*, 16 Sim. 290, as being to the same effect, but in that case A. died before the first tenant for life.

(*p*) 5 B. & Ald. 801.

(*q*) 2 D. M. & G. 145.

(*r*) Williams, Real P. (12th edition,

pp. 269, 274); approved in *Whitby v. Mitchell*, 44 Ch. D. 85.

(*s*) Fearn, C. R. 222; *Lewis v. Waters*, 6 East, 336.

(*t*) 1 Ves. sen. 420. See also the examples of vested remainders taking effect after devises to monks, given arguendo in *Robinson v. Hardcastle*, 2 T. R. 241.

fee before by a conditional limitation, but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place."

If, however, there is a vested remainder following a series of limitations which are void because they tend to create a "perpetuity" (or unbarrable entail) within the meaning of the old Rule against Perpetuities (*u*), then the vested remainder shares the fate of the contingent remainders which precede it. Thus, in *Re Mortimer (v)*, land was devised to the use of A. for life, with remainder to the use of his first and other sons successively for life, with remainder to the use of the first and other sons of each such son of A. successively in tail male, with remainder to the daughters of each such son of A. in tail, with remainder to the use of A.'s daughters in tail, with remainder to the use of A. in fee simple. A. survived the testator, and died a bachelor. It was held by Farwell, J., and the Court of Appeal, that the doctrine of *cy-près* was inapplicable, and that being so, it was conceded by the persons claiming under A. that the ultimate limitation to him failed, and that there was an intestacy (*w*).

Effect of
old Rule
against
Perpetuities.

The same principle applies where the testator attempts to create a "perpetuity," in the nature of an unbarrable entail, by limiting successive terms of years. Thus, in *Somerville v. Lethbridge (x)*, the testator devised lands upon trust for A. for 99 years if he should so long live, with successive limitations of like terms for the lives of A.'s sons and their respective male issue, and in default of such issue to B., a living person, with similar limitations to his issue; at the death of the testator A. was unmarried, and the limitations following the term for the life of his first unborn son were, therefore, void under the old Rule against Perpetuities (*y*), and consequently the limitation to B. was also void. *Beard v. Westcott (z)* was a similar case. And *Burley v. Evelyn (a)* seems to have been decided on the same principle, though whether it was right to apply the technical doctrine of the old Rule against Perpetuities to a settlement of money may perhaps be doubted.

Attempt
to create
perpetuity
by terms
of years, &c.

(*u*) Ante, p. 283. This, of course, assumes that the limitations are not saved from failure by the doctrine of *cy-près*: ante, p. 288.

(*v*) [1905] 2 Ch. 502.

(*w*) The headnote states that the limitations after A.'s life estate were void "for remoteness," but this is inaccurate: they were void under the old Rule against Perpetuities; but for this Rule, the ultimate limitation to A. in fee, being a vested remainder, would

have been good.

(*x*) 6 T. R. 213. That the limitations were as stated in the text appears from *Beard v. Westcott*, infra, and Sugden's note to Gilbert on Uses, 269.

(*y*) Ante, p. 283.

(*z*) 5 Taunt. 393, 5 B. & Ald. 801. The doctrine of *cy-près* was inapplicable in these cases, because an entail cannot be limited by terms of years: ante, p. 283.

(*a*) 16 Sim. 290, ante, p. 352, n. (o).

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Sir E. Sugden (Lord St. Leonards) explained the decision in *Beard v. Westcott* as having been made in accordance with the ground urged by him in argument, namely, that the testator intended B. to take only in case the previous limitations were capable of taking effect (b). But, as Mr. Gray justly points out (c), "the imputation of such an intent to a testator seems unwarranted." The real reason, it is submitted, why the limitations to B. and his issue were not allowed to take effect, is that they were part of a scheme for tying up the land by means of limitations in the nature of an unbarrable entail, and that the whole scheme was void (d).

It is, therefore, submitted that the ratio decidendi in *Beard v. Westcott* does not apply to such cases as *Re Thatcher's Trusts* (e), and that the decision in that case was erroneous.

Distinction where the gift over is to arise on a double contingency.

(I) ALTERNATIVE LIMITATIONS.—Care should be taken to distinguish between cases such as those referred to in the preceding section, and those in which the gift over is to arise on an alternative event, one branch of which is within, and the other beyond, the prescribed limits; so that the gift over will be valid, or not, according to the event (f). Thus, in *Longhead v. Phelps* (g), where trusts were declared of a term, in case of the death of A. without leaving issue male, or in case such issue male should die without issue, the Court held it clear that, the first contingency having happened, the trusts of the term were valid without reference to the other contingency.

Other instances of alternative limitations good or not in the event.

In *Leake v. Robinson* (h), too, certain stock and moneys were bequeathed to W. R. R. for life, and, after his decease, to the child

(b) *Monypenny v. Dering*, 2 D. M. & G. 182.

(c) *Perp.* § 254.

(d) It must be conceded that Lord St. Leonards never really grasped the distinction, clearly taken in Mr. Fearne's treatise, between "perpetuity" and "remoteness"; that this is so appears from the note in his edition of Gilbert on Uses, p. 260, where he treats the Chief Baron's definition of a perpetuity (which is perfectly accurate) as inaccurate, or at least obsolete. This accounts for the confused statement of the rules governing contingent remainders given by Lord St. Leonards in *Cole v. Sewell*, on which Mr. Jarman and Mr. Gray have commented.

(e) *Ante*, p. 352.

(f) See same principle applied to a different species of case, *Tregonwell v.*

Sydenham, 3 Dow, 194; *ante*, p. 309, n. (r).

(g) 2 W. Bl. 704. *Crompe v. Barrow*, 4 Ves. 681, is commonly cited to the same point. But in that case there was no question of remoteness, the appointor's son C. B. being the child of a former marriage, i.e., born before the creation of the power. If otherwise, the alternative gift over, if C. B. should die and leave no child surviving him (which was held good), would in fact have been too remote; for the vesting would have been suspended until the death of an unborn person. It is probable that a similar explanation may be given of *Re Lord Sondes' Will*, 2 Sm. & Gif. 416, sc. that Charlotte Palmer was living at the creation of the powers.

(h) 2 Mer. 363.

or children of the said W. R. R. who, being a son or sons, should attain the age of twenty-five, or being a daughter or daughters, should attain that age or be married with consent; and in case the said W. R. R. should happen to die without leaving issue living at the time of his decease, or, leaving such, they should all die before any of them should attain twenty-five if sons, and if daughters, before they should attain such age or be married as aforesaid, then to the brothers and sisters of W. R. R. on their attaining twenty-five if a brother or brothers, and if a sister or sisters, on such age or marriage as aforesaid. W. R. R. died without leaving issue, and it was not contended that, in the circumstances which had happened, the bequest over to the brothers and sisters was void, in reference to the event on which it was limited; though it was held that, as the bequest to the brothers and sisters included all who were living at the death of W. R. R. (i), it was clearly void from the remoteness of the bequest itself. Had W. R. R. left any issue, the event also would have been too remote.

In *Goring v. Howard* (j), there was a bequest of personal property upon trust for the testator's grandson G. G., and his brothers and sisters equally for their lives, and after the decease of any of the grandchildren to pay his or her share to his or her issue, if any, till they attained the age of twenty-five, and then to transfer to them their parent's share equally; and in case any of the grandchildren should die without leaving issue at his or her decease and without having obtained a vested interest, then the share of the grandchild so dying to go to the survivor or survivors, and to be payable and transferable as before mentioned; G. G. died a bachelor, and his brothers and sisters were held entitled to his share of income for their lives, in the alternative that had happened of no child of G. G. being alive at his decease, though the gift to such a child, had there been one, would have been too remote.

So in *Monypenny v. Dering* (k), where there was a devise in trust for P. M. for life, and after his decease in trust for his first son for life, and after the decease of such first son, "upon trust for the first son of the body of such first son and the heirs male of his body, and in default of such issue upon trust for all and every other the son and sons of the body of the said P. M., severally and successively according to seniority of age, for the like interests and limitations as I have before directed respecting the first son and his issue, and

(i) Vide ante, p. 331.

(k) 2 D. M. & G. 145. See also

(j) 16 Sim. 395; and see *Minter v. Hodgson v. Halford*, 11 Ch. D. 959.

Wraith, 13 ib. 52.

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in default of issue of the body of P. M., or in case of his not leaving any at his decease, upon trust for T. M. for life," with remainders over : Lord St. Leonards held that the limitation to the unborn son of an unborn son of P. M., being itself void, invalidated the remainders depending upon it ; but that the remainder to T. M., and the subsequent remainders, were good in the alternative event, which had happened, of P. M. not leaving any issue at his decease.

In *Cambridge v. Rous* (l), the testatrix bequeathed property upon trust for her sister A. for life, and after her death upon trust for A.'s children at twenty-seven, with a gift over in the event of A. not having any child or of all her children dying under twenty-seven : A. never had any children, and it was held that the gift over took effect.

The principle laid down in the authorities above cited was followed in *Re Bowles* (m), where certain powers, which, if they had been exercised, might (as it was assumed) have made the ultimate gift invalid, were, in fact, not exercised.

In *Miles v. Harford* (n), a testator devised freeholds to A. and his issue male in strict settlement, with a shifting clause in the event of A. or any of his issue male coming into possession of another estate, and bequeathed leaseholds upon corresponding trusts. A. came into possession of the other estate, and it was held by Jessel, M. R., that the shifting clause, being divisible, took effect as to the leaseholds.

Dividing or
"splitting",
a gift over.

In all these cases the testator had himself expressed the alternative contingency, but it often happens that a testator frames a gift over to take effect on an event which really includes two contingencies, one within, the other beyond, the limits allowed by law, and that the former happens. In such a case, the Courts refuse to divide or split the event, and the gift over consequently fails.

A well-known example of this construction is *Proctor v. Bishop of Bath and Wells* (o), stated above. In that case, if the testator had directed the gift over to take effect in the event of T. P. having no son, or of his having no son who should take holy orders, the gift over would have taken effect, because he died without having had a son, but although the latter contingency included the former, the Court refused to separate them.

(l) 8 Ves. 12, 25 Bea. 409.

(m) [1905] 1 Ch. 371. See Addenda.

(n) 12 Ch. D. 691. The M. R. also decided in the plaintiff's favour on the ground that the trust of the leaseholds was an executory one. Compare *Har-*

ding v. Nott, 7 E. & B. 650, where the person named in the shifting clause died without coming into possession of the other estate, and the gift over failed : *supra*, p. 306.

(o) 2 H. Bl. 358.

Again, in *Lord Dungannon v. Smith* (p), where a testator devised leaseholds in trust for his grandson A. for life, and after his death "to permit such person who for the time being would take by descent as heir male of the body of his said grandson to take the profits thereof until some such person should attain the age of twenty-one years, and then to convey the same unto such person so attaining the age of twenty-one years" absolutely, with a gift over "if no such person should live to attain" that age. The eldest son of A. attained twenty-one in his father's lifetime, and claimed the property as having, in event, vested within legal limits. He contended that the devise might be read as containing separate gifts, to the eldest son, if he attained twenty-one, if not, to the first other heir male who should attain that age; but it was held otherwise, for there was no gift to the eldest son, except as one of a set or series of persons, any one of whom might come within the description, whether he was within the limit or not, and there was no authority for moulding or splitting the bequest in the manner proposed. The case was considered to be analogous to *Leake v. Robinson*.

The principle on which the Courts proceed in these cases was laid down by Jessel, M. R., in *Miles v. Harford* (q), with his usual clearness and accuracy: "On a gift to A. for life, with a gift over in case he shall have no son who shall attain the age of twenty-five years, the gift over is void for remoteness. On a gift to A. for life, with a gift over if he shall have no son who shall take priest's orders in the Church of England, the gift over is void for remoteness; but a gift superadded, 'or if he shall have no son,' is valid, and takes effect if he has no son; yet both these events are included in the other event, because a man who has no son, certainly never has a son who attains twenty-five, or takes priest's orders in the Church of England; still, the alternative event will take effect, because that is the expression. The testator, in addition to his expression of a gift over, has also expressed another gift over on another event, although included in the first event, but the same judges who have held that the second gift over will take effect where it is expressed, have held that it will not take effect if it is not expressed. . . . That is what they mean by splitting: they will not split the expression by dividing the two events."

A recent illustration of the principle in question is *Re Bence* (r).

(p) 12 Cl. & F. 546. See also the judgment of Sir E. Sugden in *Ker v. Dungannon*, 1 Dr. & War. 509.

(q) 12 Ch. D. 691.

(r) [1891] 3 Ch. 242. It should be

noted that the limitations of the will on which the case of *Evers v. Challis* was decided are not accurately stated in the judgment of the Court of Appeal in *Re Bence*.

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There the testator gave his real and personal estate to trustees upon trust as to one-fifth share for the testator's daughter B. for life, and after her death for such child or children of B. as should attain twenty-one, and also such child or children of any son or daughter of B. dying under the age of twenty-one as should attain twenty-one or marry, and the testator declared that if B. should die without leaving any lawful issue who should live to attain a vested interest, her share should go over. B. died without ever having had a child, but it was held that the gift over could not be split so as to make it take effect in that event, because the gift over was single in point of expression, although it included two events, and although that one of the two events which happened was within the limits of the Rule against Perpetuities (s).

Doctrine of
Pelham v.
Gregory.

If personal property is given to A. for life, with remainder to his sons successively in tail male, and, in default of such issue, to B. for life, with remainder to his sons successively in tail male, and A. and B. both die, A. having no son, the first son of B. will take (ss). Mr. Jarman does not treat this as an exception to the ordinary mode applying the Rule against Perpetuities (t). Mr. Gray thinks that it is an instance of the law splitting a gift which has not been split by the testator (u).

Exception.

The principle that the Court will not divide the events on which a gift over is to take effect, does not apply where, in the event which has happened, the gift over can take effect as a contingent remainder, although if the other event had happened it would have been void as an executory devise.

Evers v.
Challis.

This exception was established by the decision in *Evers v. Challis* (v). In that case the testator devised four houses in trust for his daughter Elizabeth for life, and after her decease to such of her children as being sons should attain the age of twenty-three years, or being daughters should attain the age of twenty-one years, equally as tenants in common in fee; and in case all the children of Elizabeth should die, if a son or sons, under the age of twenty-three years, or, if a daughter or daughters, under the age of twenty-one, or if she should have none, then he devised the property in trust for his son John and his daughters Sarah and Ann equally for their respective lives, and at their respective deaths he devised the share

(s) *Re Harvey*, 39 Ch. D. 289, and *Re Hancock*, [1901] 1 Ch. 482 s. c., s. n. *Hancock v. Watson*, [1902] A. C. 14, are to the same effect.

(ss) *Pelham v. Gregory*, 3, Br. P. C.

204, and other cases cited post, Chap. XXXIII.

(t) Post, Chap. XXXIII.

(u) Gray on Perp. § 356.

(v) 7 H. L. C. 531.

of the one dying to his or her children who being sons should attain twenty-three, or being daughters should attain twenty-one, as tenants in common in fee; and in case of the death of his son or either of his said two daughters without leaving a child who being a son should attain twenty-three, or being a daughter should attain twenty-one, he devised the third share of the one so dying to the children of the others in the same manner as before. Elizabeth died in 1838 without ever having had a child, and in 1847 Ann died without ever having had a child. The son John had two daughters, one of whom, M. A. E., attained twenty-one during the life of Ann. Two questions were raised: first, whether the gift over on the death of Elizabeth was good; and, secondly, whether the gift over on the death of Ann was good. The Court of Q. B. decided both questions in the affirmative (*w*). As to the first, they held (in accordance with the authorities before stated) that if Elizabeth had had a child, although he did not attain the prescribed age, the gift over would have been void for remoteness, but that in the event which happened of her never having had a child, the gift took effect as an alternative contingent remainder. As to the second, the Court decided that here also the gift over took effect, although the event of her never having had any children was not actually expressed, being of opinion, upon the authority of *Jones v. Westcomb* (*x*) and similar cases, that wherever there was a gift over on a class dying within a particular age, it took effect if that class never came into existence. In the Exchequer Chamber the decision on the second point was reversed, the Court, without denying the authority of *Jones v. Westcomb*, applying the same principle to the splitting of one set of words into two contingencies, that Sir W. Grant, in *Leake v. Robinson*, applied to the splitting of a class. Alderson, B., who delivered the judgment of the Court, said (*y*): "The true meaning of the devise is, in every event which can happen in which Ann dies leaving no children if male who attain twenty-three, or if female who attain twenty-one, I give the estate over. That is what he says, and that is what he means. He includes all those events in one clause. Some are legal, some are illegal. How is the Court to sever these events, which the testator has expressly joined together, without making a new will? The principle seems, therefore, to be against splitting such a devise when we are considering the question whether it is a legal one. Now this question, it is conceded, must be determined as on reading the will at the

(*w*) 18 Q. B. 224.(*x*) 1 Eq. Ca. Abr. 245. See Chap.

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(*y*) 18 Q. B. p. 248.

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instant of the testator's death. Do the cases cited affect this principle? On looking over them we find in all of them that the devise in any event was legal, and that it was competent for the testator to make it."

Apart from the question of remoteness, it was admitted by the Exchequer Chamber that *Jones v. Westcomb* was full and sufficient authority for construing the will as was done in the Court of Q. B.; what prevented the Court from applying the doctrine laid down in *Jones v. Westcomb* to the case before them, was that, assuming the gift over to be an executory devise and nothing more, there was a possibility of the gift over taking effect on a remote contingency, and this vitiated the whole limitation, on the principle that in applying the Rule against Perpetuities, possibilities, and not actual events, must be considered (z).

On appeal to the House of Lords (a), the decision of the Exchequer Chamber was reversed, and it was held that M. A. E. took a share of the property under the gift over on the death of Ann, although the contingency of Ann's never having had any children was not expressed. Wightman, J., in giving the opinion of himself and several of his brother judges, who were summoned to advise the House of Lords, said: "No case or authority has been cited to shew that where a devise over includes two contingencies, which are in their nature divisible, and one of which can operate as a remainder, they may not be divided, although included in one expression; and our opinion does not at all conflict with the authority of *Jee v. Audley* and *Proctor v. Bishop of Bath and Wells*, in neither of which cases was it possible for the limitation over to operate as a remainder." In other words, the gift over took effect as if the limitation had been to Ann for life, with remainder to her children who attained the specified ages, with remainder to the children of John who attained the specified ages. "Whether the result should be to give the estate to her [Ann's] own child, or to the children of her brother and sister, in either case the gift must take effect as a remainder, for no prior estate is divested or displaced" (b).

In *Watson v. Young* (c), the testator devised land in trust for A. for life, and after his death in trust for his children who should reach twenty-one, and the issue of any child dying under twenty-one who should reach twenty-one, with a gift over in case there should be no child nor the issue of any child of A. who should live to

(z) *Supra*, p. 299.

(a) 7 H. L. C. 531.

(b) Per Lord Cranworth, 7 H. L. C.

at p. 551.

(c) 28 Ch. D. 436.

reach twenty-one. A. had no children, and Pearson, J., held that the gift over was divisible into two alternative gifts, one in the event of A. having no child, and the other in the event of no child or issue of a child of A. attaining twenty-one, and he held that the former event having happened, the gift over was good. The learned judge decided the case on the authority of *Evers v. Challis*, but as the gift over in the case of *Watson v. Young* did not take effect as a contingent remainder, it seems clear that the decision of Pearson, J., was wrong (*d*).

When personal property is bequeathed to a series of persons not in esse, by words which would create successive estates tail if the subject of the gift were real estate, and the first person does not come in esse, the next will take, under the doctrine laid down in *Pelham v. Gregory* (*e*), which is considered in a later chapter. Mr. Gray thinks that the doctrine is an exception to the rule that a gift not split by the testator cannot be split by the Court (*f*), and this view seems to be accurate, but the doctrine is not generally so treated.

Quasi-entail
of personality.

(K) MODIFYING AND QUALIFYING CLAUSES—SUBSTITUTION—CONDITIONS, &c.—The cases in which clauses of accruer, shifting clauses, and gifts over have been held void under the Rule, have been already referred to (*g*).

Mr. Jarman remarks (*h*) that “though the Courts will not violate the established rules of construction for the sake of bringing a gift within legal limits, yet an anxiety to prevent a testator’s dispositive scheme from proving abortive, on account of its remoteness, is plainly discoverable throughout the cases. To this anxiety we may ascribe the rule, which recent cases seem to establish, that where a testator has by his will made an absolute bequest in favour of unborn persons, and has afterwards by a codicil revoked such bequest, and in lieu thereof given to the same legatees life interests only, with remainder to their children (which substituted bequest, of course, would be void as to the children), the codicil may be rejected, and the legatees take the interests originally given them by the will (*i*).

Clauses
illegally
modifying
previous
absolute
gifts rejected.

“And this rejection of qualifying clauses ineffectually attempted to be engrafted on a previous absolute gift, equally obtains where the whole is contained in the same testamentary paper, and in spite,

(*d*) See *Re Bence*, [1891] 3 Ch. at p. 251.

(*e*) 3 Bro. P. C. 204. Post, Chap. XXXIII.

(*f*) *Perp.* § 357.

(*g*) *Supra*, pp. 306, 346.

(*h*) First edition, p. 256.

(*i*) *Arnold v. Congreve*, 1 R. & Myl. 209. The actual decision in this case was wrong, and it may be treated as overruled, but the principle for which Mr. Jarman cites it is correctly laid down in it.

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too, of the principle hereafter discussed, which prefers the posterior of two inconsistent clauses; it being considered (for this is the ground upon which alone the construction can be defended) that the testator intends the prior absolute gift to prevail, except so far only as it is effectually superseded by the subsequent qualified one (j). As in *Carver v. Bowles* (k), where a testatrix, having under her marriage settlement a power of selection in favour of her children, appointed the settled fund to her five children, two sons and three daughters, absolutely in equal shares; and then proceeded to declare that the one-fifth so appointed to each of her daughters, she did thereby, so far as she lawfully might or could, order and appoint should be held upon trusts for the daughter for her separate and inalienable use for life; and after her decease for her children, and in default of children, subject to her general power of appointment, and in default of appointment, for her next of kin. Sir John Leach, M. R., held that the words of the appointment were sufficient to vest the shares absolutely in the daughters; that the attempt to restrict their interest by limitations to their issue, being inoperative, did not cut down the absolute appointment; but that it was competent to the donee of the power to limit the interests which he appointed to his daughters to their separate use, and to restrain them from anticipation or alienation" (l).

The same principle was acted on in *Kampf v. Jones* (m), *Ring v. Hardwick* (n), *Lassence v. Tierney* (o) (a leading case on the doctrine), and other cases (p), the latest being *Hancock v. Watson* (q).

This principle, however, is only applicable where the restriction or modification can be separated from the original gift (r).

Void gift by
way of
substitution.

On the same principle, if there is a gift to a class of persons ascertainable within due limits, followed by a substitutional gift to

(j) On the question whether the prior gift is absolute or not, see *Whitell v. Dudin*, 2 J. & W. 279, and other cases cited post, Chap. XXXVIII. And see and consider *Doe d. Blomfield v. Eyre*, 5 C. B. 713, cited in that chapter.

(k) 2 R. & M. 306. See also *Church v. Kemble*, 5 Sim. 525.

(l) The M. R. therefore thought that this restriction took effect; but it is now settled that it is void for remoteness and will be rejected, *Fry v. Capper*, Kay, 163; *Armitage v. Coates*, 35 Bea. 1; *Re Teague's Settlement*, L. R., 10 Eq. 564; *Re Cunynghame's Settlement*, L. R., 11 Eq. 324; *Re Ridley*, 11 Ch. D. 645; *Shute v. Hogge*, 58 L. T. 546; *Whitby v. Mitchell*, 44 Ch. D. 85, except

in those cases where the gifts are separable: post, p. 363.

(m) 2 Kee. 756.

(n) 2 Bea. 352.

(o) 1 Mac. & G. 551.

(p) *Hodson v. Micklethwaite*, 2 Dr. 294; *Harvey v. Stracey*, 1 Dr. 73; *Stephens v. Gadsden*, 20 Bea. 463; *Courtier v. Oram*, 21 Bea. 91; *Salmon v. Salmon*, 29 Bea. 27; *Cooke v. Cooke*, 38 Ch. D. 202; *Re Boyd*, 63 L. T. 92; *Douglass v. Waddell*, 17 L. R. Ir. 384.

(q) [1902] A. C. 14, in which the House of Lords affirmed the decision of the C. A. (*Re Hancock*), [1901] 1 Ch. 482. See Chaps. XXXIII., XXXVIII.

(r) *Whitehead v. Bennett*, 22 L. J. Ch. 1020; *Re Crawshaw*, 43 Ch. D. 615.

take effect within a period exceeding that allowed by the Rule, the substitutional gift is void, and the original gift remains (*rr*).

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So in the case of a divesting clause, or gift over, which is void for remoteness, the result may be that the original gift becomes absolute (*s*).

Void divesting clause, or gift over.

Where there is an absolute gift to A., followed by a direction, made for A.'s supposed benefit, postponing possession until the attainment by A. of some age exceeding twenty-one, this direction is void, not because it transgresses the Rule, but because any direction postponing the enjoyment of a vested and indefeasible interest beyond the age of twenty-one is repugnant to the nature of an absolute interest (*ss*).

Possession of vested gift postponed beyond age of twenty-five.

It has been held in several modern cases, that where an interest in property is given to an unborn daughter of a living person, with a clause against anticipation, the restraint on anticipation is void, and that consequently, on the principle above stated, the gift of the interest is good, the restraint alone being rejected (*t*).

Restraint on anticipation.

When gifts are made to several persons by one description, but the gift to one is not affected by the existence or non-existence of the others, the gifts are separable, and if modifying clauses are not too remote when applied to the gifts to some of these persons, but are too remote when applied to the gifts to the others, they will be operative in the former cases, and disregarded in the latter (*u*). Thus, where there is a gift to such of the children of A. as shall be living at the death of B., followed by a direction that the share of each daughter shall be settled upon her for life, with remainder to her children, here the limitation in favour of the children of daughters is good in the case of those daughters who are born

Separable gifts.

(*rr*) *Baldwin v. Rogers*, 3 D. M. & G. 649; *Packer v. Scott*, 33 Bea. 511; *Goodier v. Johnson*, 18 Ch. D. 441, stated ante, p. 333.

(*s*) *Harding v. Nott* and other cases cited ante, p. 306.

(*ss*) See Chap. XVII., ante, pp. 303-4; Gray, §§ 120-21. As to the effect on a gift to a class, see *Kevern v. Williams*, 5 Sim. 171; *Blease v. Burgh*, 2 Bea. 221, and other cases cited post, Chap. XLII.

(*t*) *Fry v. Capper*, Kay, 163; *Armistage v. Coates*, 35 Bea. 1; *Re Teague's Settlement*, L. R., 10 Eq. 564; *Re Cunyngame's Settlement*, L. R., 11 Eq. 324. The principle of these cases (holding the restraint to be bad) was disapproved by Jessel, M. R., in *Re Ridley*, 11 Ch. D. 645, and he followed them reluctantly. It seems clear that they

involve a confusion between gifts which are void for remoteness, and restraints which are void because they hinder alienation. A gift to a married woman may be subject to a restraint on anticipation, and the fact that the restraint may last beyond the period allowed by the Rule against Perpetuities cannot make any difference. "The true doctrine is believed to be that a future estate, not in itself too remote, can be subjected to the same restraints to which a present estate can be subjected" (Gray, *Perp.* § 437). The doctrine stated in the text must, however, be considered as adopted by the Court of Appeal; see *Whitby v. Mitchell*, 44 Ch. D. 85, although the point was not argued.

(*u*) Gray, *Perp.* § 441.

CHAPTER X.

Restraint on anticipation good during prior life interests.

Entailed personalty.

Construction of will not affected by Rule.

during the testator's lifetime, and bad as to those born subsequently (*v*). So where there is a gift to the daughters of the testator's children with a restraint on anticipation, the restraint is good as to those daughters who are born in the testator's lifetime, and void as to those born afterwards (*w*).

In *Re Millward* (*x*), a testator gave his residuary estate to his wife, two daughters, and a son for life (the interests of the wife and daughters to be without power of anticipation), and after the death of the survivor he gave his estate to the born and future children of his son in equal proportions. By a codicil he imposed a restraint on anticipation on all females taking any interest under his will. The survivor of the wife, daughters, and son died in January 1902. The son left five children living at his death, of whom two were married women: it was held by Joyce, J., that the restraint on anticipation was valid as to income and corpus during the existence of the prior life interests, and that it determined when the property fell into possession in January 1902.

Where personal property is settled upon trust to follow entailed realty, with a proviso that it shall not vest absolutely in any tenant in tail who dies under twenty-one, this proviso will, it seems, as a general rule, be construed as part of the primary trust, so that the whole trust is void, unless it is confined to tenants in tail by purchase (*y*).

(L) CONSTRUCTION.—The principle that the Court will not depart from the established rules of construction in order to render a disposition valid under the Rule, has been already referred to in connection with gifts to classes (*z*). The principle is recognised in numerous cases (*a*). “It is against the settled rules of construction to strike out any words from a will because they offend against the perpetuity rule. For all purposes of construction, the will must be read as if no such rule existed. Any dispositions which, so reading and construing it, are found to be the testator's wishes, must be taken to be his wishes, and if those wishes offend against the rule, the gifts would fail, and must fail accordingly; but they are not the

(*v*) *Wilson v. Wilson*, 28 L. J. Ch. 95; *Re Russell*, [1895] 2 Ch. 698; ante, p. 339.

(*w*) *Herbert v. Webster*, 15 Ch. D. 610; *Re Ferneley's Trusts*, [1902] 1 Ch. 543; *Re Game*, [1907] 1 Ch. 276. The point seems to have been overlooked in *Re Michael's Trusts*, 46 L. J. Ch. 651, and *Re Ridley*, 11 Ch. D. 645. The

doctrine stated in the text is, of course, open to the criticism expressed in n. (*t*).

(*x*) 87 L. T. 476.

(*y*) *Christie v. Gosling*, and other cases referred to ante, p. 347, and post, Chap. XX.

(*z*) Supra, p. 341.

(*a*) *Dungannon v. Smith*, 12 Cl. & F. 546.

less part of his will, and to be resorted to as part of the context for all purposes of construction, as if no such rule had been established" (b). "You do not import the law of remoteness into the construction of the instrument by which you investigate the expressed intention of the testator. You take his words and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean that, in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; but I do say that if the construction of the words is one about which a Court would have no doubt, though there was no law of remoteness, that construction cannot be altered or wrested to something different, for the purpose of escaping from the consequences of that law" (c).

Accordingly, the Court refuses to strain the rules of construction in order to make a gift to a class valid (d), or to split a gift over if the testator has not done so (e).

But, as Mr. Jarman points out (f), the Court has, especially in the older cases, often been consciously or unconsciously influenced by a desire to give effect to the intention of testators. Instances will be found in the doctrine which rejects modifying and qualifying clauses when too remote (g), and in the rule that in carrying out executory trusts the Court will, if possible, so modify them as to bring them within the limits of the Rule (h).

And if a particular clause in a will is capable of two constructions, one of which will make it void under the Rule against Perpetuities, while the other will carry out the obvious intention of the testator, the latter construction is preferred (i). There are numerous cases in which a gift which would have been void for remoteness if it had

Construction
of ambiguous
clause.

(b) *Heasman v. Pearse*, L. R., 7 Ch. at p. 283.

(c) Per Selborne, L. C., in *Pearks v. Moseley*, 5 A. C. at p. 719. See also per Wood, V.-C., in *Catlin v. Brown*, 11 Ha. 375.

(d) *Supra*, p. 331.

(e) *Supra*, p. 356.

(f) *Supra*, p. 361.

(g) *Supra*, p. 361.

(h) *Supra*, p. 309. Mr. Gray thinks that this unconscious tendency influenced the decision in *Forth v. Chapman* (1 P. Wms. 663) and other cases of that class (post, Chap. LII.). The cases of *Mogg v. Mogg* (1 Mer. 654),

Leach v. Leach (2 Y. & C. C. C. 495), *Kevern v. Williams* (5 Sim. 171), and *Elliott v. Elliott* (12 Sim. 276), in which rules of construction appear to have been strained in order to avoid remoteness, are commented on by Mr. Gray (Perp. §§ 634 seq.).

(i) *Re Turney*, [1899] 2 Ch., p. 747. The same rule was stated by Lord Chelmsford in *Martelli v. Holloway* (L. R., 5 H. L. at p. 548), but it is submitted that the principle followed in that case (post, Chap. XX.) does not depend on the rule suggested by Lord Chelmsford (see *Christie v. Gosling*, L. R., 1 H. L. 279).

CHAPTER X.

been construed to be contingent, has been held to be vested subject to be divested, and therefore good (*j*).

"So far as the law permits."

A testator sometimes declares that the dispositions of his will shall take effect "as far as the rules of law and equity permit," or that he makes them "so far as he lawfully or equitably can or may"; words of this kind are most frequently used in connection with gifts of personalty to go according to limitations of real estate. It was formerly supposed that such trusts were executory (*k*), but this doctrine has been long overruled (*l*), and it seems now settled that the presence of words of this kind does not justify the Court in putting a forced construction on the will in order to save the testator's provisions from the penalty of remoteness (*m*), unless the trust is really executory (*n*).

As to implying estates which would be too remote.

According to Mr. Jarman (*o*), a further illustration of the leaning of the Courts against a construction which will defeat the testator's intention, is to be found in the "disinclination in the Courts to apply those liberal rules of construction which, in favour of the apparent intention, as collected from the context, operate to raise devices by implication, in the absence of words of positive gift, where the effect of such implication would be to impute to the testator a scheme of disposition at variance with the principle of law which regulates and restricts the period of vesting" (*p*).

Doctrine of cy-près.

But it is the doctrine of cy-près which, in Mr. Jarman's view, affords "the most striking illustration of the anxiety of the Courts to prevent the total disappointment of the testator's intention by the operation of the Rule against Perpetuities" (*q*). This, however, is not quite accurate, for historically there seems no doubt that the doctrine of cy-près is derived from the old rule forbidding the creation of unbarrable entails (*r*), and that it has nothing to do with the modern Rule against Perpetuities. Unless the doctrine can be explained on this theory, it is the solitary instance in which the Courts have disregarded an otherwise inflexible rule in order to give effect to the intention of testators, and it is difficult to understand why this particular instance should have been selected.

Charitable gifts.

(M) EXCEPTIONS TO THE RULE.—(1) *Charitable Gifts*.—It is some-

(*j*) See the cases cited in the last note, and post, Chap. XXXVII.

(*k*) *Gower v. Grosvenor*, 5 Madd. 337; *Trafford v. Trafford*, 3 Atk. 347.

(*l*) See *Rowland v. Morgan*, 2 Ph. 764. The cases are cited in Chap. XX., post.

(*m*) *Tollemache v. Coventry*, 2 Cl. & F. 611; *Christie v. Gosling*, L. R., 1 H. L.

279; *Harrington v. Harrington*, L. R., 5 H. L. 87.

(*n*) See *Miles v. Harford*, 12 Ch. D. 691.

(*o*) First edition, p. 260.

(*p*) *Chapman v. Brown*, 3 Burr. 1626.

(*q*) First edition, p. 260.

(*r*) *Supra*, p. 281.

times said that charitable gifts are an exception to the Rule (s), but this is inaccurate. A charitable trust creates a perpetuity in the primary sense of the word, and it follows that charitable gifts are an exception to the general principle of law which forbids the creation of inalienable and indestructible interests in property (t). It has even been held that property may be given to one charity, subject to a gift over, in an event which may never happen, to another charity (u). But these cases have nothing to do with the modern Rule against Perpetuities (v), which clearly applies to charitable gifts. Thus, a gift to a charity, conditional upon a future and uncertain event which may not happen within the period allowed by the Rule, is void (w). So, if property is given to a private individual, with a limitation in a remote contingency to a charity, this limitation is void (x). Conversely, if property is given to a charity, with a gift over in a remote contingency in favour of private persons, the gift over is void (y). But a gift of a fund for a charity may be made defeasible or determinable on an event which must or may happen after the expiration of the period allowed by the Rule, so that when that event happens, the fund reverts to the testator's estate; and an express direction by the testator that on the happening of the event the fund shall fall into his residue, does not offend against the Rule, because it is mere surplusage (z).

Resulting trust after gift to charity.

(2) *Trusts for Accumulation*.—The Rule against Perpetuities does not apply to a trust for accumulation whereby a fund is to be created for payment of the testator's debts, or for the discharge of existing incumbrances on an estate, because such a provision only prescribes a particular mode of paying the debts, and it may

Accumulation for payment of debts,

(s) Lewis, 663, 687 seq. This is one of the many instances of the mental confusion caused by the ambiguity of the word "perpetuity" which are to be found in Mr. Lewis's work: see ante, p. 288, n. (i).

(t) Ante, p. 278; *Thomson v. Shakespear*, 1 D. F. & J. at p. 407.

(u) *Christ's Hospital v. Grainger*, 1 Mac. & G. 460, ante, p. 280. Lord Cottenham's decision was expressly based on the doctrine of perpetuity in the primary sense of an inalienable interest. See Mr. Gray's remarks on the decision (§ 599 seq.), and ante, p. 280, as to the decision in *Re Tyler*.

(v) Mr. Gray says, with great truth, that much confusion would have been

avoided if the modern "Rule against Perpetuities" had been called the "Rule against Remoteness": Gray on Perp. §§ 2, 140, 589 seq.

(w) *Chamberlayne v. Brockett*, L. R., 8 Ch. 206; *Re Lord Stratheden and Campbell*, [1894] 3 Ch. 265; *Kingham v. Kingham*, [1897] 1 Ir. R. 170.

(x) *Company of Pewterers v. Christ's Hospital*, 1 Vern. 161; *Att.-Gen. v. Gill*, 2 P. W. 369; *Re Johnson's Trusts*, L. R., 2 Eq. 716; *Commissioners, &c. v. De Clifford*, 1 Dr. & War. 245.

(y) *Re Bowen*, [1893] 2 Ch. 491; *Re Barnett*, 24 T. L. R. 788.

(z) *Re Randell*, 38 Ch. D. 213; *Re Blunt's Trusts*, [1904] 2 Ch. 767.

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or legacies.

at any time be put an end to, either by the owner of the property paying them off, or by the creditors enforcing their claims (a). A trust to accumulate rents to pay a legacy to an existing person is also good (b).

Trusts for
accumulation
for benefit of
legatee.

An apparent exception to the Rule against Perpetuities occurs in the case of certain other trusts for accumulation. A trust to accumulate income for the benefit of a person who may not be ascertained within the period allowed by the Rule is, of course, void, but a trust to accumulate income for the benefit of some one to be ascertained within due limits, who can put an end to it at any time after his interest has vested, is not within the Rule (c).

Charity.

The same doctrine applies to a trust to accumulate for the benefit of a charity (d).

Thellusson
Act.

The statutory law with regard to the accumulation of income is considered in the next chapter.

Equitable
contingent
remainders.

(3) *Contingent Remainders*.—There can be no doubt that the Rule applies to equitable contingent remainders (e).

Apparent
exception
in the case
of legal
remainders.

With regard to legal contingent remainders, there are cases in which they are clearly not within the modern Rule. Thus, if land is devised to A., a bachelor, for life, and on his death to the first son of his who attains twenty-five, this is a contingent remainder which will fail, unless at A.'s death there is a son who has attained twenty-five: if it vests at all, it must vest at A.'s death, and can, therefore, never be too remote. This case is, therefore, an apparent, and not a true, exception to the Rule.

Can a legal
contingent
remainder
be void for
remoteness?

Apart from this undisputed rule of law, the question whether a legal contingent remainder can be void for remoteness has been much discussed. It has been answered in the affirmative in two recent cases, by Kay, J., in *Re Frost* (f), and by

(a) *Tewart v. Lawson*, L. R., 18 Eq. 490; *Lord Southampton v. Marquis of Hertford*, 2 V. & B. 54; *Marshall v. Holloway*, 2 Sw. 432; *Bateman v. Hotchkin*, 10 Bea. 426; *Bacon v. Proctor*, T. & R. 31; *Briggs v. Earl of Oxford*, 1 D. M. & G. 363. *Gilbertson v. Richards*, 5 H. & N. 453, is sometimes cited as an illustration of the principle above stated: see per Jessel, M. R., in *London & South-Western Ry. v. Gomm*, 20 Ch. D. p. 577.

(b) *Williams v. Lewis*, 6 H. L. C. 1013.

(c) *Saunders v. Vautier*, Cr. & Ph. 240; *Gosling v. Gosling*, Johns. 265; *Oddie v. Brown*, 4 De G. & J. 179.

(d) *Wharton v. Masterman*, [1895] A. C. 186, overruling dictum of Wickens, V.-C., in *Harbin v. Masterman*, L. R., 12 Eq. 559.

(e) *Abbiss v. Burney*, 17 Ch. D. 211. The curious result follows that equitable contingent remainders are subject to both the old and the new Rules against Perpetuities.

(f) 43 Ch. D. 246.

Farwell, J., in *Re Ashforth (g)*, but as both these cases ignore the older authorities, and the result of the decision of the Court of Appeal in *Whitby v. Mitchell (h)*, they cannot be considered satisfactory.

Before the decision in *Whitby v. Mitchell*, real property lawyers were divided into two schools on this question. The older school, headed by Mr. Fearne, held that contingent remainders are not subject to the modern Rule against Perpetuities, but are governed by the old Rule, which forbids the limitation of land to the unborn issue of a person in succession beyond the first generation (*i*). According to this school, the modern Rule was invented to restrict the creation of executory interests, and does not apply to contingent remainders, for these are governed by their own special rules, definitely fixed before the introduction of executory interests. In addition to Mr. Fearne (*j*), this school included Mr. Peter B. Brodie (*k*), Mr. Lewis Duval (*l*), Mr. Preston (*m*), Mr. Charles Butler (*n*), Lord

Doctrine
laid down by
Mr. Fearne
and others.

(*g*) [1905] 1 Ch. 535. In *Whitby v. Von Luedecke*, [1906] 1 Ch. 783, the question was not argued.

(*h*) 44 Ch. D. 85.

(*i*) Ante, p. 281.

(*j*) After explaining (Cont. Rem. 429) that the invention of the modern Rule against Perpetuities was made necessary by the fact that executory devises are free from the restrictions imposed by the common law on contingent remainders, Mr. Fearne goes on to remark that "future and shifting uses, and other springing and executory interests which are not remainders, are to be considered as subject to the same limits and restrictions as executory devises." (Cont. Rem. 441, 10th edition; the italics are mine.) Mr. Fearne's statement of the old Rule against Perpetuities will be found in the passage quoted above, p. 285. Mr. Lewis entirely misunderstood Mr. Fearne's views on the subject, owing to his inability to see the difference between "perpetuity" and "remoteness." So far as I am aware, Mr. Fearne never uses "perpetuity" in its modern sense, as equivalent to "remoteness" [C. S.].

(*k*) The draftsman of the Fines and Recoveries Act, and probably the ablest real property lawyer who has ever lived.

(*l*) Mr. Lewis Duval was one of the most eminent conveyancers of his day. He and Mr. Brodie were two of the Real Property Commissioners, the others being Lord Campbell and Messrs. W. H. Tinney, John Hodgson, Samuel Duckworth, and John Tyrrell, all men of

eminence in their profession. The Real Property Commissioners unanimously stated in their third report, as a familiar and unquestioned doctrine, that the Rule against Perpetuities does not apply to contingent remainders: "All future interests, not being remainders, are restrained in their limits by the rules of law relating to perpetuities" (p. 29). The Commissioners recommended (p. 30) that the rule with regard to the failure of contingent remainders should be amended by enacting that every contingent remainder should take effect if the particular estate determined before the remainder vested, "becoming in that event liable to the rules prescribed for restraining perpetuities." This recommendation has been carried into effect by the Contingent Remainders Act, 1877, which thus confirms the correctness of the view held by the Commissioners.

(*m*) "No remainder can, in point of expression, be too remote, since the necessity that the remainder should vest during the particular estate, or *eo instante* that the particular estate determines, and the liability of a contingent remainder to be defeated by the merger, &c., of the particular estate, are a protection against the inconvenience of perpetuities" (Abst. ii. 114).

(*n*) "The remoteness of a remainder, however great, was no objection to it on its creation" (note to Fearne, Cont. Rem., p. 565, 10th edition).

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St. Leonards (o), Lord Brougham (p), Mr. S. M. Leake (q), Mr. Coventry (r), Mr. Burton (s), Mr. Joshua Williams (t), and Mr. H. W. Challis (u).

Mr. Lewis's theory.

The contrary view—that contingent remainders are subject to the modern Rule against Perpetuities—seems to have originated with Mr. Lewis: he denied the existence of the rule forbidding the limitation of land to two or more unborn generations in succession (now established by the decision in *Whitby v. Mitchell*), and contended that it is merely an example or instance of the modern Rule against Perpetuities (v). But this, as Mr. Joshua Williams pointed out, involves an entire misapprehension of the rule in *Whitby v. Mitchell*, which “is more stringent than that which confines executory interests” (w), for it absolutely forbids the limitation of land by way of remainder to the unborn issue of a person for two or more generations in succession; even if such a limitation is restricted to issue born within a life in being, it is void (x).

(o) “It is now perfectly settled that where a limitation is to take effect as a remainder, remoteness is out of the question”: *Cole v. Sewell*, 4 Dr. & W. at p. 28.

(p) “I was a good deal surprised to find that there was a question raised about the remoteness of the limitation. . . . It [the suggestion in question] opened to my mind a new and strange view of the law, applying that to contingent remainders which I had always understood must be, from the very nature of the thing, confined to springing uses and executory devises”: *Cole v. Sewell*, 2 H. L. C. 230.

(q) Prop. in Land, 334, 335, n. (1st ed.).

(r) “The Rule against Perpetuities does not apply to remainders”: Watkins, Convey. (6th edition, by Coventry), 176, n.

(s) Comp. § 782.

(t) Mr. Joshua Williams's statement of the law, which was adopted as accurate by Kay, J., and the Court of Appeal in *Whitby v. Mitchell* (44 Ch. D. 85), will be found in the 12th edition of his treatise on Real Property, pp. 269 seq., 318 seq. It is to the effect that there are only two rules governing the creation of contingent remainders, namely, the rule requiring that the seisin shall never be without an owner, and the rule that if an estate is given to an unborn person for life, followed by any estate to any child of such unborn person, the latter limitation is void; Mr. Williams goes on to point out that it is “in analogy to

the restrictions thus imposed on contingent remainders that the law has fixed the following limit to the creation of executory interests,” namely, the modern Rule against Perpetuities. The matter is stated in the same way by Lord Kenyon in *Long v. Blackall*, 7 T. R. 100.

(u) “Whether the Rule against Perpetuities applies (apart from express statutory enactment) to legal limitations by way of remainder, is one of those questions which ought never to have arisen. It implies an anachronism which may be said to trench upon absurdity” (Real P. 183).

(v) Lewis on Perp. 420; Supp. 97 seq.

(w) Real Prop. 275, and Appendix F (12th edition).

(x) As to the dictum of Wood, V.-C., in *Catlin v. Brown*, see ante, p. 287, Mr. Lewis's error arose partly from the unfortunate and inaccurate theory that the rule forbidding the limitation of land to two unborn generations in succession is derived from the doctrine of double possibilities, and partly from Mr. Lewis's having overlooked the change in the meaning of the word “perpetuity” during the first half of the nineteenth century. In the sixteenth, seventeenth, and eighteenth centuries the usual meaning of “perpetuity” was a limitation of land to unborn generations in succession, by way of unbarred entail (supra, p. 283). Mr. Lewis's ignorance of this fact led him to cite the well-known passage in Mr. Fearn's book (to the

Mr. Jarman was unable to make up his mind which view was correct. He was misled by the ambiguity of Lord St. Leonards' remarks in *Cole v. Sewell*, with reference to the old rule forbidding the limitation of remainders "on too remote a possibility," into supposing that Lord St. Leonards considered the old rule to be "exploded"; with the result, as Mr. Jarman thought, that in Lord St. Leonards's opinion, "all contingent remainders are withdrawn from every species of perpetuity-restraint" (y). But this was not Lord St. Leonards's opinion, for in *Monypenny v. Dering*, he explained that in *Cole v. Sewell* he never meant to deny the existence of the rule forbidding successive limitations to unborn generations (z). It was under the influence of this error (a) that Mr. Jarman stated his own conclusion thus (b): "It is submitted, therefore, that both principle and authority justify the questioning the proposition that remainders owe obedience to no other law than that which requires that they should take effect at the instant of the determination of the particular estate. They are, it is conceived, either subject to the old doctrine, directed against remote possibilities, or the modern Rule against Perpetuities, unless these are identical, as may be contended with much plausibility, although it is not necessary to go to this extent in support of the denial of the exemption of remainders from all perpetuity-restraint."

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Mr. Jarman's views.

As it is now settled by the decision of the Court of Appeal in *Whitby v. Mitchell*, that contingent remainders are "subject to the old doctrine directed against remote possibilities," it follows, according to Mr. Jarman, that they are not subject to "the modern Rule against Perpetuities." It is equally clear, from the judgments in that case, that the two rules are not identical, as suggested by Mr. Jarman.

Decision in *Whitby v. Mitchell*.

effect that a limitation by way of contingent remainder to two unborn generations in succession tends to a perpetuity, and that the second remainder is, therefore, "absolutely void," supra, p. 285) as meaning that in Mr. Fearne's opinion a contingent remainder can be void for remoteness, although it is obvious to anyone familiar with the history of the subject that in this passage Mr. Fearne was not referring to the modern Rule against Perpetuities, but was stating the rule now established by the decision in *Whitby v. Mitchell*. Mr. Lewis's remarks on the subject, and on the cognate subject of the doctrine of cy-près (Perp. Supp., p. 136 seq.), shew an ignorance of the devices invented by landowners

in their efforts to re-establish unbarable entails during the fifteenth and sixteenth centuries, which is surprising in a man of his industry and learning. These devices are referred to in detail by the Real Property Commissioners (Third Report, pp. 30-31).

(y) First edition of this work, Vol. II. p. 730.

(z) 2 D. M. & G. at p. 168; and see Sugden, Powers, 393.

(a) It must be admitted that the error was quite excusable, owing to the vagueness of the Chancellor's language in *Cole v. Sewell*. See ante, p. 354, note (d).

(b) First edition, Vol. II. p. 733. Mr. Jarman's remarks on *Cole v. Sewell* are printed at length in an appendix to the fourth edition of this work.

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Result.

In short, the effect of the decision in *Whitby v. Mitchell* is to affirm the correctness of the view held by Mr. Fearne and his followers (including Mr. Joshua Williams), and to demonstrate the error of Mr. Lewis and his followers (including Mr. Gray) in denying the existence of the old Rule against Perpetuities.

Re Frost.

The question came before Kay, J., in *Re Frost* (c), and he held that contingent remainders are subject to the modern Rule against Perpetuities. Two remarks may be made upon the decision. In the first place, the learned judge entirely disregarded the opinion of Mr. Joshua Williams on the point, although in deciding *Whitby v. Mitchell* (d), five months previously, he said: "I do not want any higher authority than that of the late Mr. Joshua Williams, who was certainly one of the best real property lawyers that have existed in my lifetime." In the second place, Mr. Justice Kay fell into the error of supposing that when Mr. Fearne (in the passage already quoted (e)) referred to the old Rule against Perpetuities, he had in mind the modern Rule against Remoteness. This error deprives the decision of all value.

Re Ashforth.

The decision of Farwell, J., in *Re Ashforth* (f) is also unsatisfactory. In the first place, the learned judge seems not to have been aware that the rules governing legal contingent remainders are different from those governing equitable contingent remainders, for he remarked that the case before him was "really undistinguishable from *Garland v. Brown*" (g). But in *Garland v. Brown* the limitations were equitable, and no one denies that equitable remainders are subject to the modern Rule. However, in a later part of his judgment, the learned judge treated the limitations in the case before him as legal, which they clearly were, being, in effect, to trustees and their heirs during the lives of A., B., and C. and their children; after the death of all the children except one, the testatrix devised the land to such surviving child in tail. Now it is by no means clear that land can at common law be limited for an estate pur autre vie during the life of an unborn person (h), and if it cannot, then the limitation in *Re Ashforth* to the surviving child was not a contingent remainder, but an executory devise. Whether this is so or not, the judgment, if one may say so with respect, fails to notice the essential difference between the "perpetuities" referred to in the

(c) 43 Ch. D. 246.

(d) 42 Ch. D. 494.

(e) Ante, p. 285.

(f) [1905] 1 Ch. 535.

(g) 10 L. T. 292.

(h) The question is discussed in an article by me in Sol. Journ. xlix. 793. In the addenda to the second edition of his work on Perpetuities, Mr. Gray refers to this article without dissent. [C. S.]

old books, and those remote limitations by way of shifting use and executory devise, against which the modern Rule against Perpetuities is directed; and this is the more strange, because the difference is pointed out in Lord Nottingham's judgment in the *Duke of Norfolk's Case*, referred to by Farwell, J. Nor does the attention of the learned judge seem to have been called to the fact that, down to the middle of the nineteenth century, the most eminent real property lawyers were practically unanimous in thinking that the modern Rule does not apply to legal contingent remainders. On a question of this kind the opinion of Mr. Fearne, Mr. Butler, and the Real Property Commissioners, is entitled to some consideration. Again, the statement of the learned judge (i), that the opinion of Mr. Joshua Williams on the question has been displaced by Mr. Gray, must have been made per incuriam, for the opinion of Mr. Gray, that contingent remainders are subject to the modern Rule, is based on the assumption that there never was a rule forbidding the limitation of estates to two or more unborn generations in succession (j); this assumption was held to be erroneous by the Court of Appeal in *Whitby v. Mitchell*, in which case the Court adopted Mr. Joshua Williams's views on the subject. Mr. Joshua Williams's views, however, do not rest on his own personal opinion: they are identical with those of Mr. Fearne, Mr. Brodie, Mr. Duval, Mr. Preston, Mr. Butler, Lord St. Leonards, and the other distinguished real property lawyers above referred to, while the views of Mr. Gray (which are identical with those of Mr. Lewis) make the rule in *Whitby v. Mitchell* and the doctrine of *cy-près* hopelessly unintelligible (jj).

(4) *Other Common Law Interests*.—Questions seldom arise under wills as to common law interests in land other than contingent remainders, but it may be useful to state shortly how the law at present stands. In 1832 the Real Property Commissioners remarked, "The ancient common law did not restrain the creation

Common law conditions, &c.

(i) [1905] 1 Ch. at p. 546.

(j) Ante, p. 286, n. (g). Mr. Gray remarks (§ 284) that "as the Rule [meaning the modern Rule against Perpetuities] governs all contingent equitable limitations of real estate and all contingent limitations, legal and equitable, of personal estate, whether in the form of remainders or not, it is very desirable that legal contingent remainders of real estate should be subjected to the Rule also." On this it may be noted, first, that sub-

jecting legal contingent remainders to the Rule would not make the law symmetrical, because they are already subject to their own special rules, which do not apply to other contingent interests; and secondly, that the desire of text writers to make the law symmetrical does not justify the Courts in applying the modern Rule to common law interests which were recognised as valid long before the Rule was invented.

(jj) See the argument in *Williams v. Teale*, 6 Ha. at p. 245.

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of future interests to a given period. The time allowed for re-entries under conditions broken, and for grants of rentcharges, or other incorporeal hereditaments, commencing in futuro, and for creating the *interesse termini*, was indefinite, however Courts of Justice may at present be disposed to consider them within that policy of the law which restrains perpetuities. Sir Edward Coke expressly says, 'If I enfeoff another of an acre of ground, upon condition that if mine heir shall pay the feoffee, &c., twenty shillings, he and his heirs shall enter, this condition is good.' We know of no bounds originally fixed by the common law within which interests of this kind were restrained; and it is a mistake to suppose that at the common law, properly so called, there was any rule against perpetuities" (k). The Commissioners accordingly recommended that the operation of the Rule against Perpetuities should be extended so as to apply to future interests of the kind above referred to, with certain exceptions in the case of landlord and tenant. No statute has been passed to carry out this recommendation. Mr. Charles Butler also treats common law conditions as being free from restriction on the score of perpetuity (l). The opinion of modern text-book writers is divided. Mr. Lewis (m) and Mr. Gray (n) think that the opinion of the Real Property Commissioners is erroneous, and that conditions of re-entry are within the Rule against Perpetuities. Mr. Gray quotes a dictum of Jessel, M. R., in *Re Macleay* (o), and another of North, J., in *Dunn v. Flood* (p), as supporting his view. Mr. Challis, on the other hand, was unable to understand why a rule invented by the judges in the seventeenth century to restrict the creation of future interests unknown to the common law, should be applied to future interests which the common law always allowed to be created without any restriction (q). The point first arose for decision in *Re The Trustees of Hollis's Hospital and Hague's Contract* (r).

(k) Third Report, 29. The names of the distinguished lawyers who formed the Commission are given above, p. 369, n. (l). The erroneous opinion that the modern Rule against Perpetuities formed part of the common law is, however, widely held; it was held by Jessel, M. R., in *L. & S. W. Railway v. Gomm*, 20 Ch. D. 562, and by the Privy Council in *Cooper v. Stuart*, 14 A. C. 286.

(l) Co. Litt. 327a, n. (2), II. 3.

(m) Perp. 616.

(n) Perp. § 300a seq.

(o) L. R., 20 Eq. 186.

(p) 25 Ch. D. 629. See also the dictum of Baggeally, L. J., on appeal:

28 Ch. D. 592.

(q) Challis, R. P. 174.

(r) [1899] 2 Ch. 540. See *Att.-Gen. v. Cummins*, [1906] 1 Ir. R. 406, referred to post, p. 375, n. (t). An undoubted exception to the modern Rule against Perpetuities occurs in the case of covenants for the perpetual renewal of leases (*London & South-Western Ry. v. Gomm*, 20 Ch. D. 562), and it seems somewhat curious that common law conditions, which are of much greater antiquity, should not be allowed a similar immunity: see Williams, Vendor and P. 600, n. (k).

In that case the question was as to the title to some property which had been conveyed by Thomas Hollis in 1726 to trustees upon trust for a hospital. The conveyance contained a proviso that if at any time thereafter the property should be used for any purposes other than those therein mentioned, it should revert to the heirs of Thomas Hollis. Byrne, J., said: "I am of opinion that the condition in question is obnoxious to the Rule against Perpetuities." The point, however, was raised on a summons under the Vendor and Purchaser Act, and as the heir-at-law of Thomas Hollis declined to be bound by the decision, Byrne, J., refused to force the title on the purchaser. It will be noticed that the learned judge relied to a considerable extent on the opinion of Mr. W. D. Lewis, and that the opinion of the Real Property Commissioners (most of whom were far superior to Mr. Lewis in learning and authority) was not cited.

Although the decisions in *Re Frost* and *Re Ashforth* (if and so far as they decide that a legal contingent remainder can be void for remoteness (*s*)), and the decision in *Re Hollis's Hospital*, are contrary to the views held by the most eminent real property lawyers of the last two generations, it would not be safe to predict how the points involved in them will be decided when they come before the Court of Appeal. The question requires patient investigation of a somewhat obscure subject, and it is, perhaps, hardly fair to expect modern judges, whose time is fully occupied with more interesting matters, to explore, without assistance, the musty and dimly lighted recesses of the law of real property (*t*). It is much easier to adopt the general principle that the modern Rule against Perpetuities applies to all future interests in property, including those which were recognised as valid at common law long before the modern Rule was even thought of. The difficulty is that the Court of Appeal cannot follow this course, unless it takes upon itself to alter the doctrines of the common law: the Court has not hitherto claimed to have jurisdiction to do this. It is to be hoped that the legislature will summon up courage to amend the law by abolishing contingent remainders, and by allowing all

The future
of the Rule
against
Perpetuities.

(*s*) It will be remembered that the decision in *Re Frost* was an alternative one, and that in *Re Ashforth* the question whether the ultimate devise was a contingent remainder or an executory limitation was not argued or con-

sidered.

(*t*) The excellent judgment of Pallas, C. B., in *Att.-Gen. v. Cummins* (1895, reported [1906] 1 Ir. R. 406), stands out as a valuable contribution to the learning on this branch of law,

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future interests in property, both real and personal, to take effect if, in the event, they vest within the period allowed by the Rule. The question involved in *Re Hollis's Hospital* is more complicated, but ought not to present any insuperable difficulty (*u*).

(*u*) The anomalies and injustice caused by the present state of the law are shortly referred to in an article in the *Juridical Review* for July 1906. Mr. Gray does not approve of the suggestion that the modern Rule against Perpetuities should be altered by statute: he thinks it dangerous

to attempt to amend the Rule, and points to the statute in force in the State of New York as a warning. I venture to think that the law might easily be improved. The Thellusson Act is a partial amendment of the Rule against Perpetuities, and it has worked fairly well. [C. S.]

CHAPTER XI.

ACCUMULATION OF INCOME.

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I. —The Accumulations Act, 1800.—Mr. Jarman says (a) : “ Formerly the rule that fixed the period for which the vesting of property might be suspended, regulated also the power of deferring its enjoyment ; it being then permitted to a settlor or testator to create an accumulating trust absorbing the entire income during the full period for which the vesting might be protracted, and whether it was or was not so protracted (b). And no inconvenience appears to have been felt in allowing so wide a range of accumulation, few persons having availed themselves of the permission to a mischievous extent, until Mr. Thellusson made the extraordinary and well-known disposition of his immense property (c), by the operation of which, every child and more remote descendant born or rather procreated in his lifetime were excluded from enjoyment, for the purpose of swelling to a princely magnitude, the fortune of some remote and unascertained scions of the stock. The necessity then became apparent, of preventing, by legislative enactment, the repetition of a scheme of disposition fraught with so much mischief and hardship. This led to the stat. 39 & 40 Geo. 3, c. 98 (d), which, after

Old rule fixing extent of prospective accumulation of income.

Stat. 39 & 40 Geo. 3, c. 98.

(a) First edition, p. 264.

(b) As to the invalidity of trusts for accumulation on the ground of remoteness, see ante, p. 308. And as to the cases where a trust for accumulation is nugatory, because the beneficiary can put a stop to it, see *Saunders v.*

Vautier, 4 Bea. 115, and other cases cited in Chap. XXIV.

(c) 4 Ves. 227.

(d) Known as the Thellusson Act, until the Short Titles Act, 1896, gave it an official title,

CHAPTER XI. reciting that it was expedient that all dispositions of real or personal estate, whereby the profits and produce thereof were directed to be accumulated, and the beneficial enjoyment thereof was postponed, should be made subject to the restrictions hereinafter contained, proceeded to enact 'that no person or persons shall, after the passing of this act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise soever, settle or dispose of any real or personal property, so and in such manner, that the rents, issues, profits or produce thereof shall be wholly or partially accumulated, for any longer term than *the life or lives of any such grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of any such grantor, settlor, deviser or testator, or during the minority or respective minorities of any person or persons who shall be living or en ventre sa mère at the time of the death of such grantor, deviser, or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations would for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends, or annual produce so directed to be accumulated*; and in every case, where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated, contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed.' Sect. [2] provides, 'That nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor, or deviser, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor, or deviser, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood, upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this act had not passed.' By sect. [3] (e) the act is not to extend to heritable property in Scotland (f), nor [by sect. 4] to wills made before the act, unless the testator should be living and of sound mind for twelve calendar months from its passing."

Accumulation restrained, unless for life of settlor, or for twenty-one years, or during minority, &c.

Act not to extend to provisions for debts, or portions for children;

—nor to Scotland; nor to prior wills, unless, &c.

(e) Since repealed by stat. 11 & 12 Vict. c. 36, s. 41.

(f) But a direction to invest accu-

mulations in lands in Scotland did not bring the case within s. 3. *Macpherson v. Stewart*, 28 L. J. Ch. 177.

This statute, having been passed just before the Irish Act of Union came into operation, does not extend to Ireland (*g*).

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—nor to Ireland.

To bring a case within the act, it is not necessary that the word “accumulate” should be used, or that there should be an express direction to accumulate (*h*); a direction to “invest” or “capitalise” income (*i*), or to form a reserve or guarantee fund, or the like, may be sufficient (*j*). Indeed, the act applies in cases where an obligation to accumulate arises from the nature of the gift, for in applying the statutory provision against accumulation, as Mr. Jarman remarks (*k*), “regard is had to the substance and effect, and not to the form and mere language of an instrument; for, if property be disposed of in such manner as to produce an accumulation of income, for a period exceeding what the statute authorises, it will not avail that there is an absence of any trust expressly and in terms directed to this object.” Thus if a testator charges the income of his property with the raising of a gross sum which cannot be raised within the period allowed by the act, this is tantamount to a trust for accumulation, and is void so far as it exceeds the period (*l*).

What constitutes a direction to accumulate.

Trusts whose effect is to produce accumulation held to be within the statute.

An obvious case of this nature is that of a bequest of a general residue to a class of persons (some of them unborn at the testator's decease), whose shares are not to vest until the age of twenty-one years; for it is to be observed, that as a residuary bequest, to take effect in future, carries not only the bulk or corpus of the property, but also the intermediate income (*m*), it follows that the statute is infringed whenever the vesting, or even the distribution, is postponed until a period or event which occurs more than twenty-one years after the testator's decease, without any express application of the income accruing in the interval. In such a case the income is accumulated for the statutory period, and after that goes as under an intestacy (*n*). Sir L. Shadwell was indeed of opinion that the statute did not affect accumulation which arose from the nature of the gift, but operated merely to strike out of the will so much of

As to accumulation under a residuary bequest in favour of unborn persons at majority.

(*g*) *Ellis v. Maxwell*, 12 Beav. 104; *Heywood v. Heywood*, 29 Beav. 9. English leaseholds, though personal estate, are governed by the *lex loci*, and though belonging to a domiciled Irishman are subject to the act, *Freke v. Lord Carbery*, L. R., 16 Eq. 461; vide ante, p. 2.

(*h*) *Morgan v. Morgan*, 4 De G. & S. 164.

(*i*) *Mathews v. Keble*, L. R., 3 Ch. 691; *Re Danson*, 13 R. 633; *Re Mason*,

[1891] 3 Ch. 467.

(*j*) *Re Cox*, [1900] W. N. 89.

(*k*) First edition, p. 274.

(*l*) *Shaw v. Rhodes*, 1 My. & Cr. 135, s. c., sub nom. *Evans v. Hellier*, 5 Cl. & F. 114.

(*m*) As to this, see *infra*, Chap. XXIX.

(*n*) *Re Taylor*, [1901] 2 Ch. 134. For another example of accumulation required by law, see *Re Hiscoe*, 48 L. T. 510.

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a direction to accumulate as exceeded the prescribed limits (o) ; his opinion, however, is clearly opposed to the other authorities upon this question, including one of the highest court of appeal (p). There is a plain distinction between such a case and the cases where, the property being vested in an infant, the accumulation is to be assumed to be the act of the Court (q).

Where trust
is postponed.

The act also does not apply where property is directed to be dealt with in a manner which cannot immediately be carried into effect, and it consequently becomes necessary to accumulate the income (r). Thus, in *Wentworth v. Wentworth* (s), a testator devised his residue upon trust for conversion, with power to postpone conversion for twenty-one years, and a direction that during that period the surplus income and all accumulations thereof should go in augmentation of capital ; the residue was settled on trusts for tenants for life and remainderman, and included minerals which were not let or worked until after the testator's death : it was held that during the twenty-one years the trustees were bound to accumulate the rents and royalties, and that after that period the tenants for life were entitled to receive out of the rents and royalties a fair equivalent for the annual income which would have been received by them if the property had been sold at the expiration of the twenty-one years, the residue being added to capital.

Trusts for
improving or
maintaining a
property.

Nor is a trust for the application of money in keeping buildings in repair within the act. But a trust for the erection of new buildings is within the act. The test seems to be whether the expenditure ought properly to be debited to capital or income (t).

Trusts embracing too
wide an
accumulation
good pro
tanto.

"It is well settled," says Mr. Jarman (u), "that a trust for accumulation exceeding the statutory limit, is good pro tanto. Thus, where a testator directed that the profits of certain canal shares should be invested, the interest arising to be applied to the education of the children of A. and B., (who had no child at the death of the testator,) and on their attaining twenty-one to be

(o) *Elborne v. Goode*, 14 Sim. 165 ; *Corporation of Bridgnorth v. Collins*, 15 ib. 538.

(p) *Evans v. Hellier*, 5 Cl. & Fin. 114 ; s. c. nom. *Shaw v. Rhodes*, 1 My. & Cr. 135 ; *McDonald v. Bryce*, 2 Kee. 276 ; *Morgan v. Morgan*, 20 L. J. Ch. 111, 15 Jur. 319 ; *Tench v. Cheese*, 6 D. M. & G. 453 ; *Macpherson v. Stewart*, 28 L. J. Ch. 177 ; and see *Bective v. Hodgson*, 10 H. L. Ca. 664, 668 ; *Wade Gery v. Handley*, 3 Ch. D. 374.

(q) See per Wood, L. J., *Mathews v. Keble*, L. R., 3 Ch. 696 ; per Lord Cranworth, V.-C., *Wilson v. Wilson*, 1 Sim. N. S. 297.

(r) *Lombe v. Stoughton*, 12 Sim. 304. (s) [1900] A. C. 163. See this and other cases cited in Chap. XXXIV.

(t) See *Vine v. Raleigh*, [1891] 2 Ch. 13 ; *Drake v. Trefusis*, L. R., 10 Ch. 364 ; *Re Mason*, [1891] 3 Ch. 467, cited post, p. 395.

(u) First edition, p. 269,

divided among them; Sir W. Grant, M.R., held that the accumulation was good for twenty-one years from the death of the testator, though void for the subsequent period" (v). So a trust to accumulate the income of property in order to raise a specified sum for the benefit of persons in esse, is stopped by the statute at the expiration of twenty-one years from the testator's death (w). If, however, the persons to benefit by any trust for accumulation are not necessarily ascertainable within the period allowed by the Rule against Perpetuities, the trust is void ab initio (x).

The results which follow from a trust for accumulation being invalidated, wholly or partially, by the statute, are referred to in a later part of this chapter (y).

The period of twenty-one years from the testator's death is to be calculated exclusively of the day of his death (z), and must be a period immediately following his death. Thus, if the accumulation be fixed to commence at a time subsequent to the testator's death, it will necessarily cease when twenty-one years from his death have elapsed, though it may have been in operation only one or two years (a).

How the period of twenty-one years is to be calculated.

It should be borne in mind that a trust for accumulation may be void ab initio, or become inoperative before the expiration of the period prescribed by the testator, for reasons irrespective of the act. Thus a trust for accumulation which transgresses the limits allowed by the Rule against Perpetuities is void ab initio (b), and a trust to accumulate the income of property to which a person is absolutely entitled may be stopped by him at any time (c).

Trusts void or inoperative irrespective of act.

A testator or settlor is not at liberty to take more than one of the several periods of accumulation mentioned in the statute (for instance, he cannot direct an accumulation for a term of twenty-one

(v) *Longdon v. Simson*, 12 Ves. 295; see also *Griffiths v. Vere*, 9 Ves. 127; *Palmer v. Holford*, 4 Russ. 403; *Re Rosslyn's Trust*, 16 Sim. 391, and cases in this section, passim; *Talbot v. Jevers*, L. R., 20 Eq. 255, where the accumulation was limited to such period "as the rules of law will permit."

(w) *Oddie v. Brown*, 4 De G. & J. 179; *Williams v. Lewis*, 6 H. L. C. 1013; supra, p. 368.

(x) *Curtis v. Lukin*, 5 Bea. 147; *Scarisbrick v. Skelmersdale*, 17 Sim. 187; supra, p. 308.

(y) Post, p. 388.

(z) *Gorst v. Lowndes*, 11 Sim. 434; *Lester v. Garland*, 15 Ves. 248.

(a) *Shaw v. Rhodes*, 1 My. & Cr. 154; *Webb v. Webb*, 2 Bea. 493; *Att.-Gen. v. Poulden*, 3 Hare, 555; *Nettleton v. Stephenson*, 3 De G. & S. 366.

(b) Supra, pp. 308, 367. *Curtis v. Lukin*, 5 Bea. 147; *Scarisbrick v. Skelmersdale*, 17 Sim. 187.

(c) Ante, p. 368; *Wharton v. Masterman*, [1895] A. C. 186, and see *Phipps v. Kelynge*, 2 V. & B. 57, n., as explained in *Southampton v. Hertford*, ib. 54.

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years, and also during the minority of a person entitled under the limitations): the language of the statute being disjunctive (*d*).

Unborn child.

II.—Accumulation during Minority.—It was at one time thought that the provision of the statute which authorises the accumulation of income during the minority of any person who would, if of full age, be entitled to it, did not permit accumulation during the minority of a person not born at the time of the testator's death. This was the view hastily expressed by Leach, V.-C., in *Haley v. Bannister* (*e*), where, however, the only point open for decision was whether accumulation can lawfully be directed from a period commencing before the birth of the child during whose minority the income is to be accumulated. It is clear that it cannot (*f*).

Accumulation cannot commence before the birth of the minor,

but may be directed during minority of unborn person.

The dictum of Leach, V.-C., above referred to, is inaccurate. The point arose in *Re Cattell* (*g*), and Neville, J., had no difficulty in holding that a trust for accumulation during the minority of a child born after the testator's death, is valid.

The act does not impliedly make valid trusts for accumulation previously bad.

Accumulation for payment of testator's debts valid, though to endure longer than a life and twenty-one years; but if for payment of the debts of another, good only if within that limit;—rule not affected by the act.

III.—Accumulation for Payment of Debts.—A trust for accumulation which not only exceeds the statutory limits, but also the period allowed by the Rule against Perpetuities, is, like any other such limitation, void in toto, even though it be for a purpose excepted from the operation of the act; for the act does not by the exceptions contained in it impliedly make valid what was previously invalid (*gg*). As before noticed (*h*), accumulation for payment of the debts of the testator does not contravene the Rule against Perpetuities, and is therefore good, though its duration be unlimited (*i*). But an accumulation for the payment of debts of a stranger does not come within the reason of the rule which protects a similar provision for payment of the testator's own debts, and is therefore valid by the common law only for the period of

(*d*) *Wilson v. Wilson*, 1 Sim. N. S. 288; *Rosslyn's Trust*, 16 Sim. 391; *Ellis v. Maxwell*, 3 Bea. 595; *Jagger v. Jagger*, 25 Ch. D. 729; *Re Errington*, 76 L. T. 616.

(*e*) 4 Madd. 275, and adopted by Romilly, M. R., in *Bryan v. Collins*, 16 Bea. 14.

(*f*) *Ellis v. Maxwell*, 3 Bea. 587; *Longdon v. Simson*, 12 Ves. 295.

(*g*) [1907] 1 Ch. 567.

(*gg*) *Lord Southampton v. Marquis of Hertford*, 2 V. & B. 54; *Marshall v. Holloway*, 2 Sw. 432; *Browne v. Stough-*

ton, 14 Sim. 369 (as to which cases see ante, p. 313); *Scarisbrick v. Skelmersdale*, 17 Sim. 187; *Boughton v. James*, 1 Coll. 26, 1 H. L. Ca. 406; *Turvin v. Newcome*, 3 K. & J. 16.

(*h*) Ante, p. 367.

(*i*) *Lord Southampton v. Marquis of Hertford*, 2 V. & B. 54, see at p. 65; *Bacon v. Proctor*, T. & R. 40; *Bateman v. Hotchkiss*, 10 Beav. 426. As to what are "incumbrances" within a trust for accumulation for their discharge, see *Re Llanover*, [1907] 1 Ch. 635.

a life in being and twenty-one years after. The act leaves this rule untouched, sect. 2 excepting from the operation of the first section "all provisions for payment of debts of any grantor, settlor, or deviser, or other person or persons" (*j*). And this has been held to include not only debts due at the testator's death, but future debts accruing within the period last mentioned (*k*). But the accumulation must be designed and intended bonâ fide as a provision for payment of debts. Where a testator directed the income of residue or a sufficient part of it to be applied for the benefit of his son, and the surplus to be accumulated and added to capital, and after the son's death the whole to be divided among the son's children; but if the son should die without issue, the testator bequeathed a moiety of the fund to B.; B. afterwards became indebted to the testator, who then by codicil declared that B. should not be obliged to pay the debt unless and until he became possessed of the moiety, which, in that case, was to be set off against the debt. B. eventually became entitled to the moiety, but it was held that the testator was not thinking of the debt when he directed the accumulation, and that it was not protected by sect. 1 (*l*). And if creditors avail themselves of their legal rights, and get their debts paid in a different way, as by resorting to the corpus, the accumulation cannot, even if the will so direct, be continued beyond the period allowed by sect. 1 of the act, in order to recoup the persons to whom, subject to the trust for accumulation, the estate is devised (*m*). Even if the statutory period has not expired, the remainderman has no equity (unless the will contains a direction to that effect) to have the accumulation continued during the statutory period in order to recoup the capital (*n*). But an annuitant may have the right of subrogation or marshalling as against creditors (*o*).

IV.—Accumulation for Portions (*p*).—The exception in the act respecting accumulations for the purpose "of raising portions for any child or children (*q*) of any grantor, settlor or deviser, or any child or children of any person taking any interest under such

Construction of the exception as to accumulation for children's portions.

(*j*) *Barrington v. Liddell*, 2 D. M. & G. 498.

(*k*) *Varlo v. Faden*, 27 Beav. 255, 1 D. F. & J. 211. See *Re Mason*, [1891] 3 Ch. 467.

(*l*) *Mathews v. Keble*, L. R., 3 Ch. 691.

(*m*) *Tewart v. Lawson*, L. R., 18 Eq. 490; *Re Heathcote*, [1904] 1 Ch. 826.

(*n*) *Ibid.*; *Norton v. Johnstone*, 30

Ch. D. 649; *Re Green*, 40 Ch. D. 610.

(*o*) *Biggar v. Eastwood*, 19 L. R. Ir. 49.

(*p*) This section, with the exception of the passages in brackets, which have been added by the present editor, is taken verbatim from the fourth edition of this work, by Mr. Vincent.

(*q*) This means legitimate children, *Shaw v. Rhodes*, 1 M. & Cr. 159.

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conveyance, settlement or devise," has created great difficulty. And first, what is a portion within this exception ?

In *Beech v. Lord St. Vincent* (r), lands were devised to A. for life, with remainder to his first and other sons in tail, with remainders over, and 2000*l.* per annum was directed to be accumulated for twenty-one years during the life of A., and so much longer as A. had any younger children ; the accumulations to be held on certain trusts for such younger children. It was twice held that this was an accumulation for raising portions within the exception in the statute. And in *Barrington v. Liddell* (s), where lands had been settled on the marriage of A. in the usual way, with a term of years for securing (in the events that happened) the sum of 40,000*l.* for younger children's portions ; and afterwards a testator bequeathed a sum of 15,000*l.* in trust to be accumulated during the life of A., until it reached the sum of 40,000*l.*, and then to be applied in satisfaction of the portions ; and he gave another sum for building a mansion house on the settled estate ; Lord St. Leonards held, that this was clearly within the exception, and that the accumulation might continue after the expiration of twenty-one years, computed from the testator's death. A provision for raising or satisfying portions charged or created by a previous instrument is, therefore, within the exception in the statute (t).

Barrington v. Liddell.

Not necessary to exclude eldest son.

[In *Re Stephens* (tt), the testator directed income to be accumulated for the benefit of all the children of his daughter who attained twenty-one or married ; and it was held by Buckley, J., that the fact of the eldest son not being excluded (as in *Beech v. Lord St. Vincent*) did not prevent the fund from being a " portion."]

Gift of general estate augmented by accumulation is not a portion.

On the other hand, it has been decided that an accumulation of the whole of a testator's estate (u), or of the residue, comprising the bulk, of it (v), and a gift of the augmented fund, comprising both capital and accumulations, is not protected by the exception. " A direction to accumulate all a person's property," said Lord Cranworth (w), " to be handed over to some child or children when

(r) 3 De G. & S. 678.

(s) 2 D. M. & G. 480.

(t) But (as appears by *Beech v. Lord St. Vincent* and other cases, and notwithstanding *Halford v. Stains*, 16 Sim. 496) not exclusively so.

(tt) [1904] 1 Ch. 323.

(u) *Wildes v. Davies*, 1 Sm. & Gif. 475.

(v) *Eyre v. Marsden*, 2 Kee. 573 ; *Bourne v. Buckton*, 2 Sim. N. S. 91 ; *Edwards v. Tuck*, 3 D. M. & G. 40 ;

Mathews v. Keble, L. R., 3 Ch. 691. [*Re Walker*, 54 L. T. 792, where the residuary personalty and the accumulations of the income thereof, and the accumulated rents of certain real and leasehold properties, were given as one fund, and it was held that the accumulations of the rents could not be separated so as to constitute a portion.]

(w) *Edwards v. Tuck*, 3 D. M. & G. 58.

they attain twenty-one can never be said to be a direction for raising portions for the child or children ; it is not raising a portion at all ; it is giving everything. ' Portion ' ordinarily means a part or share, and though I do not know that a gift of the whole might not in some circumstances come under the term of a gift of a portion, yet I do not think it comes within the meaning of a portion in this clause of the act, which points to the raising of something out of something else for the benefit of some children or class of children. . . . If every direction for accumulation for a child was a portion, the intention of the legislature, which was to prevent accumulations, such accumulations being most frequently directed for the benefit of children, would be entirely defeated."

Again, in *Burt v. Sturt (x)*, where legacies were given to all the testator's children, and the residue was directed to be accumulated during the lives of the children and of the survivor of them, and after the decease of the survivor the whole was to be divided between the grandchildren of the testator then living, Sir W. P. Wood, V.-C., said it was simply a scheme of the testator for the purpose of accumulating his property into one mass, and handing it over in that mass at the remote period of the death of the survivor of a number of persons whom he had mentioned, not to any given child or children, but to two or three or possibly one favoured individual ; it did not seem to him that in any sense or upon any rational construction he could call that the raising of a portion for children : in truth it was only the Thellusson scheme arranged in a somewhat less complicated and less extensive shape.

In *Jones v. Maggs (y)*, where a legacy of 200*l.* was directed to be accumulated until the child of A. (who then had one child) should attain twenty-one, and on that event to be divided, with its accumulations, among the children of A. who should be then living, and the residue of the personal estate was given to the parent, Sir G. Turner, V.-C., held that the legacy was not a portion, though in a certain sense it was raisable out of the property of the parent ; otherwise every legacy given to a child of a residuary legatee must be so construed and the act would be wholly defeated. This decision was much influenced by the V.-C.'s opinion, now exploded, that to bring the case within the exception, the parent must take an interest in the very fund directed to be accumulated ; and no distinction was noticed between the accumulation of the entirety or bulk of

Whether same rule applies to pecuniary legacy so augmented.
Jones v. Maggs.

(x) 10 Hare, 415. See also *Drewett v. Pollard*, 27 Beav. 196. (y) 9 Hare, 605.

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an estate and of a mere pecuniary legacy. The effect upon the act of a contrary decision was certainly overstated.

Middleton v. Losh.

On the other hand, Sir J. Stuart, V.-C., distinguished between a gift of the whole of a testator's estate, augmented by accumulation, and a gift of a pecuniary legacy so augmented (z). And in *Middleton v. Losh* (a), where a testatrix bequeathed 50,000*l.* to trustees upon trust to invest, and apply a competent part of the income towards the maintenance and support of her son W., and to accumulate the remainder, and after his decease upon trust to divide the capital and accumulations between the children of W., and in case of the death of W. without issue the capital and accumulations to sink into the residue of her personal estate; he decided that the accumulation was valid as a provision for portions, relying mainly on "the just principles of construction" adopted by Lord St. Leonards in *Barrington v. Liddell*.

The question chiefly discussed in that case was not what is a portion, but what interest must be given to the parent (b). And although the subject of gift was, as in *Middleton v. Losh*, a pecuniary legacy augmented by accumulation, and although it must be admitted that whether the testator has or has not directed the legacy to be taken in satisfaction of portions already charged on the estate of another person, the result quoad the testator's own estate is the same, yet the presence of such a direction brings the case literally within the words of the act, and distinguishes it too widely from *Middleton v. Losh* to permit its being regarded as an authority for the decision in the latter case. A similar direction would equally bring within the letter of the act a case where (as in *Edwards v. Tuck*) the subject of gift was not a pecuniary legacy only but the bulk of the testator's estate. But there is no actual decision to that effect.

Legacy to accumulate in trust for one for life, and afterwards for his children, not a portion.

A trust to accumulate a legacy during a stated period, and at the expiration of it to pay the income to A. for life, and afterwards to divide the capital among the children of A., is plainly not a provision for raising portions for children, but only a legacy in trust for a parent for life, and after his death for his children (c). And it cannot be material to the construction of the statute that the testator has or has not called the children's shares of an accumulated fund their "portions" (d).

(z) *Wildes v. Davies*, 1 Sm. & Gif. 475.

(a) 1 Sm. & Gif. 61. See also *St. Paul v. Heath*, 13 L. T. N. S. 270; and the observations on *Middleton v. Losh*, in 10 Hare, 426.

(b) See this insisted on, 2 Dr. & Sm. 61.

(c) *Watt v. Wood*, 2 Dr. & Sm. 56.

(d) See per Kindersley, V.-C., *Bourne v. Buckton*, 2 Sim. N. S. 96.

It will have been seen that, in *Middleton v. Losh*, the aggregate fund was not necessarily to go to the children of W., but if all his issue died in his lifetime it was to fall into the residue, so that it was not in all events a fund for portions. But the validity of the accumulation may well depend on the event: as in *Re Chulow's Trusts* (e), where a fund was directed to be accumulated, and was given to the children of the testator's son (who took an interest under the devise); but if there should be no children, to such persons as the parent should by will appoint: Sir W. P. Wood, V.-C., said that, if there had been children, this might have been upheld as a provision for their portions; but as there were and could be none, and the testamentary power of appointment was clearly no "portion" for the parent, the V.-C. held that the direction to accumulate was within sect. 1 of the act, and invalid after the lapse of twenty-one years from the testator's death.

Accumulation valid or not according to the purpose whereto in event it is applicable.

The next question is, what is the interest which a parent, not being the grantor, settlor, or deviser, must take under the conveyance, settlement, or devise in order to render valid an accumulation for portions for his children? (f). May it be an interest of any kind, or must it be an interest in the *identical* property from which the income directed to be accumulated arises? and must it be a substantial interest, or will a merely nominal interest suffice? In *Barrington v. Liddell* (g), Lord St. Leonards read the word "devise" in the act as meaning "will," and held, that the interest need not be one in the very fund to be accumulated, and that the legacy for building a mansion house on the estate of which the parent was tenant for life, gave him a sufficient interest within the act. And as to quantum, the L. C. cited, with apparent approbation, the opinion expressed by Lords Lyndhurst and Brougham (h), and approved by Lord Cranworth (i), that any interest, however minute, was sufficient. But according to Lord Langdale (j), it would seem that, where accumulation is directed for the benefit of children of several parents, if any one parent takes no interest, the whole direction fails.

What interest the parent must take under the devise.

V.—Accumulation for Purchase of Land.—By the Accumulations Act, 1892, it is enacted that after the 28th June 1892, no

Accumulations Act, 1892.

(e) 1 J. & H. 639.

[(f) See *Re Stephens*, [1904] 1 Ch. 322.]

(g) 2 D. M. & G. 480, stated above. *Morgan v. Morgan*, 15 Jur. 319, 20 L. J. Ch. 109, appears to decide that a specific legacy to the parent will not render valid an accumulation of a

general legacy to the child. But the case is obscure.

(h) *Evans v. Hellier*, 5 Cl. & Fin. 126.

(i) *Edwards v. Tuck*, 3 D. M. & G. 40. Wood, V.-C., appears to have been of the same opinion: *Burt v. Sturt*, 10 Hare, 423.

(j) *Eyre v. Marsden*, 2 Kee. 573.

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person shall settle or dispose of any property in such manner that the rents, issues, profits, or income thereof shall be wholly or partially accumulated for the purchase of land only, for any longer period than during the minority or respective minorities of any person or persons who, under the uses or trusts of the instrument directing such accumulation, would for the time being, if of full age, be entitled to receive the rents, issues, profits, or income so directed to be accumulated.

The act applies to the will of a testator who dies after the passing of the act, although the will was executed before that date (*k*).

“Land” in this act has the meaning given to it by the Interpretation Act, 1889, and therefore includes incorporeal hereditaments (*l*).

Limited
application
of act.

It seems that the act does not apply if the trust for accumulation authorises the application of the money in two or more ways, although one of them is the purchase of land: otherwise no effect would be given to the word “only.” Thus in *Re Danson (m)*, a testator devised freehold lands in strict settlement, and directed that accumulations made during the minority of any infant taking by purchase should be deemed capital moneys arising under the Settled Land Acts, and should be primarily liable to be laid out in the purchase of land; he also directed that during twenty-one years after his death the net profits of his leaseholds should be capitalised and become capital moneys of the settlement, and subject to the powers of the Settled Land Acts, and desired that any lands purchased therewith should be adjacent to or fitting to be held with the settled freeholds. It was held that the act did not apply either to the accumulations of the rents of the freeholds, or to the capitalised income of the leaseholds.

Effect of
act.

Where the will directs the accumulations to be applied for two or more alternative purposes, one of which is the purchase of land, the effect of the act is to make the will read as if the trust for the purchase of land were struck out (*n*). Whether the act affects a provision for the permanent improvement of land and houses out of income has not yet been decided (*o*).

Destination
of the income
released from
accumulation.

VI.—Destination of Released Income.—The destination of the income which the Thellusson Act releases from accumulation has

(*k*) *Re Llanover*, [1903] 2 Ch. 330.

(*l*) *Re Clutterbuck*, [1901] 2 Ch. 285, correcting an error in the report of *Re Danson*, 13 R. 633.

(*m*) 13 R. 633.

(*n*) *Re Llanover*, [1903] 2 Ch. 330; *Re Llanover*, [1907] 1 Ch. 635.

(*o*) See above, p. 380.

occasioned much debate. The law on this point, however, may now it is conceived be stated as follows :—

1. Where there is a present gift in possession, and the direction to accumulate is engrafted upon that gift, the statute, by discharging the property from the superadded trust, has the effect of entitling the donee or successive donees to the immediate income, as if the prior gift had stood alone (*oo*).

2. Where the vesting of a contingent interest (*p*), or the possession of a vested interest (*pp*), is postponed till the expiration of the period of accumulation, the statute, by stopping the accumulation, does not accelerate the vesting in the one case, or the possession in the other (*q*), and the released income devolves as if the testator had made no disposition of it. Consequently :

(i) If the property is a legacy or a specific bequest or devise, the released income goes, in the case of personal property, to the residuary legatee (*r*) ; and in the case of real property, to the residuary devisee, or heir, according as the will does or does not come within the Wills Act (*s*). If it is in the nature of a charge on real estate, it sinks for the benefit of the estate (*t*). Where the residue is not given absolutely, but only for life or some other limited interest, the released income forms part of the capital of the residue, so that the person having such limited interest is only entitled to the income of the investments representing the released income (*u*).

(*oo*) *Trickey v. Trickey*, 3 My. & K. 560 ; *Coombe v. Hughes*, 34 Beav. 127, 2 D. J. & S. 657. The cases in which a person is entitled to stop the accumulation of income on the ground that he is the only person interested in the property have nothing to do with the Thellusson Act (see *Wharton v. Masterman*, [1895] A. C. 186) : they are referred to in Chap. XXIV.

(*p*) *Jones v. Maggs*, 9 Hare, 605.

(*pp*) *M'Donald v. Bryce*, 2 Kee. 276 ; *Eyre v. Marsden*, ib. 574 ; *Ellis v. Maxwell*, 3 Beav. 597 ; *Nettleton v. Stephenson*, 3 De G. & S. 366 ; *Lord Barrington v. Liddell*, 10 Hare, 429 ; 2 D. M. & G. 480 ; *Weatherall v. Thornburgh*, 8 Ch. D. 261 ; *Talbot v. Jevors*, L. R., 20 Eq. 255.

(*q*) *Green v. Gascoyne*, 4 D. J. & S. 565.

(*r*) *Ellis v. Maxwell*, 3 Beav. 587 ; *Att.-Gen. v. Poulden*, 3 Hare, 555 ; *Jones v. Maggs*, 9 ib. 605 ; *Re Parry*, 60 L. T. 489, and the cases cited post, note (*u*).

(*s*) *Nettleton v. Stephenson*, 3 De G. & S. 366 ; *Smith v. Lomas*, 33 L. J. Ch. 578 ; *Green v. Gascoyne*, 4 D. J. & S. 565. In *Simmons v. Pitt*, L. R., 8 Ch. 978, a charge on real estate was directed by the owner of it to form part of his personal estate, the income of which was to be accumulated, and it was held that the released income went to his next of kin.

(*t*) *Shaw v. Rhodes*, 1 My. & C. 135 ; s. c. *Evans v. Hellier*, 5 Cl. & F. 114 ; *Re Chulow's Trusts*, 1 J. & H. 639.

(*u*) *Crawley v. Crawley*, 7 Sim. 427 ; *O'Neill v. Lucas*, 2 Keen, 313 ; *Morgan v. Morgan*, 4 De G. & S. 175, 176 (stated post, p. 390) ; *Re Pope*, [1901] 1 Ch. 64, disapproving *Re Phillips*, 49 L. J. Ch. 198. The decision in *Re Phillips* seems on principle to be correct (see Gray, *Perp.* § 708) ; but the rule laid down in *Crawley v. Crawley* may now be considered as established beyond question.

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(ii) Where it is residue that is directed to be accumulated, the income of such residue, when the accumulation is stopped, will, in obedience to a well-settled principle (*v*), devolve in the case of personal property to the next of kin (*w*), in the case of real property to the heir (*x*), and in the case of a mixed fund to the next of kin and heir respectively (*y*).

3. The income of the accumulations follows the same rule; therefore if the accumulations arise from personal property, not being a residue, the income falls into the capital of the residue (*z*), so that a tenant for life would only be entitled to the income of such income; and where residuary personalty is directed to be accumulated, the income of the accumulations, of course, goes to the next of kin. Where the accumulations arise from residuary real estate, the accumulations of rents and profits seem to preserve their character of realty, so that the heir is entitled to the income of such accumulations (*a*); and it would, of course, follow that, where the accumulations arose from real estate other than residuary, the residuary devisee would, under the present law, be entitled. In *Ellis v. Maxwell* (*b*), where the rents of the testator's real estate were directed to form part of his personal estate, and the personal estate was directed to be accumulated, it was held that the income of the accumulations went to the residuary legatees. The case turned on the special words of the will.

*Morgan v.
Morgan.*

In *Morgan v. Morgan* (*c*), the testatrix bequeathed a legacy of 5000*l.* to A. upon her marriage with all the accumulations of interest thereon from the time of the testatrix's death, and gave her residuary estate to C. for life, with remainder to various persons. C. died in 1838. Twenty-one years from the testatrix's death expired in 1846. A. was still living, and a spinster. It was held that in the event of A.

(*v*) *Skrymsher v. Northcote*, 1 Sw. 566.

(*w*) *M'Donald v. Bryce*, 2 Kee. 276; *Pride v. Fooks*, 2 Beav. 437; *Elborne v. Goode*, 14 Sim. 165; *Wilson v. Wilson*, 1 Sim. N. S. 288; *Bourne v. Buckton*, 2 ib. 91; *Oddie v. Brown*, 4 De G. & J. 179; *Weatherall v. Thornburgh*, 8 Ch. D. 261 (crown entitled in default of next of kin).

(*x*) *Halford v. Stains*, 16 Sim. 488; *Wildes v. Davies*, 1 Sm. & Gif. 475; *Weatherall v. Thornburgh*, sup. (crown in default of heir).

(*y*) *Eyre v. Marsden*, 2 Kee. 564, 4 My. & Cr. 431; *Edwards v. Tuck*, 3 D. M. & G. 40; *Burt v. Sturt*, 10 Hare,

415; *Ralph v. Carrick*, 5 Ch. D. 984; *Re Travis*, [1900] 2 Ch. 541.

(*z*) See cases cited supra, note (*u*).
(*a*) *Eyre v. Marsden*, 2 Kee. 577; but see Gray, Perp. § 706.

(*b*) 12 Beav. 104.

(*c*) 4 De G. & S. 164; 20 L. J. Ch. 109, 441; 15 Jur. 319. The reports of this case differ from one another, but the result stated in the text seems consistent with all of them. In order to simplify the statement no notice has been taken of the fact that two legacies were given in similar terms, and that part of the judgment related to one and part to the other.

marrying she would be entitled to the legacy and accumulations made down to 1846 ; that the income of the legacy and accumulations from 1846 until the marriage or death of A. belonged to the residuary legatees ; that in the event of her dying without having been married the personal representative of C. would be entitled to so much of the accumulations as represented that part of the income of A.'s legacy which accrued during C.'s lifetime ; that so much of the interest on the accumulations made between 1825 (the death of the testatrix) and 1838 as accrued between 1846 and the death or marriage of A., belonged in any event to C.'s personal representative ; and that so much of the interest on the accumulations made between 1838 and 1846 as accrued between 1846 and the death or marriage of A., belonged in any event to the residuary legatees.

Another case of a contingent legacy arose in *Bryan v. Collins* (d). There the testatrix bequeathed a fund upon trust to accumulate the income and to pay the whole fund to the eldest daughter of A., and if there should be no such daughter, then in trust for the eldest daughter of B. The testatrix died in 1819 : A. died in 1851 without having had any issue. B. had a daughter C., who was born in 1821 and died in 1827. It was held by Romilly, M. R., that the personal representative of C. was entitled to the fund and the accumulations made between 1819 and 1827, with interest at 4 per cent. per annum on the amount so ascertained up to the time of payment, and that the rest of the accumulations went to the residuary legatee.

Bryan v. Collins.

The interest which, by the operation of the act, results to the heir is generally either an estate pur autre vie or a chattel interest, and consequently if he dies while the income is in suspense, his interest passes to his executor or administrator, and not to his heir (e).

Nature of interest which devolves to the heir.

The Thellusson Act, by invalidating or stopping a disposition of the income of land, may affect the operation of other acts of parliament, such as the Settled Land Acts (f), or the Fines and Recoveries Act (g).

Effect of Thellusson Act on other statutes.

VII.—Life Insurance.—In *Bassil v. Lister* (h), Turner, V.-C., decided that a direction in a will to apply a sufficient part of the

Whether insurances on lives form a mode of accumulation within the act.

(d) 16 Bea. 14.

(e) *Sewell v. Denny*, 10 Bea. 315 ; *Gray*, Perp. § 702, note, where *Halford v. Stains*, 16 Sim. 488, is referred to.

(f) *Vine v. Raleigh*, [1896] 1 Ch. 37.

(g) *Re Hughes*, [1906] 2 Ch. 642.

(h) 9 Hare, 177. And see *Meller v. Stanley*, 2 D. J. & S. 183. The decision in *Bassil v. Lister* was followed by Chitty, J., in *Re Vaughan*, [1883] W. N. 89. See also *Re Errington*, 76 L. T. 616 (settlement by deed).

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income of the testator's property in keeping up certain policies which he had effected on the lives of his children in their names, and which in case of their marriage he directed to be settled on their wives and children, was not a trust for accumulation within the statute, and was therefore valid beyond the period of twenty-one years from his death. He observes: "It was said in argument that the payment of the income to the Insurance Company was itself an accumulation; that the Company were recipients of the income for the purpose of accumulation; that what was done was the same thing as if the rents were paid to an individual, to accumulate in his hands, and to be paid over at the death of the life insured; and the case was presented to the Court in many similar points of view; but I do not see how the payment of the premiums to the Insurance Company out of the income is an accumulation of the income. The premiums, when paid to the Insurance Company, become part of their general funds, subject to all their expenses; and although it is true that the funds in the hands of the companies do generally produce accumulations, it is impossible to say what accumulations arise from any particular premium. It was said that it was an accumulation as to the estate, because the estate receives back a certain sum upon the death of the party whose life was insured; but what the estate receives back is not the accumulation of the income, but a sum payable by the office by contract with the testator; and is this an accumulation within the meaning of the statute? The history of the statute goes far to shew that it is not, and I think the language of the enactment confirms that view. The enactment is, that no person shall settle or dispose of real or personal estate, so and in such manner that the rents, profits, income, or produce shall be accumulated beyond the prescribed periods; and these are words which admit of a clear, plain, common-sense interpretation, as referring to the accumulation of rents, profits, and income, *quâ* rents, profits, and income. Why is the Court to put a strained construction upon them, and cut down the undoubted right which existed before the statute, beyond what the language of the statute, in its ordinary interpretation, imports? It is said that the Court ought to do so, because the spirit and intent of the statute was to prevent accumulation and the suspension of the beneficial enjoyment; but this argument appears to me to beg the question; for it assumes that what the petitioner here calls an accumulation suspending the beneficial enjoyment, was an accumulation intended to be prevented by the statute. Much reliance was placed in the argument upon the mischief which

might ensue from policies of insurance being resorted to for the purpose of evading the statute, if the disposition of this will were upheld, but I entertain no apprehension of any such mischief; I think that settlors and testators, who contemplate accumulations, are far too keen-sighted to incur the risks to which such a course of proceeding would be exposed. On the other hand, I see enormous mischiefs which would arise from the construction for which the petitioner contends. The case before us is but one instance of the difficulties to which such a construction would lead. If it be supported, what is to become of partnership agreements for long terms of years, where certain sums are to be drawn out annually, and the remaining profits are to accumulate and be divided at the end of the terms? What is to be done with policies of insurance on the lives of debtors (*h*)? And how is the case of a settlement of policies of insurance, with stock transferred in trust to pay premiums out of the dividends, to be dealt with?"

The V.-C. seems here to argue that because of the mode of accumulation adopted the statute did not apply; but the terms of the statute are general, that no person shall "by deed or deeds, &c., or otherwise howsoever, settle or dispose of his property so and in such manner" that the income thereof shall be accumulated; it can scarcely therefore be said that the act does not apply because a particular mode of accumulation is resorted to (*hh*). To exclude the act, it must be denied that there is any accumulation of income whatever; but it could not be denied, nor did the learned Judge attempt to deny, that effecting an insurance was one mode of accumulation. This answers the objection, that, "though the funds of the company might be accumulated, it would be impossible to say what part of such funds arose from any particular premiums"; an objection which affects only the mode of accumulation. The testator's estate, instead of getting back the total amount of premiums with compound interest, a sum varying in amount according to the period during which the premiums have been paid, gets back a *sum certain*, whatever that period may be. This sum is not less the result of an accumulation because it is of certain amount.

The decision was also rested on the ground that the sum paid back was in pursuance of a *contract*, and therefore not within the statute; this seems to beg the question, since, if there be an accumulation, the statute must reach it, whether it arise under a

Observations
on *Bassil v.*
Lister.

(*h*) The statute expressly excepts provisions for the payment of debts of any person, see 2 D. M. & G. 498.

(*hh*) And see the observations of Lord Cranworth, 6 D. M. & G. 462.

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contract or by will : for its terms are general ; and a person can no more contract that his income shall be accumulated beyond the prescribed limits, than he could direct by will that it should be so accumulated ; indeed, if the statute does not extend to contracts, it does not touch any accumulation made by marriage settlement, for every such settlement is a contract. The question what would become of partnership agreements for long terms of years, by which a certain sum is to be drawn out and accumulated annually, may, perhaps, be answered by another question, namely, supposing such agreements not to be effected by the act in question, what would become of them when considered with respect to the Rule against Perpetuities ? an ordinary trust for accumulation, extending over a long term of years (that is, as the V.-C. must have meant, more than twenty-one years), would be void altogether as transgressing the Rule against Perpetuities ⁽ⁱ⁾ ; one of two things, therefore, is clear, either such agreements are not valid, or, if they are valid, they are governed by rules which do not hold good with regard to ordinary trusts, and, in either case, no argument can be drawn from this source in support of the decision in *Bassil v. Lister*. Probably, the partnership agreements in question would be held good on the principle of the decision in *Bateman v. Hotchkin* ^(j), before noticed, that an accumulation which is capable at any moment of being put an end to ^(k) can infringe neither the statutory rule against accumulation, nor the common law rule against perpetuities. Lastly, as to the question what would become of settlements of policies of assurance with trusts for keeping them on foot by payment of the premiums, the answer seems to be, that they are either cases where security is given for a debt, or cases of settlement on a marriage, in which one of the settlors is the person during whose life the accumulation is to be made, both of which classes are within the exceptions of the statute under which a direct trust for accumulation would be good ; and it is conceived that there is no authority for saying that any other settlement of policies of assurance are good, where a direct trust for accumulation would not also be good.

It will be observed that the remarks of the learned Judge are irrespective of the fact, that the policies were effected in the testator's lifetime ; his decision was, that insurance is not a mode of accumulation affected by the statute, and it would, therefore, have been the same, if the policies had been effected after the

⁽ⁱ⁾ *Palmer v. Holford*, ante, p. 381.

^(k) See *Downs v. Collins*, 6 Hare, 418.

^(j) Ante, pp. 367-8.

testator's death. By giving small conditional legacies, a testator could easily procure persons, after his death, to allow policies to be effected on their lives, in their names, and to assign them to the testator's trustees, than which an easier and cheaper mode of accumulation could not be devised (*l*).

The principle laid down in *Bassil v. Lister* has been followed in some recent cases. Thus a direction to expend surplus income in the improvement of a landed estate and in maintaining in good habitable repair houses and tenements on the property, is not affected by the Thellusson Act, but it does not authorise expenditure in building new houses, or for any purpose the expense of which ought to be defrayed out of capital (*m*). So a direction to apply income in keeping buildings insured and repaired, and in reinstating any building destroyed by fire, is good pro tanto and void as to the surplus (*n*). And in a will declaring trusts of leasehold property, a direction to keep up a policy of insurance to replace at the end of the term the capital which would be lost by the falling in of the lease is good (*o*). In all these cases the direction to apply and the application of the income must be made in good faith and not for the purpose of evading the act.

(*l*) The foregoing remarks on *Bassil v. Lister* are printed as they stand in the fourth edition of this work, by Mr. Vincent. They were cited in *Re Vaughan*, [1883] W. N. 89, but not adopted by Chitty, J., who held that a policy of life insurance is not within the Thellusson Act. But in *Vine v. Raleigh*, [1891] 2 Ch. at p. 21, Chitty, J., expressed his entire agreement with the concluding observations of Turner, L.J., in *Bassil v. Lister*. With regard to

partnership agreements, it seems clear that they are not subject to the Rule against Perpetuities, which only applies to such contracts as are specifically enforceable, and therefore create an interest in property: *London & S. W. Ry. v. Gomm*, 20 Ch. D. 562; Gray, *Perp.* § 273a, 329. [C. S.]

(*m*) *Vine v. Raleigh*, [1891] 2 Ch. 13. See *Drake v. Trefusis*, L. R., 10 Ch. 364.

(*n*) *Re Mason*, [1891] 3 Ch. 467.

(*o*) *Re Gardiner*, [1901] 1 Ch. 697.

CHAPTER XII.

FROM WHAT PERIOD A WILL SPEAKS.

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From what period a will speaks.

“FOR some purposes a will is considered to speak from its date or execution, and for others from the death of the testator: the former being the period of the inception, and the latter that of the consummation of the instrument” (a).

In *Randfield v. Randfield* (b), a testator prepared a will in 1837, in which certain provisions were contingent on his son attaining twenty-one; he did not execute it until 1844, before which time the son attained that age: it was held that the will must be construed without reference to the contingency.

Construction of words referring to an existing individual.

I.—Object of Gift.—As a general rule, words indicating an existing individual are considered to refer to the date of the will, and not to the testator’s death. “Thus, if a testator give an estate or a sum of money to his son John, the gift will take effect in favour of his son of this name (if any) at the date of the will, and of him only. If, therefore, such son should die in the testator’s lifetime, and he should afterwards have another son of the same

Date and execution relatively considered.

(a) Thus Mr. Jarman, in the 1st edition of this work, p. 277. He adds the following note: “In this chapter, and indeed throughout the present work, the date and the period of execution are assumed to be identical; which, it is obvious, may not be the case, and then the question would arise—which is to predominate? It is conceived that, for some purposes, the date, and for others the time of execution, would do so. In regard to the will’s capacity of operation on real estate (supposing, of course, the will to be subject to the old law), the period of the actual execution would be the material fact; but in

regard to points of construction, the effect would sometimes, perhaps generally, depend on the date, or the time of *apparent* execution: for instance, if a testator dated his will on the 1st January 1830, and executed it on the 1st June in the same year, a bequest in such will of ‘all the Three per cent. Consols now standing in my name,’ possibly might be held to pass the Consols only of which he was possessed on the 1st January, and not what he had acquired between the date and execution, and which he held on the 1st June.”

(b) 8 H. L. C. 225.

name who should survive him, such after-born son would not be an object of the gift. And the same rule would seem to obtain if the devisee or legatee were described with reference to his filial character only, without any other designation (c), as in the case of a gift to 'my son' simply, which would apply, it is conceived, to the son (if any) living at the date of the will, to the exclusion of any after-born son, though such after-born son should, by reason of the decease of the then existing son, happen to be the only person answering the description at the death of the testator" (d). Similarly, a gift to the child with which the testator's wife was pregnant, which child was still-born, was held not to take effect in favour of another child of which the testator's wife was pregnant at the time of his death, though the result was that all the testator's property was devised away, and the last-mentioned child left unprovided for (e). And a gift to "the eldest son" of A. is a gift to the person who answers the description at the date of the will, as *persona designata*, so that if he dies before the testator the gift lapses (f).

On the same principle, where a testator bequeathed a silver cup to Lord S. and his heirs as an heirloom, and the person who was Lord S. at the date of the will died before the testator, leaving a successor to the title, it was held that the bequest lapsed (g).

A question of this nature may arise on wills made before 1838, containing a gift to the wife of the testator (h), and on all wills containing a gift to the wife of another person, under which, on the principle just stated, the individual standing in the conjugal relation at the date of the will, would take, exclusively of any other person who might happen to answer the description at the death of the testator (i). Accordingly, by early writers it is laid down (j), that if one devise land to the wife of J. S., and J. S. die, and she take to husband J. D., and then the devisor die, she shall take the land; and yet she is not the wife of J. S. when the devisor dies, nor shall she take it as his wife: but the intent is, that she who was the wife

Gifts to wife,
how construed.

(c) "This position, however, is advanced with some diffidence, seeing the strong anxiety of the Courts to extend, as much as possible, gifts to children." (Note by Mr. Jarman.) See *Perkins v. Micklethwaite*, ante, p. 203; and *Thompson v. Thompson*, and *King v. Bennett*, post, Chap. XLII.

(d) This statement of the law by Mr. Jarman is taken from the first edition, p. 283.

(e) *Foster v. Cook*, 3 Br. C. C. 346.

(f) See Chap. XLII.

(g) *Re Whorwood*, 34 Ch. D. 446.

(h) Since 1 Vict. c. 26, s. 18, the will would be revoked by a second marriage, and the question could not arise. See *Pratt v. Mathew*, 22 Beav. 334.

(i) *Garratt v. Niblock*, 1 R. & My. 629; *Bryan's Trust*, 2 Sim. N. S. 103; *Franks v. Brooker*, 27 Bea. 635. As to the meaning of the word "unmarried," see post, Chap. XXXV.

(j) See *Woodright v. Wright*, 10 Mod. 371; 8 Viner Abr. 309, tit. Devise, T. b. pl. 2; *Plow. 344a*.

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General propositions.

Whether gifts in remainder are distinguishable.

of J. S. at the time of the making the will should have it, and the person is clear by the description. But as Mr. Jarman points out (*k*), if J. S. had had no wife at the date of the will, it is very doubtful whether a person subsequently becoming such could have claimed under the devise, unless the description were applicable to her at the testator's death; she ought, it is conceived, to answer the description at *one* of these periods. Mr. Jarman says (*l*): "The distinctions upon the subject deducible from general principles, and the authorities just referred to, appear to be the following:—First, that a devise or bequest to the wife of A., who has a wife at the date of the will, relates to that person, notwithstanding any change of circumstances which may render the description inapplicable at a subsequent period, and, by parity of reasoning, is under *all* circumstances confined to her (*m*); but that, secondly, if A. have no wife at the date of the will, the gift embraces the individual sustaining that character at the death of the testator (*n*); and, thirdly, if there be no such person either at the date of the will, or at the death of the testator, it applies to the woman who shall first answer the description of wife, at any subsequent period.

"There seems to be no ground, upon principle, for varying the construction, where the gift to the wife is by way of remainder after the death of the husband; the rule being, that the devise of an estate in remainder, to a person in a certain character, and by reference simply and exclusively to that character, vests in the person sustaining it at the death of the testator. The consequence would be, that in case the person who was wife at the death of the testator, or who subsequently became such, die in the lifetime of her husband the tenant for life, no after-taken wife, surviving him, would be entitled under the devise; since it would be impossible, consistently with the principle in question, to hold that it remained contingent until the death of the husband, or that it shifted from time to time to the several persons upon whom the character of wife successively devolved (*o*).

(*k*) First edition, p. 284.

(*l*) First edition, p. 285.

(*m*) See the case of *Re Coley*, [1903] 2 Ch. 102, cited below note (*o*), which treats the general principle as unquestionable, unless there is something in the context of the will to prevent its application; as to this, see *Re Drew*, post, p. 400.

(*n*) See *Lloyd v. Davies*, 14 C. B. 76; and analogous cases, Ch. XLII. ad fin.

(*o*) See *Driver d. Frank v. Frank*, 3 M. & Sel. 25, 8 Taunt. 468; *Long-*

worth v. Bellamy, 40 L. J. Ch. 513; *Radford v. Willis*, L. R., 7 Ch. 7, and see *Boreham v. Bignall*, 8 Hare, 131, where however the words were special. The point may now be considered settled; see *Re Burrow's Trusts*, 10 L. T. N. S. 184; *Firth v. Fielden*, 22 W. R. 622; *Re Griffiths' Policy*, [1903] 1 Ch. 739; *Re Coley*, [1903] 2 Ch. 102. The decision of Malins, V.-C., in *Re Lyne's Trust*, L. R., 8 Eq. 65, is overruled, so far as it professes to lay down any general rule.

“ The doctrine here contended for, however, may appear to be encountered by the case of *Peppin v. Bickford* (p), where a testator gave to his nephew A. 6000*l.* to be raised out of his estate, and which he directed should not be paid or payable until the day of his marriage, when it was to be laid out in the purchase of land, to be settled and conveyed to the said A. and his assigns for life, and after his decease, *to and upon the wife of A. for life*, and after her decease, then unto and upon the first son of A. on the body of such wife to be begotten, in tail male, remainder to the other sons successively in tail male, remainder to the daughters as tenants in common in tail, remainder to the testator’s brother-in-law B. in fee. A. was unmarried at the date of the will and the death of the testator. He subsequently married a lady, who died in his lifetime without issue. He afterwards married again, and the second wife claimed to be included in the trusts, contending that the estates were to be settled on any after-taken wife of A. and his issue by such wife, in case his first wife should die without issue ; and the Court so decided : Lord Loughborough said, ‘ If the wife had died within a month after the marriage, there could have been no issue to take the provision : and the legacy of 6000*l.*, except as to the life interest of the nephew, would have lapsed (qu. failed ?). It is impossible to ascribe such an intention to the testator ’ (q).

“ In this case, the construction must, it is conceived, be referred to the special circumstances of the trust being executory, which authorised the Court to give it a liberal construction, and that, by restricting the trust in favour of the wife to the first person standing in that relation, the limitation to the issue would have been restricted to *her* children, which could hardly be the intention of the testator, who was the husband’s relation.”

Executory trusts.

In all cases of executory trusts, it is purely a question of intention. Thus, in *Re Parrott* (r), a testator bequeathed a fund to be settled upon his daughter A., “ the wife of M. W.,” for her life, part of the fund to be paid at her death “ to her husband if living, if deceased then the whole amount is to be divided amongst her children ” ; it was held by the Court of Appeal that a settlement be directed, so framed as to apply to M. W. and not to any future husband, and so as to confine the trusts to the daughter’s children by him. On the other hand, in *Nash v. Allen* (s), a trust to settle

(p) 3 Ves. 570.

(q) See also *Allanson v. Clitherow*,

1 Ves. sen. 24 : Belt’s Supp. 24.

(r) 33 Ch. D. 274.

(s) 42 Ch. D. 54. The subject is discussed more in detail in Chap. XXIV. (Executory Trusts).

CHAPTER XII. property upon the testator's daughter or daughters "and her or their intended husband or husbands" and "the children of such marriage or respective marriages," was held to authorise a settlement in favour of a second husband.

Contrary intention.

Apart from the question of executory trusts, the presumption that a gift to the wife of a married person is confined to the wife living at the date of the will, may in any case be rebutted by the context. Thus, in *Re Drew* (t), a testator gave property upon trust to pay the income to his son B. for life and after his death "to his wife" for life, and after her decease upon trust for B.'s children living at his decease; the will contained a provision for the cesser of B.'s interest on alienation or bankruptcy, and a discretionary trust in that event for the maintenance and support of B., his wife and children. B. was married at the date of the will. It was held by Stirling, J., that B.'s second wife, whom he married after the date of the will, was entitled, on the ground that the will shewed a general intention to provide for B.'s family.

The decision in *Re Lory* (u) may be supported on the same ground. There a testator bequeathed property upon trust to pay the income during the life of his son to his son's wife and children in equal shares, and after his son's death to his son's widow and children in equal shares. The son was married at the date of the will, but shortly after the testator's death the son's wife died and he married again: it was held by Chitty, J., that the second wife was entitled to a share of the income.

Reputed wife.

Difficult questions sometimes arise where the person who claims a legacy left to the "wife" of the testator or another person is not really married to him. As a general rule, it seems sufficient that the legatee had at the date of the will acquired the reputation of a wife. Thus, where the testator had separated from his wife A. (by whom he had no children), and went through the ceremony of marriage with another woman B. by whom he had two children, and made a will by which he made bequests in favour of "my wife" and the two children: it was held that B. took under those words (v). On principle it would seem that the same rule applies to a gift to "the wife" of another person; that is to say, a woman not really his wife would be entitled, if the testator believed her to be, or treated her as, his wife. But the evidence would no doubt require to be strong, and in the absence of such evidence the testator would be presumed to refer to a person properly answering the

(t) [1899] 1 Ch. 336.

(u) 7 T. L. R. 419.

(v) *In bonis Howe*, 33 W. R. 48.

description (*w*). In *Re Lowe* (*x*) the testator made a bequest to "the present wife" of A. B., "if she shall become his widow," and also made bequests to various persons by name, describing them as the children of A. B.; they were, in fact, the illegitimate children of A. B. by a woman who lived with him as his wife: it was held that she was entitled to the bequest made to "the present wife" of A. B.

In considering gifts to a person as "wife" or "widow," it is necessary to distinguish three classes of cases: where the gift is to "my wife" or "the wife" or "widow" of A. B.; where the gift is to "my wife A." or "A. the wife of B."; and where the gift is to a woman on condition of her being or remaining the widow of A. B. The subject is considered in Chapter XXXV.

In *Bullmore v. Wynter* (*y*), a testator devised property to his daughter for life, and after her death in trust for any husband with whom she might intermarry, if he should survive her, for his life; she married a man from whom she was afterwards divorced on his petition, and he married again and survived her: it was held by Fry, J., that he was entitled to a life interest. But in *Re Morrieson* (*z*), under a bequest to the testator's son for life and after his decease to "any wife" of the son, it was held by Kay, J., that a woman whom the son married and afterwards divorced was not entitled. It is difficult to support the decision in *Bullmore v. Wynter*.

Divorced wife of third person.

In *Schloss v. Stiebel* (*a*) the testator in his will referred to his intended marriage with Miss A., and among other dispositions bequeathed 3000*l.* "to my wife"; he died before the marriage, while still engaged to Miss A.: Shadwell, V.-C., held that she was entitled to the legacy.

Intended wife.

The general rule above referred to (*b*) does not necessarily apply where the gift is to a person holding an official position, or to a class or fluctuating body of persons. Thus a gift to the superioresses of two convents means the persons who answer that description at the testator's death (*c*). And a simple gift to the children of A., comprises all such as are living at the testator's death (*d*), unless it is to children "now living."

Gifts to classes and officials.

(*w*) *Re Davenport's Trust*, 1 Sm. & G. 126. If the gift had been to "A., the wife of B.," A. would have taken, though not really married to B., under the rule stated in Chap. XXXV, *infra*; *Anderson v. Berkley*, [1902] 1 Ch. 936.

(*x*) 61 L. J. Ch. 415.

(*y*) 22 Ch. D. 619.

(*z*) 40 Ch. D. 30.

(*a*) 6 Sim. 1.

(*b*) *Supra*, p. 396.

(*c*) *Re Laffan and Downes' Contract*, [1897] 1 Ir. R. 469. As to gifts to persons holding charitable offices, see *ante*, p. 223.

(*d*) As to the construction of gifts to classes, see Chap. XLII., and *post*, p. 433.

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It is hardly necessary to say that if the gift is expressly confined to members of the class "now living," that will exclude any born after the date of the will (*e*). And the words "now living" have a similar restrictive effect, even where combined with a term which could not have full effect, according to its technical import, unless used prospectively; as in the case of a devise to the heir male of the body of A. "now living," under which the heir apparent of A. living at the date of the will has been held to be entitled; so that the word "heir" was made to surrender its primary and proper signification, in order to give effect to the word "now," with which it stood associated (*f*).

Verbs in present tense.

On the same principle, verbs in the present tense have a similar effect in restricting a devise or bequest to the objects existing at the date of the will, though in some of the cases considerable reluctance appears to have been manifested to carry out this principle, where its effect would be inconveniently to narrow the scope of the will, by excluding any who might be presumed to be intended objects of the testator's bounty. Thus in *Ringrose v. Bramham* (*g*), Sir L. Kenyon, M. R., held that a bequest of 50*l.* "to A.'s children, to every child he hath by his wife B.," to be paid to them as they should come of age, spoke at the time the will took effect, so as to let in all the children then living. "The circumstances of the case, however," as Mr. Jarman points out (*h*), "though not expressly adverted to by his Honour, perhaps aided the construction. The testator had directed a sum of money to be placed in the hands of a person until the children came of age, which exceeded the sum which would have been necessary for the purpose if the legacy were confined to the children then in existence. In regard to gifts to children, indeed, an anxiety to include as wide a range of objects as possible has so powerfully influenced the construction, that such cases are to be regarded as *sui generis*. To this anxiety is also to be ascribed the rule, which constitutes another exception to the doctrine under consideration, that a gift to children 'begotten' extends to children born after the date of the will; and a gift to children 'to be begotten' includes those antecedently in existence" (*i*).

Gifts to children.

(*e*) *Crossly v. Clare*, Amb. 397.

(*f*) *James v. Richardson*, T. Jon. 99, 1 Eq. Ca. Ab. 214, pl. 11, 1 Vent. 334, 2 Lev. 232, Raym. 330, 3 Keb. 832, Poll. 457; *Burchett v. Durdant* (*Durdant v. Burchett*) on same will, Skin. 205, 2

Vent. 311, Carth. 154.

(*g*) 2 Cox, 384.

(*h*) First edition, p. 279.

(*i*) Co. Litt. 20 b. See also post, Chap. XLII.

If the testator refers to a number of children in such a way as to shew that he has certain individuals in his mind, they take as personæ designatæ, and not as a class; as where he gives a sum "to be divided between the six children of A" (*j*).

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Where children take as personæ designatæ.

Legacies to clerks, servants, &c.

Legacies to clerks, servants, and the like, are also, as a rule, gifts to a class, and therefore those, and only those, who are in the testator's service at the time of his death, can take under such a bequest. Thus, in *Re Marcus* (*k*), the testator made the following bequest: "My office and warehouse employés, such as clerks and workmen, shall have to receive six months' full salary." It was held by North, J., that employés in the testator's service at the date of the will, but subsequently dismissed, were not entitled, and that employés who had been engaged by the testator after the date of the will, and were in his service at the time of his death, were entitled. His Lordship said: "The ordinary natural meaning of the words is 'those who were his employés at the time of his death.' If he had meant to describe the persons who were his employés at the time the will was made, nothing would have been easier than to say who they were and who were meant. But instead of adopting the obvious course in case that was intended, he does something else. He seems to consider that the employés are a class to be ascertained, and he gives the mode by which the trustees are to ascertain, when the time comes, who are the persons to take." *Jones v. Henley* (*l*), which decided that under a bequest of 100*l.* a-piece to all his servants, the testator meant only those who were continuously in his service from the date of the will to the testator's death, is quite contrary to principle. Of course, a testator may, by the context, shew that under a bequest to servants he has in mind persons in his service at the date of the will. Thus in *Parker v. Marchant* (*m*), the testator by codicil bequeathed "to the following persons, who have lived many years in my family, viz. to A. 1000*l.*, to B. 1000*l.*, to C. 1000*l.*; to the other servants, 500*l.* each." A servant not named was, at the date of the codicil, in the testator's service, but quitted it before his death: it was held that she was entitled. A similar construction was adopted in *Re Sharland* (*n*).

In *Sleach v. Thorington* (*o*), a testatrix bequeathed to the two servants who should be living with her at her death a sum of stock

(*j*) *Sherer v. Bishop*, 4 Bro. C. C. 55;

(*m*) 1 Y. & C. C. C. 290.

Orford v. Orford, [1903] 1 Ir. R. 121.

(*n*) [1896] 1 Ch. 517.

See post, Chap. XIII.

(*o*) 2 Ves. sen. 561; see Roper Leg.

(*k*) 56 L. J. Ch. 830.

182.

(*l*) 2 Ch. Rep. 162.

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in equal shares; she had two servants in her employ when she made her will, and afterwards took another, who was in her service at the time of her death: it was held that all three were entitled, on the principle laid down in *Tomkins v. Tomkins* (p).

Other points connected with legacies to servants (including the question of compliance with an express condition of being in the testator's service at the time of his death) are considered in another chapter (q).

Wills Act,
sect. 24.

Section 24 of the Wills Act, which makes a will speak from the death of the testator so far as regards his property, does not in any manner affect its construction with regard to the objects of gift (r).

II.—Subject of Gift.—In considering this question, it is necessary to distinguish between wills which are subject to the old law, and those regulated by the Wills Act.

Old law.

A. Old Law.—Under the old law, the general principle was that verbs in the present tense restricted a bequest (s) to the subjects existing at the date of the will, though in some of the cases considerable reluctance to carry out this principle appears to have been manifested. Thus in *Wilde v. Holtzmeyer* (t) Arden, M. R., expressed the opinion that a bequest of “all the property I am possessed of” would, if unrestrained by the context, extend to all the testator's personal estate at his death.

Doctrine as
to specific be-
quests.

The general rule, however, as stated by Mr. Jarman (u), is that “where a testator, in a will which is regulated by the old law, refers to a specific subject of gift, he is considered as pointing at the state of facts while he is penning the instrument, and not at the time of his decease, even though he may not have used the word ‘now’ or any other adverb emphatically denoting present time (v). The doctrine relating to the ademption of specific bequests stands upon this principle. Thus if a testator before the year 1838, having a leasehold messuage, or a sum of 1000*l*. Three per cent. Consols, bequeathed ‘all that my messuage in A.’ or ‘all that sum of 1000*l*.”

(p) Cited 3 Atk. 257; post, Chap. XLII.

(q) Chap. XXX.

(r) *Bullock v. Bennett*, 7 D. M. & G. 283; *Violet v. Brookman*, 26 L. J. Ch. 308. The decision in *Re Harris's Trust* (2 W. R. 689), so far as it conflicts with the rule above stated, is overruled. See the cases on gifts to eldest sons, &c., post, Chap. XLII.

(s) Devises of land were subject to a special rule, as to which see Chap. XXV.

(t) 5 Ves. 816; see also *Bridgman v. Dove*, 3 Atk. 201.

(u) First edition, p. 280.

(v) *Cockran v. Cockran*, 14 Sim. 248; *Pattison v. Pattison*, 1 My. & K. 12. See also per Wood, V.-C., *Goodlad v. Burnett*, 1 K. & J. 347.

Three per cent. Consols standing in my name,' he is considered as referring to the house or the stock belonging to him when he made his will; and, therefore, if he subsequently disposes of such house or stock, the bequest fails, though he may at his decease happen to be possessed of a messuage or a sum of stock answering to the description in the will (*w*).

"And a new estate in leasehold property, acquired by a subsequent renewal of the lease or otherwise, is no less out of the reach of a specific disposition of such property, as ordinarily expressed, than an interest in any other property answering to the same locality; it being considered that the testator, when referring to the property in question, had in his contemplation exclusively the specific interest in it of which he was possessed when he made his will, though he had not in terms referred to such interest, but had used expressions descriptive of the corpus of the property: as in the case of a bequest of 'all my tithes and ecclesiastical dues at W.' (*x*), or 'the perpetual advowson and disposal of the living or rectory of W. for ever, together with the tithes of all sorts thereof' (*y*), or 'all my leasehold estates in the parish of C.' (*z*). In all such cases the renewal of the lease under the old law revoked the bequest, or rather, to speak more accurately, withdrew from its operation the property which was the subject of disposition; in short, effected what is technically called an *ademption*" (*a*).

Effect of renewal upon bequest of leaseholds.

But though the general principle was settled, yet questions often arose in consequence of the context of the will affording ground to contend, that the testator intended any after-acquired interest of which he might become possessed by renewal, to pass under the bequest (*b*).

Exceptions to doctrine.

So in the case of a specific bequest of stock, debts, or other choses in action, many of the old cases went on the principle that if the nature of the property was changed without any *animus adimendi* on the part of the testator, the bequest was not adeemed (*c*). But

(*w*) See *Smallman v. Goolden*, 1 Cox, 329.

(*x*) *Rudstone v. Anderson*, 2 Ves. sen. 418.

(*y*) *Hone v. Medcraft*, 1 Bro. C. C. 261.

(*z*) *Coppin v. Fernyhough*, 2 Bro. C. C. 291.

(*a*) As to the effect of the testator purchasing the reversion in fee of leaseholds bequeathed by his will, see *Capel v. Girdler*, 9 Ves. 509.

(*b*) The question is discussed in the fourth and earlier editions of this work. See *Carte v. Carte*, 3 Atk. 174; *Abney*

v. Miller, 2 Atk. 593; *James v. Dean*, 11 Ves. 383, and 15 Ves. 236; *Slatter v. Noton*, 16 Ves. 197; *Poole v. Coates*, 2 D. & War. 493, and 1 Con. & L. 531; *Churchman v. Ireland*, 1 R. & My. 250; *Hance v. Truwhitt*, 2 J. & H. 216; *Colegrave v. Manby*, 2 Russ. 238; *Woodhouse v. Okill*, 8 Sim. 115; *Clough v. Clough*, 3 My. & K. 296. As to renewed leases for lives, see *Marwood v. Turner*, 3 P. W. 163.

(*c*) See cases cited in *Barker v. Rayner*, 5 Madd. 208; post, Chap. XXX.

CHAPTER XII. this doctrine may now be looked upon as exploded, even in cases where the money has been set aside or re-invested so that it can be traced (*d*).

As to general
devises and
bequests.

Mr. Jarman continues (*e*): "Under the old law, where a testator made a general gift of his real and personal estate, he was considered as meaning to dispose of these respective portions of property to the full extent of his capacity; and, accordingly, such a gift, in regard to the real estate, was read as a gift of the property belonging to the testator at the time of the execution of his will (he being incapable of devising any other), and as to the personalty, as a disposition of what he might happen to possess at the period of his decease. And the reluctance of the Courts to confine a general bequest of personalty to what the testator possessed at the date of the will sometimes, we have seen (*f*), prevailed against the force of words which might seem so to restrict it. The same principle also was applicable to a general bequest of any particular species of personal property, as of 'my furniture and effects,' which accordingly was held to embrace property of this description belonging to the testator at his death" (*g*).

Stat. 1 Vict.
c. 26, s. 24.

B. *Modern Law*.—Wills made or republished since the year 1837 are regulated, with respect to the period from which they speak, by the act 1 Vict. c. 26, which provides (s. 24), "That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

"This enactment must," as Mr. Jarman remarks (*h*), "be viewed in connection with sect. 3, which enables testators to dispose of all the real and personal estate to which they may be entitled at the time of their death, which, if not so disposed of, would devolve to their general real and personal representatives. Had the latter clause stood alone, it might have been a question whether the legislature, by merely enabling testators to dispose of after-acquired real estate, had so far varied and enlarged the construction of a general devise, as to make it extend beyond the real estate belonging to the testator when he made his will, to which the established

General
devise of
real estate
now extends
to property
at death.

(*d*) *Pattison v. Pattison*, 1 My. & K. 12; *Humphreys v. Humphreys*, 2 Cox 184; *Ashburner v. Macquire*, 2 Bro. C. C. 108; *Re Bridle*, 4 C. P. D. 336.

(*e*) First edition, p. 287.

(*f*) See cases cited ante, p. 404.

(*g*) 3 P. W. 325, 1 Eq. Ca. Ab. 200,

pl. 12. See also *Banks v. Thornton*, 11 Hare, 176, where a bequest of "all the residue of my property which consists of stock" was held to include all stock in the testator's possession at his death.

(*h*) First edition, p. 288.

rules of construction, no less than the principle which forbade the devise of after-acquired real estate, previously restricted it. Any such question is, of course, now precluded; for by the combined effect of the 3rd and 24th sections of the statute, it is evident that a general devise of real estate (*i*) will operate on all the property of that description, to which the testator may happen to be entitled at his decease; and though it seems to have become usual in practice, to extend the devise in express terms to the real estate belonging to the testator at his death, yet this must be considered as a measure of excessive caution, and not as springing from, or sanctioning, any serious doubt as to the construction. Indeed, to hold that a general devise is still confined to real estate belonging to the testator at the date of his will, would most inconveniently narrow, and go far towards rendering nugatory, the enactment which declares the will to speak, in regard to the estate (real as well as personal) comprised in it, from the death of the testator."

General
devise of
lands in par-
ticular place.

So a devise of the testator's real estate in a given county or parish, will *primâ facie* include all the real estate in that place to which the testator is entitled at his decease (*j*). But a general devise of lands in a particular place will, of course, not include lands subsequently purchased, where the will expressly disposes of the latter; the contrary intention spoken of in the act is then clearly shown (*k*).

Mr. Jarman continues (*l*): "The application of the new principle of construction to specific bequests, however, is attended with more difficulty, and will, in all probability, give rise to much controversy and litigation, before its precise limits and effect are fully established. The case immediately in the contemplation of the legislature, probably, was that of a specific bequest of a renewed leasehold property, which, we have seen, under the old law, did not apply to the new estate acquired by a renewal of the lease subsequently to the will; and, also, the case of a bequest of a specific sum of stock in the funds, which, upon the same principle, did not extend to substituted stock subsequently acquired by the testator, though of precisely similar amount. The applicability of the new enactment to such cases, of course, cannot be questioned (*m*), and there is as little doubt respecting its beneficial operation."

Application
of sect. 24 to
specific gifts.

Renewed
lease.

(*i*) *O'Toole v. Browne*, 3 Ell. & Bl. 572; *Jepson v. Key*, 2 H. & C. 873.

(*j*) *Doe d. York v. Walker*, 12 M. & Wels. 591. Compare *Mason v. Ogden*, [1903] A. C. 1. As to the effect of the words "which I am seised of or entitled

to," occurring in *Doe v. Walker*, see post, p. 418.

(*k*) *Re Farrer's Estate*, 8 Ir. C. L. 370.

(*l*) First edition, p. 289.

(*m*) But as to the second case put by Mr. Jarman, see post, p. 411.

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Purchase of
reversion of
lease.

The section applies not only to the case of a testator renewing the lease of leasehold property bequeathed by him, but also to cases where, after making his will disposing of the demised property, the lessee has bought the reversion in fee; the newly acquired interest passes by the will, notwithstanding a reference (commonly found in such cases) to the term for which the property is at the time held; this being considered only a mode of describing the property, and not as equivalent to saying, "I give my present interest and nothing else" (n). The latter meaning would equally exclude a renewed term (o). But, of course, the language used by the testator may shew that he does not intend to give anything except his present interest (p).

Bequest of
stock.

With regard to bequests of stock, it is clear that if there is nothing to shew a contrary intention, a bequest of the testator's stock of a given description will, under the present law, include any additional stock of the same description, purchased by the testator after the date of his will. Thus in *Goodlad v. Burnett* (q), where the testatrix gave "my New Three and a quarter per cent. Annuities" to trustees, upon the trusts therein mentioned; and, after making her will, purchased a considerable quantity of that stock in addition to what she possessed at the time of making her will, it was held by Wood, V.-C., that the whole was included in the bequest. He thought the Wills Act must have some sense given to it as regarded personal estate; before that act, there was no doubt that, as regarded the general personal estate, the will in most cases spoke from the death, but not in all; and the present was one in which the bequest would have been confined to the stock in the testatrix's possession at the time of making her will (r). It was precisely such a case to which the act would seem to have application; the only question was, did a contrary intention appear by the will? There was nothing to indicate such an intention, except the mere

(n) *Struthers v. Struthers*, 5 W. R. 809; *Miles v. Miles*, L. R., 1 Eq. 462; *Cox v. Bennett*, L. R., 6 Eq. 422; *Saxton v. Saxton*, 13 Ch. D. 359. Sect. 23 of the act was also relied on, as to which vide ante, p. 164, n. (t). See also *Leckey v. Watson*, Ir. R., 7 C. L. 157.

(o) See *Wedgwood v. Denton*, L. R., 12 Eq. 290, 295, 296.

(p) See *Emuss v. Smith*, 2 De G. & S. 722, post, p. 410. In *Re Knight*, 34 Ch. D. 518, a testator gave all the plate, &c., which should be in and about the dwelling-house in which he should reside at the time of his decease, "together with the lease of such house"

to his wife; at the date of his will he was residing in a house which he held for a short term at a rack rent; several years afterwards he parted with the lease of that house and purchased a freehold house in which he resided at his death: it was held by North, J., that the wife was not entitled to the freehold house. See also the cases cited post, Chap. XXII.

(q) 1 K. & J. 341. See also *Drake v. Martin*, 23 Beav. 89; *Trinder v. Trinder*, L. R., 1 Eq. 695; and per Jessel, M. R., L. R., 20 Eq. 312.

(r) Compare *Banks v. Thornton*, 11 Hare, 176.

circumstance of the testatrix having described the stock as "my Three-and-a-quarter per Cents."; and where, as here, the bequest was generic (*s*)—of that which might be increased or diminished—that circumstance was insufficient (*t*). It follows that if a testator bequeaths his stock of a particular description, and after the execution of his will disposes of part of it, the balance will pass by the bequest (*u*). CHAPTER XII.

The same principle has been applied to a devise of land. Thus in *Strevens v. Bayley* (*v*), the testatrix devised to the plaintiff "the lands of Curramore," and devised all the residue of her real estate to the defendant; the townland of Curramore had originally been held in undivided moieties, and there had been a partition under which the testatrix was, at the date of her will, entitled to one portion in severalty; and after the date of her will, she purchased the other portion: it was held that the whole townland passed to the plaintiff. Monahan, C. J., who delivered the judgment of the Court, considered that the description comprised the whole townland, and, consequently, included all lands in the townland of which the testatrix was seised at her death. Devise of
"lands of C."

So in *Castle v. Fox* (*w*), where a testator, being entitled to the mansion-house of Cleeve Court and lands adjoining, devised "his mansion and estate called Cleeve Court" to certain persons, and the residue of his property to certain other persons; and afterwards, at different times, bought other pieces of land, which he added to Cleeve Court, and treated and spoke of them as part thereof; Malins, V.-C., said he was required by sect. 24 to ask the question what it was the testator called the Cleeve Court estate at the time of his death; and finding upon the evidence that these additions were then regarded and treated by the testator as part

(*s*) Although the description of the stock was generic, the legacy was specific; see *Bothamley v. Sherson*, L. R., 20 Eq. 304, and other cases cited in Chap. XXX.

(*t*) *Trinder v. Trinder*, L. R., 1 Eq. 695, is to the same effect.

(*u*) *Re Slater*, [1906] 2 Ch. 480; [1907] 1 Ch. 665. Compare *Re Gillins*, [1909] 1 Ch. 345.

(*v*) 8 Ir. C. L. R. 410.

(*w*) L. R., 11 Eq. 542. See *Webb v. Byng*, 1 K. & J. 580, a very similar case, where the after-acquired property was held not to pass through insufficiency of evidence to prove that it was regarded by the testatrix as part of the estate devised. Citing this case, R. P. S. p. 372, Lord St. Leonards says,

"consider this case." As to the admissibility of such evidence, see s. c. and other cases post [Ch. XV.]. (Note by Mr. Vincent in the 4th ed. of this work.) But it is not clear that this was the ground of the decision in *Webb v. Byng*, or that the operation of a specific devise in general terms depends on intention, any more than does the operation of a residuary devise or bequest; for in most cases a testator does not contemplate the possibility of a specific gift failing through lapse, remoteness, &c., and yet if it does, the property passes under the residuary gift. In *Castle v. Fox*, the V.-C. seems to have attributed too great potency to sect. 24; see post, p. 413.

CHAPTER XII. of the estate, he held that they passed as such under the specific devise.

Another example of the effect of a general description is to be found in *Everett v. Everett* (x), where a testator by will released his son from certain specified debts and "all other moneys due from him to me": it was held that these words released the son from moneys lent to him by the testator after the date of the will.

So where (xx) a testator bequeathed all his share and interest in a partnership business and in the real and personal estate employed or invested therein to trustees upon trust to continue the business at the discretion of his wife, and to pay to her a sum equal to a share in the profits of the business; the testator afterwards acquired the whole of the business: it was held by Bacon, V.-C., that the whole business passed and that the widow was entitled to the whole of the income.

But, as already mentioned (y), the testator may use language shewing that he had specific property in his mind. Thus in *Emuss v. Smith* (z), it was held that a devise of "all my freehold estate at Brickhouse Lane which I purchased of B." by a testator who had before making his will purchased of B. an estate in that lane, partly freehold and partly leasehold, did not pass the reversion in fee, afterwards purchased from C., of the part theretofore leasehold (a).

The cases in which it has been held that property may pass under a generic description (e.g., "the property to which I am entitled under the will of X."), even if its state of investment is changed by the testator, are considered elsewhere (b).

Gifts of specific sums of stock, or of a particular number of shares in a certain company, give rise to more difficulty. As a general rule, a bequest of a sum of stock without more (e.g., "I bequeath to A. 1000*l.* 2½ per cent. Consols") is a general bequest. So a bequest of "20 shares in the A. company" is *primâ facie* a general legacy. If, therefore, the testator has 20 shares of 50*l.* each at the date of his will, and they are afterwards converted into 100 shares of 10*l.* each, the legatee only gets 20 10*l.* shares (c). On the other hand, a bequest of "my 1000*l.* Consols" or "my 20 shares in the A.

(x) 7 Ch. D. 428.

(xx) *Re Russell*, 19 Ch. D. 432.

(y) *Ante*, p. 408.

(z) 2 De G. & S. 722.

(a) *Cave v. Harris*, 57 L. J. Ch. 62, is to the same effect. The principle involved in these decisions was disregarded by Romilly, M. R., in *Drake*

v. Martin, 23 Bea. 89 ("foreign securities as invested by Mr. W. L., broker"). The decision in *Cooch v. Walden*, 46 L. J. Ch. 639, is too shortly reported to be of any value.

(b) Chap. XXX.

(c) *Re Gillins*, [1909] 1 Ch. 345.

Gift of property derived from a specified source.

Bequest of specified sum of stock, or number of shares, may be general,

or specific.

company," is specific (*d*). Mr. Jarman, as already mentioned (*e*), thought that if a testator made a bequest of a specific sum of stock (by which he obviously meant a specific bequest of a certain sum of stock (*f*)), and then sold the stock, and afterwards acquired a precisely similar amount, the latter stock would pass by the bequest. The point does not seem to have been decided, but it is submitted that Mr. Jarman's contention is not well founded. For if a testator bequeaths "my 1000*l.* Consols," or "the 1000*l.* Consols standing in my name," he obviously has in mind a particular investment, and does not mean to dispose of an investment which he may make at some future time. In *Re Gibson* (*g*), Wood, V.-C., laid down the general principle thus: "When you find a mere specific thing, incapable of increase or diminution, in existence at the date of the will, but not in existence at the time of the testator's death, there is a sufficient indication upon the will of the 'contrary intention' to which sect. 24 refers, to prevent the operation of the rule which makes the will speak from the death of the testator." In that case a testator, having 1000*l.* N. B. Railway stock, bequeathed "my one thousand N. B. Railway shares," and afterwards sold his 1000*l.* stock, and at various times bought stock and shares of the N. B. Railway exceeding the amount bequeathed, and was possessed of them at his death; Wood, V.-C., said the testator had distinctly referred to one thing in his will which was no longer in existence at the time of his death: that thing and that only could be considered as the subject of the bequest. The bequest was therefore adeemed. This in principle covers a case where the substituted stock is exactly equal to the original subject of bequest.

The act not applicable to specific bequest of stock of a definite amount;

Again in *Sidney v. Sidney* (*h*), the testator recited, as the fact was, that his son owed him 1440*l.* or thereabouts, secured by bills notes or otherwise (the precise amount was 1400*l.*), and released him from the payment of interest up to the time of the testator's death; this debt was afterwards paid off, but another of 1290*l.*

nor to release of a specific existing debt.

(*d*) See Chap. XXX.

(*e*) Supra, p. 407, where Mr. Jarman's views on the application of sect. 24 to specific bequests are quoted.

(*f*) See the instance put by him of the effect of a bequest under the old law of a "sum of 1000*l.* consols standing in my name," ante, p. 404.

(*g*) L. R., 2 Eq. 669. A similar decision was come to by the V.-C. in *Goodlad v. Burnett*, 1 K. & J. 341. A bequest of railway "shares" generally includes railway stock, *Morrice v. Aylmer*, L. R., 7 H. L. 717. In *Re*

Gibson, Wood, V.-C., referred to Lord Hardwicke's doctrine in *Avelyn v. Ward*, 1 Ves. 423, that the substitution of one entire fund (not purchased bit by bit) for another of equal amount was a revival of the bequest. But since 1 Vict. c. 26, a bequest of personality once adeemed cannot be revived by parol.

(*h*) L. R., 17 Eq. 65. It should be noticed that the case of *Smallman v. Goolden* (1 Cox, 329), on which the M. R. partly relied, was before the Wills Act. See *Everett v. Everett*, 7 Ch. D. 428.

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was incurred, which was partly secured by notes and partly unsecured, and which remained due at the testator's death. *Jessel, M. R.*, held that the will meant to describe a specific sum then existing, and that consequently it could not, under sect. 24, be read as speaking at the time of the testator's death, so as to include a new subject, viz. the interest on the new debt. The legacy was therefore adeemed (*i*).

In *Re Lane* (*j*), the testator bequeathed "all my debentures in the S. Company"; at the date of the will he held certain debentures of that company which were afterwards converted into debenture stock: it was held by Hall, V.-C., that the stock did not pass by the bequest, on the ground that the two things were substantially different. But in *Re Herring* (*k*), *Joyce, J.*, expressed the opinion that the case fell within sect. 24 of the Wills Act.

Mr. Jarman's view of sect. 24 as applied to specific gifts.

Mr. Jarman seems to have anticipated that sect. 24 of the Wills Act would have a wider operation than it in fact has. He remarks (*l*): "The new rule of construction, however, will, according to the general terms in which the enactment is framed, apply to many cases in which its effect will be less decidedly salutary, nay, where it will, in all probability, defeat the intention; for example, suppose that a testator, having a house in Grosvenor Square, bequeaths it by the description of his messuage in such square, and afterwards sells the property, and purchases another house in the same square, of which he is possessed at his decease, the bequest will, it should seem, comprise the new acquisition by force of the enactment which makes the will speak from the death. So (to put a stronger case), suppose that a testator, having a small farm in the parish of A., devises all that his estate in the parish of A., and that, subsequently to the will, he disposes of the farm in question, and purchases another in the same parish, but of ten times the value, which he continues to hold until his decease, or such larger farm may have devolved on the testator by descent or otherwise without any spontaneous act on his part, or even without his knowledge, or

(*i*) See also *Maxwell v. Maxwell*, L. R., 4 H. L. 506, as to expressions showing an intention to refer only to the state of circumstances existing at the date of the will. A bequest, if specific under the old law, is specific also under the new. The Wills Act, s. 24, gives it an enlarged operation; but the nature of the bequest is not altered. See *Bothamley v. Sherson*, L. R., 20 Eq. 313; *Re Gray*, 36 Ch.

D. 205, where *Kay, J.*, considered what would have been the result if the bequest had been specific. These and other cases are discussed in the chapter on Legacies.

(*j*) 14 Ch. D. 856.

(*k*) [1908] 2 Ch. at p. 499.

(*l*) First edition, p. 289. It will, of course, be remembered that the first edition of this work was published seven years after the passing of the Wills Act.

when incapable of altering his will; in either case the newly-acquired estate must, it is conceived, be held to pass by the devise" (m).

As regards the former of the two illustrations given by Mr. Jarman, the exact case does not seem to have come before the Courts, and the dicta on the point are not consistent. Thus in *Castle v. Fox*, Malins, V.-C., expressed a decided opinion that Mr. Jarman's view was correct, and that the subsequently acquired house in Grosvenor Square would pass by the devise: "I have not a doubt about it" (n). But other judges have striven to find a reasonable meaning in the act. "Suppose," said Knight Bruce, V.-C. (o), "a man to have a brown horse and bequeath it, and then to sell it and buy another brown horse, and die, does the horse of which he was possessed at the time of his death pass?" Or suppose a man to have a picture, say, of the Holy Family, by some inferior artist, and to bequeath it as "my Holy Family," then to sell it, and afterwards to acquire a far better one on the same subject painted by an eminent artist: Wood, V.-C., thought it would be a monstrous construction to hold that the latter picture would pass; and he observed that where there was a distinct reference to a distinct and specific thing incapable of increase or diminution, and not to a genus, there was an indication of a contrary intention sufficient to exclude the rule which makes the will speak from the testator's death (p). If the question should ever arise, it may be expected that the desire to avoid a "monstrous" result will exercise a preponderating influence on its determination. It is submitted that the true principle is that laid down by Jessel, M. R., in *Sidney v. Sidney* (q), namely, that the first question to be considered is, what does the will mean: and by Lindley, L. J., in *Re Portal and Lamb* (r): "It [sect. 24] does not say that we are to construe whatever a man says in his will as if it were made on the day of his death."

Where a contrary intention is shewn by nature of specific gift.

Contrary intention indicated by nature of a specific gift.

It seems clear that if the description of the thing devised or bequeathed does not exactly cover the thing owned by the testator

(m) The terms of gift here supposed are more particular than those in *Doe d. York v. Walker*, 12 M. & W. 591.

(n) L. R., 11 Eq. at p. 551.

(o) *Emuss v. Smith*, 2 De G. & S. 722. But if a breeder of horses should bequeath "his yearlings," and survive into the next year, the yearlings of the latter year and not those of the former (now two-year-olds) would probably be held to pass. [Note by Mr. Vincent, in the 4th edition of this

work.]

(p) *Re Gibson*, L. R., 2 Eq. 669. The V.-C. had previously expressed the same opinion in *Goodlad v. Burnett* (1 K. & J. 341). See *Macdonald v. Irvine*, 8 Ch. D. 101.

(q) L. R., 17 Eq. at p. 68.

(r) 30 Ch. D. at p. 55. Followed by Joyce, J. in *Re Evans*, post, p. 414. On this principle, the decision in *Denholm's Trustees v. Denholm*, [1908] Sess. Ca. 43, seems difficult to justify.

CHAPTER XII. at the time of his death, the latter will not pass by the mere effect of sect. 24. The case of *Sidney v. Sidney* (s) is an example of this principle.

Mis-description.

But if the description was inaccurate at the date of the will, no question arises as to the operation of sect. 24. Thus in *Goodlad v. Burnett* (t), a testatrix bequeathed "my four Danish bonds" for four specified amounts; she had not, at the date of her will or at her death, any Danish bonds of those amounts, but she had, at the date of her will and at her death, Danish bonds which she had taken in exchange for bonds bought by her late husband at prices corresponding to the four specified amounts: it was held by Wood, V.-C., that this was a case of misdescription, and that the exchanged bonds passed by the bequest.

Where after-acquired property does not answer description in will.

A case somewhat similar to the second illustration given by Mr. Jarman is *Re Portal and Lamb* (u). There the testator devised to his son his cottage and land at S.; at the date of the will he had a small cottage with land held with it, and he subsequently contracted to purchase a house of considerable size with land adjoining the land held with the cottage: it was held by the Court of Appeal (overruling Kay, J.,) that the after-acquired property did not pass by the devise. In this case there were words referring to the land held with the cottage which shewed beyond all question that the testator only intended to devise that property to his son. "It is said that we are precluded by the section [24] from giving effect to this plain intention. I am always unwilling to strain this act or any other act in such a way as to defeat a man's plain intention. The object of this section was not to defeat, but to give effect to, the testator's intention" (v).

Where description of property is altered after date of will.

Conversely, in *Re Evans* (vv), it was held that the effect of a specific devise of property, by a clear and unambiguous description, was not cut down by an alteration in the property made after the date of the will.

Result of modern decisions.

These two decisions have, it is to be hoped, disposed of the notion that sect. 24 requires a will to be construed as if it were made on the day of the testator's death, and shew that Mr. Jarman's apprehensions as to the effect of the section were not

(s) L. R., 17 Eq. 65, stated ante, p. 411.

(t) 1 K. & J. 341. This decision was relied on by Joyce, J., in *Re Slater*, [1906] 2 Ch. 480; [1907] 1 Ch. 665, but in that case the exchange took place after the date of the will.

(u) 27 Ch. D. 600; 30 Ch. D. 50.

(v) Per Lindley, L. J., 30 Ch. D. at p. 55. Other passages in the judgment are cited and commented on in *Re Gillins*, [1909] 1 Ch. 345.

(vv) [1909] 1 Ch. 784. Compare *Re Edwards*, infra.

well founded, in cases where the description of the property is specific (*w*). CHAPTER XII.

The decision in *Re Champion* (*x*) is referred to later (*y*), with reference to the effect of the word "now," and also in another chapter (*z*), because it turned on the effect of republication by codicil.

In *Re Potter* (*a*) effect was given to sect. 24. There the testator, who owned two houses X. and Y., each with land attached, by his will devised them to different persons; after the date of his will he leased X., without the adjoining land, to a tenant for twenty-one years, and retained in his own occupation Y. and the piece of land adjoining X.: it was held by Cozens-Hardy, J., that the piece of land adjoining X. did not pass by the devise of X., but formed part of Y. The case seems near the line, for the description was specific rather than general.

Examples of operation of sect. 24.

So in *Re Butlin's Estate* (*b*), there was a specific devise of land which at the date of the will was subject to a charge for 950*l.*; after the date of the will the testator acquired this charge under such circumstances as to shew that he intended it to merge: it was held that the devise passed the land free from the charge.

In *Re Slater* (*c*), sect. 24 of the Wills Act was treated as forming the basis of the doctrine of ademption. In that case the testator bequeathed the interest arising from "money invested in the Lambeth Waterworks Company"; after the date of the will the testator's Lambeth Waterworks Company stock was converted into stock of the Metropolitan Water Board: it was held that the bequest did not operate on the new stock, and sect. 24 was treated by Joyce, J., and the Court of Appeal as governing the case. But would not the result have been the same if sect. 24 had never been enacted (*d*)? The case did not fall within *Oakes v. Oakes* or *Morrice v. Aylmer* (*e*).

Operation of sect. 24 on doctrine of ademption.

The decision in *Re Portal and Lamb* also seems to answer another difficulty felt by Mr. Jarman as to the effect of sect. 24. "It may even happen," he thought (*f*), "that by a strict application to specific gifts, of the principle which makes the will speak from the death,

Effect, where there is more than one subject of gift at the death of testator.

(*w*) *Cave v. Harris*, 57 L. J. Ch. 62.

(*x*) [1893] 1 Ch. 101.

(*y*) Post, p. 416.

(*z*) Ante, p. 202.

(*a*) 83 L. T. 405. If the testator had described the property with reference to its condition or occupancy at the date of the will, the result would have been different; see *Re Edwards*,

63 L. T. 481, and other cases cited post, p. 416.

(*b*) [1907] 1 Ir. R. 159.

(*c*) [1906] 2 Ch. 480; [1907] 1 Ch. 665.

(*d*) See Roper, Leg. 329, where the true principle is stated.

(*e*) See Chap. XXX.

(*f*) First edition, p. 290.

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a gift of this nature might be invalidated for uncertainty. For instance, if a testator, having a house in the Strand, devises it by the description of his house in the Strand, and afterwards acquires another in the same place, and holds both houses at the time of his decease, it is evident that the statutory provision would, in such a case, by bringing both the houses within the terms of the description, render the devise void for uncertainty; unless it could be ascertained by extrinsic evidence which of them was intended (*g*). To avoid such a consequence, probably it would be held that the fact of the testator's ownership of one house only at the date of the will was a sufficient indication of his meaning that house; and yet this is, *pro tanto*, a departure from the principle of the enactment under consideration; for had the devise been in terms of the house in the Strand which should belong to the testator at his decease, there would have been no ground for distinguishing between the house that belonged to him when he made his will, and that which he subsequently acquired: so that, if the extrinsic evidence failed to shew which of the two houses was intended (if, indeed, evidence is admissible in such a case (*g*), the plurality would be fatal to the devise."

Whether
sect. 24
makes words
of present
time point to
testator's
death.

"Another question," Mr. Jarman remarks (*h*), "will be whether the enactment which makes the will speak from the death will have the effect of carrying forward to that period words pointing at present time. For instance, supposing a testator to bequeath 'all that messuage in which I *now* reside,' and that subsequently to the making of his will he changes his residence to another house belonging to him, which he continues to occupy until his death; does the act make the word 'now' apply to the house occupied by the testator at his death? It is conceived that the principle will not be carried such a length, and that this would be considered as a case in which 'a contrary intention appears by the will.'"

Effect was given to the word "now" in *Re Edwards* (*i*), where a testator bequeathed to A. "my leasehold house and premises . . . where I now reside." After the date of the will part of the building was cut off from the rest and let to a tenant: but it was held that the whole passed under the bequest. This case was the converse of those which usually arise under sect. 24.

On the other hand, in *Re Champion* (*j*), where a testator devised land which he described as being "now in my own occupation,"

(*g*) See Chap. XV.

(*h*) First edition, p. 291.

(*i*) 63 L. T. 481.

(*j*) [1893] 1 Ch. 101.

North, J., held that the words were not a vital part of the description, and that the devise passed some land purchased and occupied by the testator after the date of the will; but the Court of Appeal, without expressly dissenting from this view, decided the case on the ground that the testator had republished his will by a codicil made after the purchase of the additional land.

Even where the words describing the subject of gift are general, yet if they expressly point to the present time, and are manifestly used with reference to the period when the will is made (*k*), the operation of the act is excluded. Thus, in *Cole v. Scott* (*l*), where by will, dated the 29th of April, 1843, the testator, after devising, “the house in which I now reside,” and also making another devise of the “residue and remainder of my messuages, &c., whereof I am now seised or possessed,” also devised and bequeathed “all such manors, &c., as well freehold as copyhold and leasehold, as are now vested in me, or as to the said leasehold premises shall be vested in me at the time of my death, as trustee or mortgagee,” the question was whether after-purchased property passed under the residuary devise; and it was held by Shadwell, V.-C., and, on appeal, by Lord Cottenham, C., that the after-purchased property did not pass. Both judges, especially the former, relied on the contrasted use of words importing a distinction between the estates then vested in the testator and those he might thereafter acquire, and concluded that the word “now” must be referred to the date of the will. If the will had been undated, the L. C. thought (for reasons not expressed) that “now” must under the act be referred to the time of the death.

But whether the will is dated or not, *Cole v. Scott* is not an authority for giving to the word “now” the effect of excluding after-acquired property in every case in which the testator gives that of which he is “now seised” or “now possessed.” Thus in *Wagstaff v. Wagstaff* (*m*), a gift of “all my ready money, shares, freehold property, plate, pictures and any other property that I may now possess, except the house at P.,” was held by Romilly, M.R., to include all the personal property of the testator at his death. He appears to have thought there was no difference between the words “I possess” and “I now possess.” As a matter of grammar, both, it is true, express the present time; but upon the

(*k*) See Sugd. R. P. S. p. 372.

(*l*) 16 Sim. 259, 1 M. & Gord. 518. See also *Douglas v. Douglas*, Kay, 400. *Cole v. Scott* was disapproved by Malins, V.-C., in *Castle v. Fox* (supra, p. 409),

but treated by the Court of Appeal as a binding authority in *Re Ord*, 12 Ch. D. 22.

(*m*) L. R., 8 Eq. 229.

CHAPTER XII. question of indicating a contrary intention within the act, the introduction of the word "now" seems to go much further towards indicating an intention to give only what the testator has at the time (*n*). Something more than this single word, however, will generally be wanted for that purpose: some more pointed distinction must be drawn (at least in the case of a general gift) between what belongs to the testator at one time and what belongs to him at the other. And "now" has never been so construed since the act as to produce intestacy (*o*).

Again, in *Re Midland Railway Company* (*p*), where a testator gave "all that my messuage situate in Bordgate in Otley, wherein my son D. now resides, with the stables and appurtenances thereto belonging and therewith occupied," and afterwards bought a piece of land adjoining the house, which he attached to it as a garden; it was held by Romilly, M.R., that the garden passed with the house. In his opinion it was as if the testator had said, "I give my farm Whiteacre, now in the occupation of J. S.": but he added that if the devise had been of "the messuage as it now stands, and the lands now held therewith by D.," it would not have included the after-acquired garden.

Is reference to occupation an essential part of description?

In the case first put by the M.R., the reference to occupation is not an essential part of the description (*q*): in the second it is; the subject of gift cannot be identified without it, and the word "now" would confine the gift to land so occupied at the date of the will (*r*).

Verbs in present tense.

But it is clear that words which merely import but do not emphatically refer to time present, as a general devise or bequest of property, or of property of a particular genus, of which I "am seised" or "am possessed," will generally include all or all of that genus to which the testator is entitled at the time of his death, though acquired after the date of the will (*s*). And the effect of the statute ought not to be frittered away by catching at doubtful expressions for the purpose of taking a case out of its operation (*t*). Thus in *Lilford v. Powys Keck* (*u*), where a testator devised all the freeholds

(*n*) See per Turner, L.J., 8 D. M. & G. 437.

(*o*) See especially *Hepburn v. Skirving*, 4 Jur. N. S. 651, a strong decision, especially as to the bank shares.

(*p*) 34 Beav. 525. That a devise of a house will generally carry the garden, see post, Chap. XXXV.

(*q*) See *Chamberlain v. Turner*, Cro. Car. 129.

(*r*) *Hutchinson v. Barrow*, 6 H. & N. 583; *Williams v. Owen*, 2 N. R. 585; *Re Edwards*, 63 L. T. 481.

(*s*) *Doe d. York v. Walker*, 12 M. & Wel. 591; *Lady Langdale v. Briggs*, 3 Sm. & Gif. 246, 8 D. M. & G. 391.

(*t*) Per Cotton, L.J., *Everett v. Everett*, 7 Ch. D. 428.

(*u*) 30 Beav. 300.

“of which I am seised,” and then devised to corresponding uses all the copyhold and leasehold property “of which I am or at the time of my death shall be possessed”; it was held by Romilly, M.R., that after-purchased freeholds passed by the former devise. So in *Re Ord* (v), where a testator, possessed of leaseholds at C., part of which was charged with a mortgage and the rest with an annuity, devised all his leasehold lands at C., charged with the mortgage debts charged thereon, “and also with the annuity now charged thereon,” to his son; and afterwards bought other leasehold lands at C.; it was argued that the devise was confined to such leaseholds as were charged with the mortgage and annuity, a construction which of course excluded the after-bought lands; but it was held by the Court of Appeal, affirming the decision of Hall, V.-C., that the reference to the charges (which was not quite accurate) was insufficient to deprive the words of gift of their proper interpretation under the act.

“In order to avoid all such questions,” as Mr. Jarman remarks (vv), “a testator should introduce into his description of property specifically disposed of, expressions incapable of being applied, or not likely to apply, to any other. He should give the ‘house No. 23 in Grosvenor Square,’ or ‘his farm in the parish of A. called B., now in the occupation of C.’ (all which particulars could hardly coincide in two instances), or all his lands in the county of C. to which he is entitled at the date of his will. The latter restriction seems in general the best, as it precludes the possibility of after-acquired property being let in.”

Practical suggestion.

It has hitherto been assumed, and the assumption pervades all the cases, that the words of the act: “every will shall be construed, with reference to the real and personal estate comprised therein, to speak and take effect as if,” &c., are not to be taken in their literal sense as meaning “real and personal estate then actually comprised therein,” (i.e., devised thereby). It is plain that this sense was not intended, for the context shews that the enactment has reference to property not then actually comprised in the will (w). The true meaning appears to be “with reference to

Is sect. 24 applicable to property excepted from devise?

(v) 12 Ch. D. 22.

(vv) First ed. p. 291.

(w) See per Turner, L.J., 8 D. M. & G. 436 (where the word “is” is misplaced, see 26 L. J. Ch. 49). The words of the act appear to have been hastily adopted from the “propositions”

of the 4th R. P. Report, p. 80. They require to be read with the report, which says (p. 24): “We propose that a will shall pass property of any description comprised in *its terms* which a testator may be entitled to at the time of his death, unless a contrary intention shall

CHAPTER XII.

the question what estates are comprised in any disposition in the will." If this is so, it disposes of a point raised and left unsettled in *Hughes v. Jones* (x), namely, whether the enactment is applicable to exceptions from a devise? To hold that it is, would (it was argued) be to make the will speak from the death with reference to property excluded from it, whereas the act makes it so speak only with reference to property comprised in it. This argument proceeds upon a mistake. The whole question is, what is comprised *in the terms*? This cannot be answered without taking into consideration and construing all the terms of the description, as well those which exclude as those which include. And if a man devises all his real estate except his copyholds or except his estates in the county of B., or bequeaths all his stock except consols, good sense requires that both parts of the description, being equally general or generic, should be construed to speak as from the same time. If the exception, or exclusive portion, refers to an actually existing state of things, it must, of course, be construed to speak as from the date of the will, just as inclusive terms having a similar bearing must be construed. If the will goes on to make a distinct disposition of the excepted property, with the result that what is excluded from one devise is included in the other, the question (if question it is) can hardly be said to arise (y).

Powers of appointment.

The effect of sect. 24 on appointments under powers is considered in another chapter (z).

Sect. 24 does not supply testamentary capacity.

III.—As to Testamentary Capacity, &c.—The 24th section of the Wills Act does not in any manner affect the question of testamentary capacity. Thus although the will of a woman, under coverture at the time of making it, may operate by force of sect. 24 to dispose of separate property afterwards acquired by her (a), or as the execution of a general power afterwards conferred upon her (b), the will of a married woman, dying before 5th December 1893,

appear by the will. If this recommendation be adopted the law respecting the time from which a devise of freehold or copyhold estate is to be considered to take effect will be precisely similar to that which is at present in force as to personal estate." And this recommendation is referred to as follows (p. 29):—"If as we have proposed wills be made to speak with reference to the property comprised in them as at the time of the testator's death," &c.

(x) 1 H. & M. 765.

(y) See *Lysaght v. Edwards*, 2 Ch. D. 521, 522; *Re Scarth*, 10 Ch. D. 499, better reported 40 L. T. 184. (The above paragraph, as to property excepted from a devise, with the notes, is taken verbatim from the 4th ed. of this work, by Mr. Vincent.)

(z) Chap. XXIII.

(a) *Willock v. Noble*, L. R., 7 H. L., p. 599.

(b) *Thomas v. Jones*, 2 J. & H. 475, 1 D. J. & S. 63.

acquires no validity under this section by the mere fact of her having survived her husband and being discoverd at the time of her death (c). The statute does not make an instrument valid which through the personal disability of the testator was invalid in its inception. Hence if a married woman, dying before 5th December 1893, made a will during coverture and survived her husband, the will was inoperative to dispose of property acquired by her after her husband's death, unless she re-executed or republished it (c). And the Married Women's Property Act, 1882, did not alter the law in this respect (d). But as regards women dying after 5th December 1893, the law has been altered by the Married Women's Property Act, 1893, which dispenses with the necessity of re-execution or republication in the cases above referred to (e).

If, after the execution of a will, a statute is passed which produces an alteration in the effect of the will, and the testator leaves the will unaltered, the question arises whether he intends that it shall take effect according to the altered law. It is clear that if the alteration of the law is one which merely affects the administration of the testator's estate (as in the case of the Apportionment Act, 1870), it applies to the estate of a testator whose will was made before the law was altered (f). But a statute does not, as a general rule, alter the construction of words contained in a will made before the act was passed: thus a bequest to A. of the dividends on a specific sum of stock, contained in a will made before 1870, gives the accrued and accruing dividends to A. (g).

But in *Re Bridger* (i), a testator, by will made in June 1891, gave "such part of my residuary trust estate which may by law be given to charitable purposes unto the Brompton Hospital" and as to the remainder to A. The Mortmain and Charitable Uses Act, 1891, was passed on the 5th August 1891, and the testator died in 1892: it was held that the act applied, and that the hospital was entitled to the whole of the residue. The Court considered that sect. 24 of the Wills Act took effect, and that the principle laid down in *Jones v. Ogle* and *Re March* does not apply to a general

Where there is a change in the law between will and death.

Does not affect construction.

Distinction where testamentary capacity is increased.

(c) *Willock v. Noble*, supra; *In bonis Wollaston*, 32 L. J. Prob. 171.

(d) *Re Price*, 28 Ch. D. 709.

(e) See above, p. 58.

(f) *Lawrence v. Lawrence*, 26 Ch. D. 795. See *Hasluck v. Pedley*, L. R., 19 Eq. 271, and *Constable v. Constable*, 11 Ch. D. 681; in each of those cases the testator made a codicil after the act came into operation.

(g) *Jones v. Ogle*, L. R., 8 Ch. 192. The same principle was acted on in *Re March*, 27 Ch. D. 166, although it appears from subsequent decisions that the statute in question in that case has not, in fact, altered the law. See *Re Supp*, 39 Ch. D. 148, cited post, Chap. XLI.

(i) [1894] 1 Ch. 297; *Re Hume*, [1895] 1 Ch. 422.

CHAPTER XII. devise or bequest where the testator's testamentary power is increased between the date of his will and that of his death.

Change in
death duties.

In *Re Rayer (j)*, a testator, by his will made in 1882, bequeathed certain annuities charged on land, and directed that they should be paid without any deduction except for legacy duty and income tax. By the Customs, &c., Act, 1888, legacy duty was abolished in respect of annuities charged on the real estate of any person dying after 1st July 1888, and succession duty was substituted. The testator afterwards made a codicil by which he confirmed his will, and died in 1892. It was held by Farwell, J., that the testator by republishing his will intended it to take effect subject to the alteration in the law, and that the annuitants were liable to succession duty.

(j) [1903] 1 Ch. 685.

CHAPTER XIII.

DOCTRINE OF LAPSE.

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I.—General Principles.—"The liability of a testamentary gift to failure, by reason of the decease of its object in the testator's lifetime, is," says Mr. Jarman (*a*), "a necessary consequence of the ambulatory nature of wills; which not taking effect until the death of the testator, can communicate no benefit to persons who previously die: in like manner as a deed cannot operate in favour of those who are dead at the time of its execution."

General principle respecting lapse.

There is, indeed, an anomalous class of cases constituting an exception to the general rule of lapse: they are said to depend on the mixed principle of bounty and obligation (*b*), namely, that where the intention of a testator in giving a legacy is not merely bounty to the legatee, but the discharge of an obligation recognized by the testator, although not legally enforceable, the legacy does not lapse by the death of the legatee in the testator's lifetime. Thus, if the testator makes a bequest for the payment of a debt

No lapse where gift is made in discharge of moral obligation.

(*a*) First ed. p. 293. The term "lapse" is generally applied to failure by the death of the devisee or legatee in the testator's lifetime, but it is sometimes used in a wider sense, as for instance in the case of the failure of a contingent gift by reason of the event not taking place: *Smell v. Dee*, 2 Salk. 415; *Re Parker*, [1901] 1 Ch. 408. So where there was a gift of consumable articles to A. for life, or so long as she should remain unmarried (equivalent to an absolute gift), it was held that the marriage of A. in the testator's lifetime

caused a result similar to that of her death in his lifetime: *Andrew v. Andrew*, 1 Coll. 690. "Lapse" is not used to signify the failure of a testamentary gift by reason of its illegality: see *Champney v. Davy*, 11 Ch. D. 949. But it is sometimes used by testators in the sense of being revoked: thus in *Re Wand*, [1907] 1 Ch. 391, the testator directed that if a certain event happened in his lifetime the share given to a legatee should lapse and form part of the residue.

(*b*) *Philips v. Philips*, 3 Ha. at p. 300.

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which is barred by the Statute of Limitations (c), or by the bankruptcy law (d), the bequest takes effect, notwithstanding the death of the creditor in the testator's lifetime. So if a married woman makes a bequest or appointment for the purpose of discharging a moral obligation, there is no lapse by the death of the legatee in her lifetime (e). It is different where the debt has been released (f).

Provisions of
Wills Act.

The exceptions to the doctrine of lapse introduced by the Wills Act are considered in a later part of this chapter.

Effect of
lapse.

The effect of lapse, beyond the mere failure of the gift itself, is considered in connection with residuary devises and bequests (g).

Lapse not
prevented by
words of
limitation :
—real estate

Mr. Jarman continues (h) : "The doctrine applies indiscriminately to gifts with and gifts without words of limitation. Thus, if a devise be made to A. and his heirs, or (unless the will be regulated by the new law) to A. and the heirs of his body, and A. die in the lifetime of the testator, the devise absolutely lapses, and the heir, special or general (as the case may be), of A. takes no interest in the property, he being included merely in the words of limitation, i.e., in the terms which are used to denote the quantity or duration of the estate to be taken by the devisee, through whom alone any interest can flow to such heir (i).

—personalty.

"Bequests of personal property, of course, are subject to the same rule (j) ; and it is observable that, in applying it to such bequests, a legacy to one and his executors or administrators is construed as a mere absolute gift (k) ; for the circumstance that,

(c) *Williamson v. Naylor*, 3 Y. & C. 208. Compare the rule that an executor may pay or retain a statute-barred debt, referred to in Chaps. LIII. and LIV.

(d) *Philips v. Philips*, 3 Ha. 281 ; *Re Sowerby's Trust*, 2 K. & J. 630. The bequest is liable to legacy duty : *Turner v. Martin*, 7 D. M. & G. 429.

(e) *Stevens v. King*, [1904] 2 Ch. 30.

(f) *Coppin v. Coppin*, 2 P. W. 295.

As to the effect of a bequest to a creditor of a statute-barred debt, see Chap. XXX. As to the effect of a covenant not to sue, see *Golds v. Greenfield*, 2 Sm. & G. 476.

(g) Post, Chaps. XXV. and XXIX.

(h) First ed. p. 293.

(i) *Brett v. Rigden*, Flow. 345 ; *Fuller v. Fuller*, Cro. El. 422 ; *Wynn v. Wynn*, 3 Br. P. C. Toml. 95 ; *Hutton v. Simpson*, 2 Vern. 722 ; see also *Goodright v. Wright*, 1 P. W. 397 ; *Ambrose v. Hodgson*, 3 Br. P. C. Toml. 416. The reader will remember that at the time when Mr. Jarman wrote, most wills were regulated by the old law, under which

words of limitation (or equivalent expressions) were required to pass an estate of inheritance in real property.

(j) A gift of a sum of money for purchase of an annuity may be the subject of lapse, *Re Draper's Trust*, 58 L. T. 942.

*(k) *Stone v. Evans*, 2 Atk. 86 ; *Elliot v. Davenport*, 1 P. W. 83, 2 Vern. 521, "where the legacy was of a debt, which," as Mr. Jarman remarks, "is liable to lapse equally with gifts in any other form (*Tophis v. Baker*, 2 Cox, 118). It is true that in *Sibthorpe v. Moxton* (or *Moxom*), 1 Ves. 49, 3 Atk. 580, Lord Hardwicke held that the forgiving of a debt, coupled with a general direction to the executor to deliver up the security (without saying to whom), operated as a release, though the legatee died in the testator's lifetime ; his lordship thinking that the latter words imported that the security should be delivered up, whether the debtor were living or not, and which he considered would, beyond all question, be the effect of the words of direction standing alone ; though he admitted

*Effect of
death of
debtor
upon
clause
forgiving
debts.

in regard to personalty, words of limitation are not requisite to carry the absolute interest, has been considered as insufficient to denote an intention to make the executors or administrators substituted and independent objects of gift. And where the devisee or legatee happens to be dead when the will is made, the words of limitation are equally inoperative to let in the representatives of the deceased person (*l*).

“And even a declaration that the devise or bequest shall not lapse, does not per se prevent it from failing by the death of the object in the testator’s lifetime, since negative words do not amount to a gift; and the only mode of excluding the title of whomsoever the law, in the absence of disposition, constitutes the successor to the property, is to give it to some one else (*m*). A declaration to this effect, however, following a bequest to a person and his executors or administrators, would be considered as indicating an intention to substitute the executors or administrators, in the event of the gift to the original legatee failing by lapse (*n*).”

Effect of declaration that legacy shall not lapse.

Where the bequest is to A., and, “in case of his death, to his executors or administrators,” or “to his legal personal representatives,” there can, of course, be no doubt that the gift does not fail (*o*); the

Cases of substitution.

that, in regard to the administration of assets, it was to be considered as a legacy. In *Maitland v. Adair*, 3 Ves. 231, the words were, ‘I return A. his bond.’ A. died in the testator’s lifetime, and it was held that the legacy lapsed. This case is overlooked by Mr. Roper (Treat. Leg. 411), who lays more stress on the merely verbal distinction between the giving and forgiving of a debt than seems warranted by the principles of the cases” (note in 1st ed. p. 294). In *Izon v. Butler*, 2 Price, 34, the words were, “I remit and forgive, &c., and I direct the bond to be delivered up,” and it was held that the legacy lapsed by the death of the debtor in the testator’s lifetime. Thomson, C.B., said he had always been at a loss to understand the distinction between giving and forgiving. In *South v. Williams*, 12 Sim. 566, where the testator directed a balance of debts due from A., and property bequeathed to A.’s wife to be struck, and the surplus to be paid to or secured by the legatee, Sir L. Shadwell thought A. was released from the debts, though his wife died in the lifetime of the testator; compare *Davis v. Elmes*, 1 Beav. 131.

(*l*) *Maybank v. Brooks*, 1 Br. C. C. 84, (where the question arose whether evidence of the testator’s knowledge of the

death of the legatee was admissible, post, Chap. XV.); and a confirmation of a will by codicil will not prevent lapse where the legatee has died between the dates of the will and codicil, although the legacy was given to the legatee, her executors, &c., *Hutcheson v. Hammond*, 3 Br. C. C. 127.

(*m*) Post, Chap. XXI. So a direction that the heir at law shall not take the proceeds of sale of land in case of lapse, is ineffectual: *Fitch v. Weber*, 6 Ha. 145; post, Chap. XXII.

(*n*) *Sibley v. Cook*, 3 Atk. 572. In *Re Wilder’s Trusts*, 27 Bea. 418, there were express words of substitution. But a declaration that a legacy shall vest in the legatee immediately upon execution of the will, following a gift to one, his executors, administrators and assigns, will not prevent lapse, *Browne v. Hope*, L. R., 14 Eq. 343.

(*o*) *Long v. Wilkinson*, 17 Beav. 471; *Hinchliffe v. Westwood*, 2 De G. & S. 216; *Hewitson v. Todhunter*, 22 L. J. Ch. 76, *Re Seymour’s Trusts*, John. 472; *Re Clay*, 54 L. J. Ch. 648, cited post, Chap. XLI. See *Maxwell v. Maxwell*, Ir. R., 2 Eq. 478, where the question arose whether substitution took place in the case of a person who was dead at the date of the will; infra.

CHAPTER XIII. only question then is, who are the persons to take beneficially, a point which will be treated of hereafter. But where there was a direction to pay legacies within six months, and a gift to the children of the legatee, in case of the legatee's death "not having received his legacy," it was held, nevertheless, that the legacy lapsed by his death in the testator's lifetime (*p*). And if property is given to A. for life and then to B., or in the event of his death to his executors or administrators, this is taken to mean death during A.'s life interest, so that if B. predeceases the testator the gift lapses (*q*).

In *Re Valdez's Trusts* (*r*), a share of residue was given to A., and in case of her death, to her executors or administrators; A. died in the testator's lifetime, having bequeathed the residue of her property to the testator himself; it was held that the interest given by the testator's will to the legatee, and in case of her death to her representatives, was not disposed of by his will.

In *Maxwell v. Maxwell* (*s*) a testator made a bequest to "my younger sons or their executors"; at the date of the will A., one of his younger sons, was dead: it was held that A.'s share did not lapse, but went to his administratrix. This construction, however, turned on the fact that the testator had many years before by deed appointed a fund in favour of his younger sons, including A., who was then living, and that by his will he directed the fund to be paid "to my younger sons or their executors," "according to my appointment."

If property is bequeathed to A. for life and after his death to B. or his executors, administrators, or assigns, this merely means that the gift is to vest in B. at the testator's death, so that if B. predeceases the testator the bequest lapses (*t*).

The question whether a gift to "A. or his heirs," or to "A. or his issue," or the like, is a substitutional gift, or whether the word "or" should be construed "and," is discussed in another chapter (*u*).

Beneficial gift
by way of
substitution.

If the gift is to A. for life and then to B. or in case of his death to his children, or next of kin, or the like, then the gift to the children, &c., takes effect, although B. dies in the lifetime of the testator (*v*).

(*p*) *Smith v. Oliver*, 11 Beav. 494 (as to this case see *Re Green's Estate*, 1 Dr. & Sm. 73); *Tidwell v. Ariel*, 3 Madd. 403; *Re Porter's Trust*, 4 K. & J., 195.

(*q*) *Corbyn v. French*, 4 Ves. 418; *Bone v. Cook*, M'Cl. 168; see Chaps. XXXVI. and LVII.

(*r*) 40 Ch. D. 159.

(*s*) Ir. R., 2 Eq. 478.

(*t*) *Leach v. Leach*, 35 Bea. 185; *Re Hopkins' Trusts*, 2 H. & M. 411; *Re Masterson*, [1902] Week. N. 192 ("heirs or assigns").

(*u*) Chap. XXXVI.

(*v*) *Re Porter's Trust*, 4 K. & J. 188, discussed more in detail in Chap. XXXVI.

When a share of residue is settled upon a person for life with remainder to other persons, and the original legatee dies in the lifetime of the testator, the question often arises whether the bequest lapses, or whether it takes effect for the benefit of the remaindermen. In *Stewart v. Jones* (w), the testator gave his residuary estate upon trust for such of his children as should attain twenty-one or being daughters should attain that age or marry, and went on to direct that "the share to which each of my daughters on attaining twenty-one or marrying shall become entitled under the trusts aforesaid" should be held upon trust for her for life with remainder to her children; it was held that the children of a daughter who predeceased the testator took nothing.

This decision was disapproved by Malins, V.-C., in *Re Speakman* (x), but its principle was carried even further by the Court of Appeal in *Re Roberts* (y). There the testator bequeathed his residuary estate upon trust for a nephew and three nieces by name in equal shares, with a clause of accruer to take effect on the death of any of them under twenty-one, and a proviso that the share of each niece should be held upon trust for her for life, and after her death upon such trusts as she should appoint, and in default of appointment upon trust for her children, and failing children for her statutory next of kin. One of the nieces predeceased the testator, leaving a child who survived him. It was held that her share lapsed. But in *Re Pinhorne* (z), the testator gave his residuary estate upon trust for his four sisters by name in equal shares, subject to a proviso that the share of each should be held upon trust for her for life, with power to appoint a life interest to a husband, and after her death for her children at twenty-one or marriage. One of the sisters predeceased the testator, leaving infant children, and it was held by Chitty, J., that her share had not lapsed, and that the children were entitled to it contingently on attaining twenty-one or marrying. Chitty, J., pointed out that in *Stewart v. Jones*, the gift being to a class, there was no question of lapse (a), and that no one could take a share as a member of the class unless he or she survived the testator, while in *Re Roberts* the clause of accruer made it impossible to say that any niece took a fixed share of the residue. In *Re Powell* (b), Cozens-Hardy, J., followed *Re Pinhorne*.

(w) 3 De G. & J. 532. See *Wordsworth v. Wood*, 4 My. & C. 641. The cases of *Rheeder v. Ower*, 3 Br. C. C. 240, and *Varley v. Winn*, 2 K & J. 700, are stated in Chap. LVII.

(x) 4 Ch. D. 620.

(y) 27 Ch. D. 346, 30 Ch. D. 234.

(z) [1894] 2 Ch. 276.

(a) Section ii., *infra*.

(b) [1900] 2 Ch. 525. Both these decisions were referred to in the Court of Appeal in *Re Whitmore*, [1902] 2 Ch. 66, without disapproval: the last case is cited in Chap. LVII.

CHAPTER XIII.

Contingent gifts.

If a legacy is given to A. with a gift over to B., on the death of A. in certain circumstances, and A. dies in those circumstances during the testator's lifetime, the legacy does not lapse : as where the legacy is to go over to B., on the death of A. under twenty-one, and A. dies under that age during the testator's lifetime (c). Nor does the fact that the legatee is a married woman, and that the gift over is to her next-of-kin, exclusive of her husband, afford any presumption that it was only intended to take effect in the event of her surviving the testator (d). But if it becomes impossible for the gift over to take effect, and then A. dies during the lifetime of the testator, the legacy lapses : as where a legacy is given to A. and if he dies before completing his apprenticeship, then to B., and A. dies during the lifetime of the testator after completing his apprenticeship, the legacy lapses (e).

Acceleration by lapse of prior limitations.

Culsha v. Cheese.

The effect of lapse in accelerating subsequent limitations is considered elsewhere (f).

In *Culsha v. Cheese* (g), A. devised Blackacre to uses and upon trusts under which B. had a certain share and interest, and C., D., and E. took the residue. B. by will devised Whiteacre "to and upon the uses, trusts, &c., in and by A.'s will expressed, declared, and contained of and concerning the same." C., D., and E. all died in the lifetime of B. : it was held by Wigram, V.-C., on the authority of *Youde v. Jones* (h), that as the will of A. declared no uses of Whiteacre, the devise contained in B.'s will failed ; this being the real ground of the decision, the Vice-Chancellor remarked : "It was therefore gratuitously, though not extrajudicially, that in the course of the argument I said that the wife's will must speak from her own death, and that no person who did not survive her could take under her will, even if the trusts of her will could be found in that of her husband." The case is, however, commonly cited as an authority on the question of lapse.

Lapse of power.

A power created by will lapses by the death of the donee before the donor (i).

The question whether, if a power of appointment among a

(c) *Darrel v. Molesworth*, 2 Vern. 378 ; *Willing v. Baine*, 3 P. W. 115 ; *Humphreys v. Howes*, 1 R. & M. 639 ; *Re Green's Estate*, 1 Dr. & Sm. 68 ; *Rackham v. De la Mare*, 2 D. J. & S. 74, and other cases cited in Chap. LVII.

(d) *Hardwick v. Thurston*, 4 Russ. 380 ; *Nichols v. Haviland*, 1 K. & J., 504, and other cases cited in Chap.

LVII.

(e) *Humberstone v. Stanton*, 1 V. & B. 385 ; *Doo v. Brabant*, 3 Br. C. C. 393 ; 4 T. R. 706 ; *Williams v. Jones*, 1 Russ. 517.

(f) Post, p. 452.

(g) 7 Ha. 236.

(h) 14 Sim. 131.

(i) *Jones v. Southall*, 32 Bea. 31.

number of named persons is created by will, and one of them predeceases the testator, the power is defeated pro tanto, is discussed elsewhere (j).

A gift over in default of appointment does not lapse by the death of the donee of the power in the testator's lifetime (k).

Gift over in default of appointment.
Lapse of appointment.

The doctrine of lapse applies to testamentary appointments under powers, and consequently if the appointee is not living at the decease of the donee of the power, the appointment will not take effect (l). And if no appointment is made, and there is no gift over in default of appointment, only the objects who survive the donee will be capable of taking by implication (m). A testamentary appointment in pursuance of a covenant to settle contained in marriage articles is not exempt from the operation of the doctrine (n). Where the fund is insufficient for all the particular gifts, and one of them lapses, the lapsed gift goes to augment the gifts to the other appointees and to prevent abatement (o).

Where there is a devise or bequest to a plurality of persons who take as joint tenants (p) no lapse can occur unless all the objects die in the testator's lifetime; because as joint tenants take per my et per tout, or, as it has been expressed, "each is a taker of the whole but not wholly and solely" (q), any one of them existing when the will takes effect will be entitled to the entire property. Thus, if real estate be devised to A. and B., or personal property be bequeathed to A. and B., and A. die in the testator's lifetime, B., in the event of his surviving the testator, will take the whole (r). And the same consequence would ensue if the gift failed from any other cause (s).

Lapse prevented by survivorship among joint tenants.

(j) Chap. XLIV., in connection with the case of *Reade v. Reade*, 5 Ves. 744.

(k) *Nichols v. Haviland*, 1 K. & J. 504, following *Edwards v. Saloway*, 2 Ph. 625. See *Hardwick v. Thurston*, 4 Russ. 380; *Kellett v. Kellett*, Ir. R., 5 Eq. 298.

(l) *Kennedy v. Kingston*, 2 J. & W. 431; *Reid v. Reid*, 25 Beav. 469; *Freeland v. Pearson*, L. R., 3 Eq. 658. It is hardly necessary to say that a power to appoint to A. does not authorise an appointment to his executors, &c., in the event of his predeceasing the donee: *Re Susanni's Trusts*, 47 L. J. Ch. 65.

(m) *Walsh v. Wallinger*, 2 R. & My. 78; see post, Chap. XIX.

(n) *Re Brookman's Trust*, L. R., 5 Ch. 182; see *Jervis v. Wolferstan*, L. R., 18 Eq. 18.

(o) *Eales v. Drake*, 1 Ch. D. 217. The doctrine of lapse in connection

with powers is referred to also in Chap. XXIII.

(p) As to the words which will create a joint tenancy, see Chap. XLIV.

(q) Cart. 4; Litt. s. 288.

(r) *Davies v. Kemp*, Cart. 4, 5, Eq. Ca. Ab. 216, pl. 7; *Buffar v. Bradford*, 2 Atk. 220; *Morley v. Bird*, 3 Ves. 629.

(s) *Humphrey v. Tayleur*, Amb. 136; *Larkins v. Larkins*, 3 B. & P. 16; *Short d. Gastrell v. Smith*, 4 East, 419; *Cresswell v. Cheslyn*, 2 Ed. 123; *Ramsay v. Shelmardine*, L. R., 1 Eq. 129; all cases of revocation: and *Young v. Davies*, 2 Dr. & Sm. 167, where one joint-tenant was an attesting witness. But in *Re Kerr's Trust*, 4 Ch. D. 600, on an appointment to A., an object of the power, and B. a stranger, Jessel, M.R., refused to apply "the rule of tenure applicable to real estate," and held that A. took one-half only.

CHAPTER XIII.

Not in the case of tenants in common.

Gift to persons as tenants in common, with benefit of survivorship—
or as a class.

Implied condition of surviving testator.

Evidence of death.

It is equally clear that if the devisees or legatees in any of these cases had been made tenants in common, the failure of the gift as to one object would not have entitled the other to the whole by the mere effect of survivorship (*t*).

But property may be given to several persons as tenants in common with benefit of survivorship, and then if the gift to one of them is revoked or otherwise fails, the whole goes to the others (*u*). Again, property can be given to a number of persons, nominatim, as tenants in common, subject to a condition that they shall be living at a given time, and if any of them are not living at that time, the others take the whole. In *Sanders v. Ashford* (*v*), the time was the testator's death: in *Re Hornby* (*w*), the time was the date of the will (*x*). A gift of this description is really a gift to a class (*y*).

In *Re Featherstone's Trusts* (*z*), the testator gave the residue of his property unto and equally amongst all the children of J. D. and R. A. (who was not a child of J. D.) and directed that the same should be vested legacies at the time of his decease. R. A. died before the testator. It was held by Kay, J., that the gift was not a gift to R. A. and the children of J. D. as a class, but that the words as to their interests being vested legacies at the time of the testator's decease, meant that the residue should be divided among such of the residuary legatees as should survive the testator, and that consequently the whole residue belonged to the children of J. D. who survived the testator.

To enable a person to take under a will it must be proved affirmatively that he survived the testator. Consequently if a testator and legatee perish by the same calamity, and there is no evidence that the legatee survived the testator, the bequest lapses (*a*). And if a legatee has not been heard of since the testator's death, so that it cannot be proved that he survived the testator, his representatives cannot claim the legacy (*b*).

(*t*) *Page v. Page*, 2 P. W. 489; *Peat v. Chapman*, 1 Ves. sen. 542; *Sykes v. Sykes*, L. R., 4 Eq. 200; *Re Wood's Will*, 29 Beav. 236. In the last case the testatrix, by codicil made after the death of one of the residuary legatees, confirmed her will "except as to any legacies lapsed."

(*u*) *Re Radcliffe*, 51 W. R. 409.

(*v*) 28 Bea. 609. Compare *Re Chaplin's Trust*, 33 L. J. Ch. 183, cited ante, p. 336, note, and post, p. 434.

(*w*) 7 W. R. 729.

(*x*) In *Clarke v. Clemmans*, 36 L. J. Ch. 171, where a testator bequeathed residue to A. and others nominatim as

tenants in common, but A. was already dead (as the testator shewed he knew), Malins, V.-C., held that the others were entitled to the whole fund: sed qu. See also *Re Spiller*, 18 Ch. D. 614. In *Re Sharp*, [1908] 1 Ch. 372, Joyce, J., referred to *Clarke v. Clemmans* as a binding authority, but it does not seem to have any bearing on that case. See [1908] 2 Ch. 190.

(*y*) See *Re Dunster*, [1909] 1 Ch. 103, post, p. 432.

(*z*) 22 Ch. D. 111.

(*a*) *Barnett v. Tugwell*, 31 Bea. 232.

(*b*) *Re Walker*, L. R., 7 Ch. 120; *Re Benjamin*, [1902] 1 Ch. 723.

If a testator gives a legacy to a charitable institution which has ceased to exist before his death, the legacy lapses, unless the testator expresses an intention to give it to charitable purposes independently of the existence of the particular institution (*c*).

CHAPTER XIII.

Gifts to charity.

II.—Gifts to a Class.—Where the devise or bequest embraces a fluctuating class of persons, who, by the rules of construction, are to be ascertained at the death of the testator, or at a subsequent period, the decease of any of such persons during the testator's life will occasion no lapse or hiatus in the disposition, even though the devisees or legatees are made tenants in common, since members of the class antecedently dying are not actual objects of gift. Thus, if property be given simply to the children, or to the brothers or sisters of A., equally to be divided between them, the entire subject of gift will vest in any one child, brother or sister, or any larger number of these objects surviving the testator, without regard to previous deaths (*d*); and the rule is the same where the gift is to the children of a person actually dead at the date of the will, or to the present born children of a person, in either of which cases, it is to be observed, there is this peculiarity, that the class is susceptible of fluctuation only by diminution, and not by increase; the possibility of any addition by future births being in the former case precluded by the death of the parent, and in the latter by the express words (*e*). So if the gift is to such of the testator's children as shall be living at the death of A., and A. dies in the testator's lifetime, this is a gift to a class; consequently the share of a child who survives A. and dies in the testator's lifetime does not lapse, and the children who survive the testator take the whole (*f*). Again, if one who would otherwise be a member of the class is incapable of taking by reason of his being an attesting witness (*g*), or by reason of the gift to him being revoked (*h*), the whole property goes to those members who are capable of taking (*i*).

Doctrine in reference to gifts to classes.

If, after a gift to children as a class, the testator directs that in

Mistaken use of word "lapse" by testator.

(*c*) *Clark v. Taylor*, 1 Drew. 642; *Fisk v. Att.-Gen.*, L. R., 4 Eq. 521; *Re Ovey*, 29 Ch. D. 560; *Re Rymer*, [1895] 1 Ch. 19; *Re Davis*, [1902] 1 Ch. 876. *Supra*, p. 238.

(*d*) *Doe d. Stewart v. Sheffield*, 13 East, 526; *Shuttleworth v. Greaves*, 4 My. & Cr. 35; and compare *Cort v. Winder*, 1 Coll. 320; *M'Kay v. M'Kay*, [1900] 1 Ir. R. 213.

(*e*) *Viner v. Francis*, 2 Br. C. C. 658, 2 Cox, 190; *Lee v. Pain*, 4 Hare, 254; *Leigh v. Leigh*, 17 Beav. 605; *Dimond*

v. Bostock, L. R., 10 Ch. 358. This point is referred to below, p. 436.

(*f*) *Cruse v. Howell*, 4 Dr. 215. This point is further discussed *infra*, p. 436.

(*g*) *Fell v. Biddolph*, L. R., 10 C. P. 709; *Young v. Davies*, 2 Dr. & Sm. 167.

(*h*) *Shaw v. M'Mahon*, 4 D. & War. 431; *Clarke v. Phillips*, 17 Jur. 886; *M'Kay v. M'Kay*, [1900] 1 Ir. R. 213; *Re Dunster*, [1909] 1 Ch. 103.

(*i*) The rule is thus stated by Jessel, M.R., in *Re Coleman and Jarrom*, 4 Ch. D. 165, *infra*.

CHAPTER XIII. case any child dies before him leaving issue, the share of that child shall not "lapse," but go to his executors, this does not cause the share of a child who dies before the testator, without issue, to lapse (*j*).

Gift to persons designated by name or number ;

A gift to several named persons is not a gift to a class unless words of contingency are added ; as where the gift is to A., B., C., and D., "if living" (*k*). And a gift to several named persons, without more, is not a gift to a class, even if they stand in a common relationship to the testator, as where the gift is "to my sons A. and B., and my daughter C." (*l*). And if a testator after a gift to "children," proceeds to name them (*m*), or if he specifies their number, as by giving "to the five children of A." (*n*), this is a designatio personarum, and is a bequest to those who are named, or to the five in existence at the date of the will, and the shares of any who die before the testator lapse. So, where the bequest was to the testator's brothers and sister and his wife's brothers and sister, the testator and his wife each having one sister at the date of the will (*o*), and in another case even where the bequest was to E., the eldest son of J. S. and the other children of J. S., he having three other children at the date of the will, it was held that the terms "children," "brothers," &c., were to be understood to mean those living at the date of the will as personæ designatæ (*p*). In *Ramsay v. Shelmerdine* (*q*), where a testator directed his residue to be divided into as many shares as should be equal in number to the number of his children living at his decease, or such of them as should die in his lifetime leaving issue, and (in effect) gave one share to or in trust for each child : it was held that this was not a gift to a class. The decision appears to be erroneous : it was not followed in *Re Dunster* (*r*), where the terms of the will were practically identical with those in *Ramsay v. Shelmerdine*.

or in separate shares.

Where some members of class are included by name,

But the fact that some of the children are mentioned by name does not prevent the gift from being a gift to a class. Thus a gift to "all my children, including B. and W." (*s*), or a gift "to

(*j*) *Aspinall v. Duckworth*, 35 Bea. 307. For another example of the erroneous use of the word "lapse" see *Re Wand*, [1907] 1 Ch. 391.

(*k*) *Re Hornby*, 7 W. R. 729 ; *Sanders v. Ashford*, 28 Bea. 609 ; *Re Spiller*, 18 Ch. D. 614.

(*l*) *Cresswell v. Cheslyn*, 2 Ed. 123.

(*m*) *Bain v. Lescher*, 11 Sim. 397 ; *Burrell v. Baskerfield*, 11 Bea. 525 ; *Re Hull's Estate*, 21 Bea. 314 ; *Spencer v. Wilson*, L. R., 16 Eq. 501.

(*n*) *Re Smith's Trusts*, 9 Ch. D. 117 ; *Jacob v. Catling*, [1881] W. N. 105.

(*o*) *Havergal v. Harrison*, 7 Bea. 49 ; and see *Hall v. Robertson*, 4 D. M. & G. 781 ; *Re Gibson's Trusts*, 2 J. & H. 656, and other cases cited post, p. 437.

(*p*) *Leach v. Leach*, 2 Y. & C. C. C. 495.

(*q*) L. R., 1 Eq. 129.

(*r*) [1909] 1 Ch. 103.

(*s*) *Shaw v. M'Mahon*, 4 Dr. & W. 431.

my son George, my daughter Lydia, &c., and such of my children hereafter to be born as shall attain twenty-one" (t), is a gift to a class (tt).

So a gift to "all my children born and to be born, except my son Thomas," is a gift to a class (u).

The question whether a gift "to A. and all the children of B." (assuming that A. is not a child of B.) is a class gift, is referred to in the judgment of Lord Davey in *Kingsbury v. Walter*, to be presently quoted (v).

If a testator gives property to all his children living at his decease and any children who may die in his lifetime leaving issue living at his death, this operates under the 33rd section of the Wills Act, so that the share of a child dying before the testator and leaving issue, forms part of that child's estate (w). But as the 33rd section only applies to gifts to the testator's own issue, a gift to the children of another person who die in the testator's lifetime leaving issue is nugatory; those children who survive the testator take as a class under the gift, and the issue of a deceased child take nothing by implication (x).

The question what constitutes a class has been already considered in connection with the Rule against Perpetuities (y). The question also arises in connection with the doctrine of lapse, and was much discussed in the case of *Kingsbury v. Walter* (z). There the testator appointed his wife and his "niece A." executrixes, and gave certain property upon trust for his wife for life, and after her death "upon trust for the said A. and the child or children of my sister B. who shall attain the age of twenty-one years" in equal shares. A. was at the date of the will nearly twenty-one: she attained twenty-one and died before the testator. At the death of the wife all B.'s children had attained twenty-one. It was held by the Court of Appeal and by the House of Lords, that the testator intended to make one class of nephews and nieces, and that consequently there was no lapse by reason of A.'s death, the other nephews and nieces taking the whole. Lord Davey in his speech referred to some of the

CHAPTER XIII.

or excepted
by name.

Gift to a class
and to an in-
dividual not a
member of
the class.

Whether
deceased child
can be in-
cluded in
class gift.

What is a
class.

(t) *Re Jackson*, 25 Ch. D. 162, following *Re Stanhope's Trusts*, 27 Bea. 201.

(tt) *Shaw v. M'Mahon*, 4 Dr. & W. 431.

(u) *Re Jackson*, supra, where the testator specified all his living children, other than Thomas, by name, and this was held equivalent to an express exception of Thomas.

(v) Post, p. 434.

(w) See 2 Key & Elph. Conv. (9th

ed.) 828, note.

(x) *Re Coleman and Jarrom*, 4 Ch. D. 165. But by apt words issue (if any) may of course be substituted to take the share of a deceased parent without destroying the nature of the class-gift. See an instance, *Aspinall v. Duckworth*, 35 Beav. 307.

(y) Ante, p. 327 seq.

(z) [1901] A. C. 187. S. c. sub nom. *Re Moss*, [1899] 2 Ch. 314.

CHAPTER XIII.

Lord Davey's
description of
a class gift.

Composite
class.

Gift to A. and
the children
of B. not
a class gift,

unless shewn
to be so by
context or
circum-
stances.

earlier decisions (*a*), and said: "Primâ facie a class gift is a gift to a class consisting of persons who are included and comprehended under some general description, and bear a certain relation to the testator (*b*). . . . But it may be none the less a class because some of the individuals of the class are named. . . . *Stanhope's Case* (*c*) is an example: there the gift was to four named daughters and all his after-born daughters, and that was rightly, as I think, held to be a class gift. To the same effect is a case before Chitty, J., *In re Jackson* (*d*), where the gift was to five named individuals and all his other sons and daughters who should be born afterwards and attain the age of twenty-one years. Chitty, J., held that that was a class gift, although the condition of attaining the age of twenty-one years was imposed upon the other children and not upon those who were named. He came to this conclusion upon the ground that it appeared from the evidence that those who were named had already attained the age of twenty-one years. . . . There may also be a composite class, such as, for instance, children of A. and children of B.: that would be a good class (*e*). On the other hand, a gift to A. and all the children of B. is, in my opinion, primâ facie not a class gift, and I think that has been so decided, and rightly decided, in the case of *In re Chaplin's Trusts* (*ee*), which I have already referred to, and also in a case before Sir George Jessel of *In re Allen, Wilson v. Atter* (*f*). . . . But it is perfectly plain that a gift in the form which I have mentioned may be a class gift, if there is to be found in the will a context which will show that the testator intended it to be a class gift. I think the same result may be arrived at if the Court, putting itself in the same position as the testator occupied, with the same knowledge as the

(*a*) *Pearks v. Moseley*, 5 App. Ca. 714; *Re Chaplin's Trust*, 33 L. J. Ch. 183; *Re Allen*, 44 L. T. 240.

(*b*) Or to some other person (*Re Featherstone's Trusts*, 22 Ch. D. at p. 121). A class is a number of persons "comprised under one general description, indefinite in number, and individually undistinguished by name or particular designation": per Lord Langdale, M.R., in *Burrell v. Baskfield*, 11 Bea. p. 534. To a certain extent, therefore, the question whether a gift is a class gift is a question of form. Thus if a testator gives property to a number of persons by some general description, he is presumed to mean such of them as survive him, even if the description can only include persons living, and therefore capable of being designated, at the date of the

will. Thus in *Viner v. Francis*, 2 Br. C. C. 658, a testator gave property to "the children of my late sister, M. C., to be equally divided among them": it was held that this meant the children of M. C. living at the testator's death; in other words, it was a gift to a class; *Shuttleworth v. Greaves*, 4 My. & Cr. 35; *Dimond v. Bostock*, L. R., 10 Ch. 358, and other cases cited post.

(*c*) 27 Bea. 201.

(*d*) 25 Ch. D. 162. Followed in *Re Mervin*, [1891] 3 Ch. 197.

(*e*) For another example of a composite class, see *Best v. Stonehewer*, 2 D. J. & S. 537.

(*ee*) 33 L. J. Ch. 183.

(*f*) 29 W. R. 480. See also *Re Woods' Will*, 31 Bea. 323; *Re Venn*, [1904] 2 Ch. 52.

testator had when he was writing his will, comes to the conclusion that the gift, although expressed in the form of a gift to an individual and the children of A., was intended to operate as a class gift. There is abundant authority for that proposition. . . . The case of *Aspinall v. Duckworth* (g) appears to me to be exactly this case. It was a gift unto and equally amongst the testator's nephew A. and the children of his sister B., as tenants in common. Lord Romilly held that that was a gift to a class. It differs from this case only in one particular, namely that the gift here is confined to those children who attain twenty-one. Another principle, which is, I think, established in this branch of the law is, that all the interests of members of the class must vest in interest at the same time. For instance, if there is a gift to A. for life, and afterwards to B. and the children of C., the class must vest in interest at the death of the testator, although it is capable of enlargement by the birth of subsequent children of C. during the lifetime of the tenant for life." As Lord Davey pointed out, if there is a gift of property to A. for life, and at his death to be equally divided between his surviving children and B., only those children of A. who survive the tenant for life can take, while the interest of B. becomes vested at the testator's death; consequently this is not a class gift so far as B. is concerned, and if he dies in the lifetime of the testator his share lapses (h). In the case at bar Lord Davey came to the conclusion that the testator treated A. as if she had attained twenty-one, and made a special class of nephews and nieces consisting of A. and the children of his sister B. (i).

If shares vest at different times, legatees do not take as a class.

The principle thus laid down was followed in *Re Venn* (j), where there was a gift to the brothers and sisters of X. living at her decease, and A., B., and C. in equal shares; A. and B. were in the same degree of relationship to the testatrix, but C. was a stranger in blood: it was held by Joyce, J., that the gift was not to a class, and that A. having died in the lifetime of the testatrix, his share lapsed.

In addition to the kind of composite class referred to above (k), there may be a class compounded of persons answering different descriptions, or belonging to different generations. Thus, a class

Class compounded of persons answering different descriptions.

(g) 35 Bea. 307.

(h) *Drakeford v. Drakeford*, 33 Bea. 43.

(i) The decision in *M'Kay v. M'Kay*, [1900] 1 Ir. R. 213 (where the gift was to the testator's wife and his children "then living"), can apparently be

supported on the theory that the testator intended the contingency of being alive at the period of distribution to apply to the wife as well as the children.

(j) [1904] 2 Ch. 52.

(k) Ante, p. 434.

CHAPTER XIII. may consist of the children of A., who attain twenty-one, and the issue of such of them as die under that age. Where a gift of this kind is unskilfully framed, the question may arise: "Are there two classes, or is there one class compounded of persons answering one or other of two alternative descriptions?" (*l*). The question has been already discussed with reference to the Rule against Perpetuities, and the distinction has been pointed out between original and substitutional gifts (*m*).

Exclusion of members.

Another way in which a testator can create a special class is by excluding certain named individuals who would otherwise belong to it. Thus in *Dimond v. Bostock* (*n*), a testatrix gave property in trust for all the nephews and nieces of her late husband who were living at the time of his decease, except A. and B. It was held that this was a gift to a class.

Class ascertained in testator's lifetime.

If the gift is to a class of persons who are ascertained during the testator's lifetime or even at the date of the will, this is in a sense equivalent to a gift to them as personæ designatæ, but it is not the less a class gift. Accordingly, in *Lee v. Pain* (*o*), where the gift was to M. for life, and after his decease, to his children living at his decease, equally between them, and M. died in the lifetime of the testatrix, leaving three children surviving, one of whom also died in the lifetime of the testatrix, Sir J. Wigram, V.-C., decided that the children living at the death of M. who survived the testatrix took as a class, and that there was no lapse. And in *Leigh v. Leigh* (*p*), a bequest to "all the present born children of B. equally," was held to be a class gift. The same construction was followed in *Viner v. Francis* (*q*), and in *Dimond v. Bostock* (*r*)—in each of which cases the bequest was to the children or nephews and nieces of a person dead at the date of the will—notwithstanding a dictum to the contrary by Kindersley, V.-C., in *Cruse v. Howell* (*s*). But if the gift is to named individuals, also described as a class, they take as personæ designatæ; as in *Bain v. Lescher* (*t*), where the gift was to "the children of L. D., to wit, J. D., E. D., and A. D."

(*l*) Per Lord Selborne, in *Pearks v. Moseley*, 5 App. C. 722.

(*m*) Ante, p. 333, and Chap. XXXVI.

(*n*) L. R., 10 Ch. 358.

(*o*) 4 Hare, 254.

(*p*) 17 Bea. 605.

(*q*) 2 Cox, 190.

(*r*) L. R., 10 Ch. 358.

(*s*) 4 Drew. 215. See also *Allen v. Callow* (3 Ves. 289) and *Ackerman v. Burrows* (3 V. & B. 54), which are sometimes cited in support of the

theory that such persons take as personæ designatæ. In *Capes v. Dalton*, 86 L. T. 129, s. c. s. n. *Kekewich v. Barker*, 88 L. T. 130, where the gift was to "G. B., M. B., and the children now living of R. H.," there seems to have been some divergence of judicial opinion on the question whether it was a gift to a class, but the question of lapse did not arise.

(*t*) 11 Sim. 397.

And even if they are not described by name, but only by number, they take as personæ designatæ; thus a bequest to "the five daughters of A. B." (u), is not a gift to them as a class. In *Re Stansfield* (v) the testator directed certain moneys to be divided among "my nine children," and gave his residue upon trust to pay and divide it "equally to and between all my children, except that my oldest son J. . . shall receive 30*l.* less than each of my other children." It was held by Bacon, V.-C., that the residue was given to the children as personæ designatæ. The decision saved the share of a deceased child from lapse under sect. 33 of the Wills Act (w), but on principle the decision seems difficult to justify, for it would have excluded an after-born child (x).

In *Havergal v. Harrison* (y) it was held that a gift to "the brother and sister of A. and my brothers and sister equally," was a gift to the individuals in question, living at the date of the will, as personæ designatæ.

Where individuals are described only by relationship.

Where a testator gives pecuniary legacies to a number of persons by name, and gives the residue to "all the before mentioned pecuniary legatees," with certain exceptions, in proportion to the amounts of their legacies, this is not a gift to them as a class, and if one of them dies in the testator's lifetime his share lapses (z). But a gift to persons by reference may be (or have the same effect as) a gift to them as a class, if that intention appears (a).

Description by reference.

It has been already mentioned, that a gift to such of a number of named persons, as are living at a particular time, or survive the testator, is equivalent to a gift to a class, so far as the question of lapse is concerned (b).

Persons living at a certain time.

"It is not clear," says Mr. Jarman (c), "what would be the effect of a gift to certain other classes of persons, as to the next of kin or relations as tenants in common of A., a person who dies in the lifetime of the testator, in the event of any of the next of kin or

Gift to next of kin or relations.

(u) *Re Smith's Trusts*, 9 Ch. D. 117.
Orford v. Orford, [1903] 1 Ir. R. 121.

(v) 15 Ch. D. 84.

(w) Post, p. 445.

(x) See the cases cited post, Chap. XLII. The question raised in these cases suggests the desirability of extending sect. 33 of the Wills Act to gifts to classes.

(y) 7 Bea. 49. Compare *Jones v. Frewin*, 12 W. R. 369, where Wood, V.-C., seems to have held that a gift to "my nephews and nieces" was a gift to individuals and not to a class; but "it is a very shortly reported judg-

ment and difficult to follow": per North, J., in *Re Hannam*, [1897] 2 Ch. 46.

(z) *Re Gibson's Trusts*, 2 J. & H. 656; compare *Nicholson v. Patrickson*, 3 Giff. 209. As to the decision in *Russell v. Kellett* (3 Sm. & G. 264), where the bequests were charitable, vide ante, p. 239.

(a) See *Knight v. Gould*, 2 M. & K. 295, post, p. 438.

(b) *Re Spiller*, 18 Ch. D. 614; *Re Featherstone's Trusts*, 22 Ch. D. 111, supra, p. 430.

(c) First ed. p. 299.

CHAPTER XIII. relations dying in the interval between the decease of A. and of the testator ; since, in every case where such a gift has occurred (and in which the entirety has been held to belong to the surviving next of kin at the death of the testator), the bequest seems to have contained no words which could operate to sever the joint tenancy " (d). In *Ham's Trusts* (e), though there were words which severed the joint tenancy, yet there were other words which prevented the legatees from taking as a class ; Sir R. T. Kindersley, V.-C., however, appears to have been of opinion that without the latter words the gift would have been a gift to a class, and would have taken effect in favour of those only who survived the testator.

Gifts to
executors
beneficially.

As a general rule, a gift to " my executors herein named," beneficially as tenants in common, is a gift to them as individuals, and not as a class, so that if one of them predeceases the testator, or renounces, his share lapses (f). The case of *Knight v. Gould* (g) is no authority to the contrary. There the testator bequeathed the residue of his estate " to my executors hereinafter named, to enable them to pay my debts, legacies, funeral and testamentary charges, and also to recompense them for their trouble, equally between them " ; and it was held that the executors took as a class in their official character, and that one having predeceased the testator, the whole went to the survivors. The decision no doubt gave effect to the intention, for the " recompense " was to go with the " trouble." Besides, the survivors took the whole in trust to pay debts ; and the same persons were, by the words of the will, entitled to keep for their own benefit what remained after such payment. The case turned on the special terms of the will (i).

Devises of
legal or
beneficial
ownership
only.

III.—Devises of Legal (or Beneficial) Ownership only.—Mr. Jarman points out (j) that " where the devise which lapses comprises the legal or beneficial ownership only, of course its failure creates a vacancy in the disposition merely to that extent. Thus, if a testator devise lands to the use of A. in fee, in trust for B. in fee, and A. die in the testator's lifetime, the legal estate comprised in the lapsed devise to A. devolves to the testator's heir (k), (or, if the

(d) *Bridge v. Abbot*, 3 Br. C. C. 224 ; *Vaux v. Henderson*, 1 J. & W. 388, n.

(e) 2 Sim. N. S. 106 ; see this case stated post, Chap. XLI., where the cases settling the period at which next-of-kin are to be ascertained are stated.

(f) *Barber v. Barber*, 3 Myl. & C. 688 ; *Hoare v. Osborne*, 33 L. J. Ch. 586.

(g) 2 Myl. & K. 295.

(i) The case is always treated as a

decision on gifts to a class (see *Re Gibson's Trusts*, 2 J. & H. p. 662).

(j) First ed. p. 299.

(k) In the case of a person dying since 1897, the legal estate would devolve to his personal representatives, who would apparently, under sect. 2 of the Land Transfer Act, 1897, hold it as trustees for A.

will has been made or republished since 1837, and contains a residuary devise, then to the residuary devisee,) charged with a trust in favour of B., whose equitable interest under the devise is not affected by the death of his trustee. An example of the converse case is afforded by the recent case of *Doe d. Shelley v. Edlin* (l), where a testator gave (inter alia) to A. his real estates, to hold to A., his [heirs,] executors, administrators, and assigns, upon trust to receive the rents and profits thereof, and pay the same to B. for her life, for her separate use, free from the control of her husband; and after the decease of B., upon trust to convey the real estates to such uses and in such manner as B. by deed or will should appoint. B. died in the testator's lifetime. It was held, nevertheless, that the legal inheritance passed to A. under the devise. Lord Denman suggested a doubt whether the doctrine would apply to a case in which the trustee had no duty to perform, as in the case of a devise to the use of A. in fee in trust for B. It seems difficult to discover any solid ground for distinguishing such cases."

IV.—Gifts by way of Charge or Condition.—Mr. Jarman also points out (m) that "where an estate is devised to one, charged with a sum of money, either annual or in gross, in favour of another, the charge is not affected by the lapse of the devise of the onerated property. Thus, if Blackacre be devised to A. and his heirs, charged with or on condition that he pay 50*l.* a year, or the sum of 500*l.*, to B., and it happens that A. dies in the testator's lifetime, his (the testator's) heir at law (or his residuary devisee, if the will is subject to the new law), will take the estate charged with the annuity or legacy in question (n). This principle is strongly exemplified in the case of *Oke v. Heath* (o), in which a person having a power of appointment over a sum of money, by will appointed a less sum (part of the fund in question) to A.; and in consideration thereof A. was to pay to his mother an annuity of 100*l.* during her life for her separate use, and to enter into a bond, with a penalty, for the payment thereof; and the testatrix gave the residue of what she had power to dispose of to B. A. died in the testatrix's lifetime, yet the mother was held to be entitled to her annuity out of the fund, the whole of which, by the death of A., had devolved to B., the residuary appointee.

Lapse of
devise of
charged
property.

(l) 4 Ad. & Ell. 582 [1836].

(m) First ed. p. 300.

(n) *Wigg v. Wigg*, 1 Atk. 382; *Hills v. Wirley*, 2 Atk. 605; *Re Kirk*, 21 Ch. D. 431.

(o) 1 Ves. sen. 135. See *Re Arrow-*

smith, 6 Jur. N. S. 1231, and on appeal (where the point did not arise) 2 D. F. & J. 474. See also *Re Kirk*, 21 Ch. D. 431, where the charge was simply in exoneration of the personal estate.

CHAPTER XIII.

Destination
of a lapsed
specific sum
charged on
real estate.

Rule as to
contingent
charges.

Where liable
to failure by
death, though
not expressly
contingent.

Charges abso-
lute in event.

“ In the converse case, namely, where the person for whom the money is to be raised dies in the testator's lifetime, it is more difficult to determine the destination of the lapsed interest, the question being then embarrassed by the conflicting claims of the devisee of the lands charged, and of the heir of the testator : the former contending that the charge has become extinct for his benefit ; and the latter, that the lapsed sum is to be regarded as real estate undisposed of by the will.

“ This, at least, is clear, that where land is charged with a sum of money upon a contingency, and the contingency does not happen, the charge sinks for the benefit of the devisee (*p*). As in the case of a devise of land to A., charged with a legacy to B., provided B. attain the age of twenty-one, as to which Lord Eldon (*q*) has observed, ‘ The devise is absolute as to A., unless B. attain the age of twenty-one : if he does, he is to have the legacy. But his attaining the age of twenty-one is a condition, upon which alone he is to have it ; and, if he does not attain that age, then the will is to be read as if no such legacy had been given, and the heir at law does not come in because the whole is absolutely given to the devisee ; but a gift which fails must clearly be intended, upon the failure of the condition, to be for the benefit of the devisee.’ It would, of course, be immaterial, in such case, whether the death of the legatee during minority occurred in the testator's lifetime or afterwards.

“ Where a legacy, payable in futuro, though not expressly contingent, is bequeathed in such a manner as that it would fail by the death of the legatee before the time of payment, (and such is always the rule where the postponement is referable to the circumstances of the legatee, and is not made for the convenience of the estate,) the case evidently falls within the principle of Lord Eldon's reasoning ; and, consequently, if the legatee die before the vesting age, whether in the lifetime of the testator or not, the charge sinks in the estate.

“ It is to be observed, also, that a legacy which, though originally made contingent, becomes absolute by the effect of events in the testator's lifetime (subject, of course, to a liability to failure by lapse), is to be regarded, in applying the doctrine in question,

(*p*) *Att.-Gen. v. Milner*, 3 Atk. 112 ; *Croft v. Slee*, 4 Ves. 60 ; *Re Cooper's Trusts*, 23 L. J. Ch. 25, 4 D. M. & G. 757. “ But such a gift as that in *Att.-Gen. v. Milner*, would now be held to be vested.” (Note by Mr. Jarman.)

(*q*) *Tregonwell v. Sydenham*, 3 Dow,

210. As to the effect of an express direction by the testator that in a certain event the sum is to sink into his residuary personal estate, see *Johnson v. Webster*, 4 D. M. & G. 474, post, Chap. XXII.

in precisely the same light as if it were originally absolute. Thus, if land be devised, charged with a specific sum to A., on condition of his attaining the age of twenty-one years, and A. do attain that age, and subsequently die in the testator's lifetime, the gift receives the same construction as if it had not originally been made conditional on his attaining the prescribed age."

With respect to the general question, as to the destination of sums charged on real estate which lapse by the death of the legatee in the testator's lifetime, or the gift of which is void ab initio, the older authorities are chiefly cases in which gifts of specific sums were void ab initio, and the decision in each case generally turned upon the question whether the gift was an exception from the residuary devise, or a mere charge upon the land. Owing to the limited operation of a residuary devise under the old law (r), if the gift was an exception, the heir took the benefit in the event of its failure; if the gift was a mere charge on the land, the specific devisee took the benefit of its failure (s). The cases are not altogether consistent, partly because some of them proceeded on "the strong reluctance in the Court to disinherit an heir at law" (t), while in other cases the Court treated the question as one of intention.

Destination of sums payable out of land.

The leading case in favour of the heir is *Arnold v. Chapman* (u); there the testator devised a copyhold estate to A., he causing to be paid to the executors the sum of 1,000*l.*, and after payment of debts and legacies the testator gave all the residue of his real and personal estate to a charity; the 1,000*l.* being included in the residuary bequest to the charity, the gift of it was void, and the question arose whether it should go to the heir or sink for the benefit of A. Lord Hardwicke held that it went to the heir, apparently on the ground that the direction to pay to the executors severed it from the devise of the land, so as to prevent the devisee from having any interest in it, but as the gift of it to the charity was void, it retained the character of land and went to the heir as undisposed of real estate (v). Lord Hardwicke's decision seems to have turned entirely on the direction to pay to the executors,

Decisions in favour of the heir.

(r) See Chap. XXV.

(s) Per Leach, M.R., *Cooke v. Stationers' Co.*, 3 Myl. & K. p. 264.

(t) See the remarks of Lord Camden in *Gravenor v. Hallum* (Amb. 643), and of Lord Eldon in *Tregonwell v. Sydenham* (3 Dow, 210). The views of Mr. Jarman, as expressed in the first edition of this work, were also strongly in favour of the heir. The tendency of

the Courts seems now to be the other way: see *Freeman v. Freeman*, 5 D. M. & G. 704.

(u) 1 Ves. sen. 108.

(v) See Lord Eldon's remarks in *Tregonwell v. Sydenham*, 3 Dow, at p. 211; and in *Sidney v. Shelley*, 19 Ves. 363. See also the comments of Wood, V.-C., on *Arnold v. Chapman* in *Heptinstall v. Gott*, 2 J. & H. 449.

CHAPTER XIII. for he said that if the devise had been on condition to pay the 1,000*l.* to the charity, the condition would have been void, in which case it seems clear that A. would have taken the land free from the condition. In *Gravenor v. Hallum* (*w*) land was devised subject to a charge in favour of a charity, and it was held that the heir took the benefit of its failure, but the decision seems to have turned partly on the fact that, subject to the charge, the land was devised in trust for sale, and the case therefore seems to come more properly under another head (*x*). In *Bland v. Wilkins* (*y*) land was devised to E. N. in fee, upon condition that her executors and administrators should pay 10*l.* to a charity: it was held that the 10*l.* should go to the heir, as part of the produce of the land undisposed of. The report is too short to make the case an authority of any value; it seems inconsistent with the principle that where land is devised subject to an invalid condition, the devisee takes the land free from the condition (*z*). *Henchman v. Att.-Gen.* (*a*) is also an unsatisfactory case.

Decisions in
favour of the
devisee.

Among the decisions in favour of the devisee, the earliest is *Jackson v. Hurlock* (*b*): there the testator devised lands to A. subject to and charged with a sum which he afterwards directed to be paid to charities: it was held that the charge sank for the benefit of A. In *Kennell v. Abbott* (*c*), Arden, M.R., said that after some difference of opinion it was then (1799) perfectly settled that if an estate were devised, charged with legacies, and the legacies failed, no matter how, the devisee should have the benefit of it, and take the estate. *King v. Denison* (*d*) and *Cooke v. Stationers' Co.* (*e*) are to the same effect.

Modern
decisions.

Since the Wills Act many cases have been decided bearing on this question. In considering them the alteration made in the law by sect. 25 of the Wills Act (*f*) must be borne in mind.

Ridgway v.
Woodhouse.

In *Ridgway v. Woodhouse* (*g*), where a testator devised real estate in trust for his wife for her life, but in case his wife's sister should reside with her, he directed his trustees to retain out of the rents 100*l.* for every day of such residence, and pay the same to a

(*w*) Amb. 643.
(*x*) Post, Chap. XXII.
(*y*) 1 Br. C. C. 61 n.
(*z*) *Arnold v. Chapman*, supra; *Wright v. Row*, 1 Br. C. C. 61. See also *Cooke v. Stationers' Co.* (3 Myl. & K. 262), where Leach, M.R., said that a devise upon condition to pay certain legacies was no more than a charge of the legacies.

(*a*) 2 S. & St. 498; 3 Myl. & K. 485.
(*b*) Amb. 487; better reported 2 Ed. 263.
(*c*) 4 Ves. 802. See *Barrington v. Hereford*, 1 Br. C. C. 61; *Baker v. Hall*, 12 Ves. 497.
(*d*) 1 V. & B. 260.
(*e*) 3 My. & K. 262.
(*f*) Post, Chap. XXV.
(*g*) 7 Bea. 437.

charity, Lord Langdale, M.R., said : " The direction to pay to the charity is void, and consequently the direction to retain, so far as it was intended to operate for the benefit of the charity, was also void, and had no effect ; and that purpose failing, I think the direction to retain must fail altogether."

The point under consideration was much discussed in *Re Cooper's Trusts* (h), in which there was a specific devise on trust in the first place to raise 2,000*l.* by sale or otherwise ; and, " after raising as aforesaid," the estate was to be in trust for the testator's son and his issue. One half of the 2,000*l.* was directed to be held in trust for a daughter of the testator for life, and afterwards for her children. Then followed a residuary devise. The daughter survived the testator, but died without ever having had a child : it was held that the 2,000*l.* was a charge on the estate, and not an exception, and that the 1,000*l.* which lapsed sank for the benefit of the specific devisee. Sir W. P. Wood, V.-C., treated the distinction between an exception and a charge as settled ; the question was to which head the case before him belonged. He said : " I was very much struck throughout with the ingenious argument in support of its being an exception. But when one looks through the cases, one is surprised to find—I do not know whether any case has arisen—but I do not find a single case in the books where a sum of money to be paid out of an estate has ever been held to be an exception. I cannot find a single case in the books to that effect."

Re Cooper's Trusts.

In *Sutcliffe v. Cole* (j) the testator devised lands specifically to A. subject to a charge of 7,000*l.*, which he directed his executors to raise by mortgage or sale, and he directed 1,000*l.*, part of the 7,000*l.* to be appropriated to a person who predeceased the testator. Kindersley, V.-C., held that A. took the estate discharged of the 1,000*l.* " If there is a devise of real estate less something, a devise with an exception out of it, the devisee can take no more than the actual devise. But if there is a devise subject to a charge for the particular purpose of a benefit to some individual, then it is a devise of the whole estate, and not of an estate less something."

In *Tucker v. Kayess* (k) the testator bequeathed to his executors a sum of money, " to be chargeable and paid as hereinafter mentioned," upon trusts which eventually failed by reason of the testator leaving no children ; he then devised certain lands to A.

(h) 23 L. J. Ch. 25 ; 4 D. M. & G. 757. See *Re Newberry's Trusts*, 5 Ch. D. 746. In that case the question did not arise, because the charge was on

land comprised in a residuary devise.

(j) 3 Drew. 135.

(k) 4 K. & J. 339. See also *Re Clulow's Trusts*, 1 J. & H. 639.

CHAPTER XIII. subject to the payment of the said sum : it was held by Wood, V.-C., that the case fell within the principle of *Re Cooper's Trusts* (l), and that the charge sank into the devised property for the benefit of the devise. The V.-C. said : " It comes back to the old distinction between an exception and a charge. The true test being this : Is the thing in question excepted out of the devised property—did the testator mean to give that property minus the thing in question, or is it a charge upon the devised property ? If it is excepted out of the devised property, it goes to the residuary devisee ; if it is a charge on the devised property, it sinks into that property for the benefit of the person to whom it is devised ; and this case, I must say, is one of the strongest I ever saw of the latter description. I made the observation in *Re Cooper's Legacy*, that ' I do not find a single case in the books where a sum of money to be paid out of an estate has ever been held to be an exception,' and I am still of that opinion." However, in *Heptinstall v. Gott* (m), the Vice-Chancellor took somewhat different ground. There the testator gave his daughter four cottages subject to a charge of 150*l.*, and bequeathed all his personal estate to certain children and grandchildren, including the daughter. No specific disposition was made of the 150*l.* : it was held that the 150*l.* sank for the benefit of the devisee. The V.-C. explained that the principle on which he acted in *Re Cooper's Trusts* (n), was " that if you can ascertain from the terms of a will that a charge is meant as an exception out of a gift, there the charge will be operative, although the disposition of it may not take effect ; but that where the purpose of the charge is merely to provide for some object, and, subject to such purpose, to leave the estate to the devisee, there, if the purpose fails, the charge sinks for the benefit of the devisee." And the V.-C. went on to say that in *Re Cooper's Trusts* the legacy was contingent on the daughter having children, and this not having happened, the charge was held to sink for the benefit of the devisee, but " if any child had ever been in existence, I apprehend that the principle of *Arnold v. Chapman* (o) would have applied." If the V.-C. meant to suggest a distinction between the failure of a gift by reason of its illegality, or by reason of there being no one in existence to take the benefit of it, and the failure of a gift by the death of the legatee in the lifetime of the testator, it is submitted that the distinction cannot be supported (p). The question is entirely one of intention ; unless

(l) *Supra*, p. 443.

(m) 2 J. & H. 449.

(n) *Supra*, p. 443.(o) *Supra*, p. 441.(p) See the decision of Kindersley, V.-C., in *Sutcliffe v. Cole*, *supra*, p. 443.

the testator intended to sever the gift from the devise for all purposes so as to make it an exception from the devise, the devisee will take the benefit of its failure, whether the failure is caused by lapse or by any other means.

It seems to follow from Lord Hardwicke's remarks in *Arnold v. Chapman* (*q*), that if a testator devises land subject to a condition or charge for securing the payment to his executors of a certain sum of money, and does not expressly dispose of this sum, it will become part of his personal estate, and will not in any event sink for the benefit of the devisee. No such case seems to have arisen. In *Heptinstall v. Gott* (*r*), Wood, V.-C., thought such a construction possible, but in the circumstances of that case, inadmissible. In *Simmons v. Pitt* (*s*), a testator by his will directed that a sum of 6,000*l.* and interest which he had by deed charged on certain real estate should form part of his residuary personal estate, which he bequeathed upon trusts which were void as to the interest arising from the 6,000*l.*: it was held that this interest went to the next of kin, and did not sink into the real estate or go to the heir of the testator.

Charge in favour of executors.

V.—Charges on Personal Property.—Where personal property is specifically given to A. subject to a charge in favour of B., and the gift to B. lapses, A. takes the benefit of the lapse (*t*). The same rule applies where the charge is on a particular fund (*u*).

Charges on personal property.

In *Fisk v. Att.-Gen.* (*v*), a testatrix bequeathed a fund upon trust to apply as much of the income as should be necessary in keeping a grave in repair, and to divide the residue among the poor of the parish: it was held that, the trust to repair the grave being void (*w*), the whole income was applicable to the charitable purpose (*x*). Questions as to the effect of lapse in the case of a charge on a mixed fund of realty and personalty, and as to the acceleration of estates and interests by the lapse of preceding interests, are considered elsewhere (*y*).

VI.—Provisions of Wills Act.—The doctrine of lapse has been modified by the Wills Act in three important particulars. First,

Stat. 1 Vict. c. 26, s. 25. Real estate comprised in lapsed or void devises included in residuary devise.

(*q*) *Supra*, p. 441.

(*r*) *Supra*, p. 444.

(*s*) L. R., 8 Ch. 978. See as to this case Chap. XXI.

(*t*) Per Wood, V.-C., in *Tucker v. Kayess*, 4 K. & J. at p. 342.

(*u*) *Scott v. Salmond*; 1 My. & K. 363.

(*v*) L. R., 4 Eq. 521.

(*w*) *Supra*, p. 228.

(*x*) Followed in *Re Birkett*, 9 Ch. D. 576; *Re Vaughan*, 33 Ch. D. 187; *Re Rogerson*, [1901] 1 Ch. 715.

(*y*) Chap. XXI, and post, p. 452.

CHAPTER XIII. by sect. 25, which provides, "That unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will."

It seems clear that the object of this enactment was to give to a residuary devise the same sweeping effect with regard to real estate as a residuary bequest has always had with regard to personalty (z). Consequently if, under a will made since 1837, a specific devise lapses, or fails as being contrary to law, the land so devised passes under the residuary devise, if the will contains one, and not to the heir (a).

Under this enactment, the gift of a sum, forming an exception out of real estate, to a person who dies in the testator's lifetime, or the gift of which is void ab initio, will enure for the benefit of the residuary devisee. If, however, the will does not contain an operative residuary devise, or the sum excepted affects the property comprised in the residuary devise, such sum falls to the heir. Of course the act has no bearing on the question whether the sum be an exception or simply a charge; nor does it do away with the rule that the failure of a mere charge enures for the benefit of the specific devisee, and not of the residuary devisee (b); nor, again, does it apply to the class of cases first noticed, in which the gift of a sum of money charged upon land on a contingency, is defeated by the failure of the event (whether it be the decease of the object before a certain age, or otherwise), and not by lapse.

1 Vict. c. 26,
s. 32.

Devises in tail
not to lapse if
devisee leaves
issue.

The next alteration in regard to lapse relates to devises in tail, to which sect. 32 provides, "That where any person to whom any real estate shall be devised for an estate tail, or an estate in quasi entail, shall die in the lifetime of the testator, leaving issue who

(z) Mr. Jarman thought that although this was "the immediate design" it was "evidently not the full scope of the clause." He thought that it altered the rule as to charges sinking for the benefit of the devisee under the doctrine above referred to (p. 440). "For instance, if a testator by a will made since 1837, devise Blackacre to A., he paying to B. 500*l.*, and all the residue of his estate to C., and it happen that B. dies in the testator's lifetime, the charge

will not sink for the benefit of A., but will be raisable for the residuary devisee" (first ed. of this work, p. 310). It is quite clear from the cases above cited (pp. 443 seq.), that the section has no such operation.

(a) *Carter v. Haswell*, 3 Jur. N. S. 788.

(b) *Tucker v. Kayess*, 4 K. & J. 339; *Sutcliffe v. Cole*, 3 Drew. 135; 24 L. J. Ch. 486; and see ante, pp. 443 et seq.

would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention should appear in the will."

The third and remaining alteration concerns gifts to the children or other issue of the testator, as to which sect. 33 declares, "That where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed, for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

Sect. 33.
Gift to testator's child or other descendant who leaves issue not to lapse.

"It will be observed," says Mr. Jarman (c), "that the words 'such issue,' occurring in sec. 32, admit of application either to the issue inheritable under the entail, surviving the deceased devisee, or the issue inheritable under the entail generally, whether living at the death of the devisee or not. According to the latter construction, if there be issue living at the death of the devisee or legatee, and also issue living at the death of the testator, the requisition of the statute is satisfied, though the *same* issue should not exist at both periods. Thus if lands be devised to A. in tail, who dies in the testator's lifetime, leaving an only child, and such child afterwards die in the testator's lifetime, leaving issue who, or any of whom, survive the testator, the devise would, it is conceived, be preserved from lapse. In the 33rd section, however, there is more difficulty in adopting a similar construction; for in this clause the words 'such issue' would seem to apply exclusively to the issue living at the death of the devisee or legatee; and if so, the result would be that in the case of a gift to a child of the testator, if it should happen that such child dies in his lifetime leaving issue, and such issue also dies leaving issue who survives the testator (certainly rather a large assemblage of contingencies to be crowded into the testator's lifetime), the existence of the last-mentioned issue would not prevent the lapse, the issue surviving the testator not being the same issue as existed at the death of the legatee. But here, also, possibly a liberal construction would be

Remarks upon
1 Vict. c. 26,
ss. 32 and 33.

Whether same
issue must be
living at death
of devisee and
of testator.

CHAPTER XIII.

adopted by considering the word 'issue' to be used as nomen collectivum, namely, as including every generation of issue, and not merely as designating the particular individual or individuals living at the death of the legatee; so that the existence of any person belonging to the same *line* of issue at the death of the testator would suffice to prevent the lapse; and in favour of this construction may be urged the desirableness of assimilating the effect of these two sections of the statute, from the penning and juxtaposition of which it is hardly to be supposed that any such difference was intended."

Lord St. Leonards was of a different opinion. He thought that there was intended to be a difference between sects. 32 and 33; and that sect. 33 "expresses what, looking at the object of the framer, it was no doubt intended to express, that some of the issue living at the death of the devisee or legatee must also be living at the testator's death" (*d*). But in *In bonis Parker* (*e*) Mr. Jarman's view prevailed. There the testatrix gave all her property to her daughter; the daughter died in her lifetime, leaving an only child who also died in the lifetime of the testatrix, leaving a child who survived the testatrix, and it was held by Sir C. Cresswell that the gift was saved from lapse by the 33rd section. Lord St. Leonards nevertheless maintained his view as to the operation of the section: "The decision is contrary to the express words of the statute, and equally contrary, it may be thought, to the intention of the legislature. The case is altogether distinguishable from the provision as to estates tail" (*f*).

Time of
legatee's
death
immaterial.

Section 33 applies: (1) Where the will is made before 1838, if the death of the legatee and the republication of the will take place after the Wills Act came into operation (*g*); (2) where the testator makes a gift to a child who is dead at the date of the will (*h*).

Wills Act does
not apply
where gift
does not
lapse, but
property
passes over to
another.

Mr. Jarman goes on to point out that "the application of both the enactments in question is excluded where the devise in tail or the gift to the testator's child or issue is expressly made contingent on the event of the devisee or legatee surviving the testator (*i*); for in

(*d*) Real P. Stat. 384 (1st ed.).

(*e*) 1 Sw. & Tr. 523.

(*f*) Real P. Stat. 392 (2nd ed.).

(*g*) *Winter v. Winter*, 5 Ha. 306. In that case the legatee died before the execution of the codicil. In *Wild v. Reynolds*, 5 N. of C. 1, the legatee died before 1838, and the legacy was held to lapse, although the will was republished in 1840.

(*h*) *Mower v. Orr*, 7 Ha. 473; *Wisden v. Wisden*, 2 Sm. & G. 396.

(*i*) It is submitted that any expression of a contrary intention is sufficient to prevent the operation of sec. 33. Thus if a testator bequeathed 1,000*l.* to his son A., and proceeded: "but if my said son shall die in my lifetime, then I bequeath the sum of 200*l.* to each of his children," would not this be sufficient to exclude the operation of sect. 33, whatever the number of the son's children might be?

such a case to let in the heir in tail under sect. 32 would be something more than substitution : it would be to give the property to the heir in tail in an event upon which the testator has not devised it to the ancestor ; and in such a case to hold the child or other descendant of the testator to be entitled under sect. 33, would be in direct opposition to the language of the will.

“ Nor, is it conceived, does the statute touch the case of a gift to one of several persons as joint tenants ; for as the share of any object dying in the testator’s lifetime would survive to the other or others, such event occasions no ‘ lapse,’ to prevent which is the avowed object of both the clauses under consideration. Joint tenants.

“ The same reasoning applies to a gift to a fluctuating class of objects who are not ascertainable until the death of the testator, though made tenants in common. Thus, suppose a testator to bequeath all his personal estate to his children simply in equal shares, it should seem that the entire property would, as before the statute, belong to the children who survive the testator, without regard to the fact of any child having, subsequently to the date of his will, died in the testator’s lifetime leaving issue who survive him (?). As gifts to the testator’s children as a class are of frequent occurrence, their exclusion from this provision of the statute will greatly narrow its practical operation.” And the same reasoning applies where there is only one member of the class. Thus in *Re Harvey’s Estate* (k), the testator gave property to his daughter for life, and after her death to her child or children who should attain twenty-one or marry ; the daughter had one child only, who died in the lifetime of the testator, leaving a child who survived the testator : it was held by Chitty, J., that the gift failed. The learned judge concurred in the view expressed by Mr. Jarman, in the concluding sentence quoted above, but said that the law was too well settled to be now altered. Gift to class.

If, however, the gift is to a single child, it seems that it may be saved from lapse by sect. 33, even although the child who is to take is not ascertained at the date of the will. Thus if in *Re Harvey* the gift had been to “ my first or only daughter who attains twenty-one or marries,” it is submitted that in the circumstances of that case the gift would have taken effect. Gift to a single child to be ascertained at a future time.

The reader will perceive that sect. 33 does not substitute the surviving issue for the original devisee or legatee ; but makes the Under sect. 33, issue of child dying in testator’s lifetime not substituted.

(j) Since Mr. Jarman wrote, the law is settled in accordance with the view above expressed : *Olney v. Bates*, 3

Drew. 319 ; *Browne v. Hammond*, Johns. 210.

(k) [1893] 1 Ch. 567.

CHAPTER XIII.

gift to the latter take effect, notwithstanding his death in the testator's lifetime, in the same manner as if his death had happened immediately after that of the testator. The subject of gift is, therefore, to all intents and purposes constituted the disposable property of the deceased devisee or legatee, and as such follows the dispositions of his will (*l*). "Hence," as Mr. Jarman remarks (*m*), "occurs this rather novel result, that it cannot be predicated of any will of a deceased person, whose parent or any more remote ancestor is living, what may be the extent of property which it will eventually comprise, and no final distribution can be made pending this possibility of accession."

Construction. In *Re Mason's Will* (*n*), Romilly, M.R., said he thought that "a very nice point might arise on the statute, as to whether the will of a legatee who predeceases his father, the testator, is to be construed according to the event, or whether it is to be construed as if the legatee had survived the testator."

Other effects of sect. 33.

The effect of the section is to prolong the life of the original devisee or legatee by a fiction for a particular purpose; that purpose is to give effect to the will in which the gift which would otherwise lapse occurs, and it only points out the mode in which that effect is to be given. Thus the subject of gift devolves with any obligation to which, under that will, it would have been subject in the hands of the deceased devisee or legatee if he had actually survived; as an obligation to compensate other legatees under the same will, disappointed by his assertion of rights that defeat their legacies (*o*); and if a devisee of land, being a feme covert, dies without having made an effectual disposition of it by will, her husband will, if the devise is saved from lapse by sect. 33, be entitled to an estate by the curtesy (*p*). Where a testator bequeathed to his children his residue in equal shares, with a direction that the shares of his daughter B., in case she should survive him, should be subject to the trusts of her marriage settlement, and the daughter died in the testator's lifetime leaving issue, it was held by Pearson, J., that the share was still subject to the direction notwithstanding her death (*q*). So if A. devises land to

(*l*) *Johnson v. Johnson*, 3 Ha. 157; *Re Mason's Will*, 34 Bea. 494. If he dies intestate, of course, it goes as part of his estate: *Skinner v. Ogle*, 9 Jur. 432.

(*m*) First ed. p. 314. Mr. Jarman adds that "though the will of the original testator must be under the new law, the will of the dying child or

descendant-legatee need not."

(*n*) *Supra*.

(*o*) *Pickersgill v. Rodger*, 5 Ch. D. 163; see further as to this case, post, Chap. XVI.

(*p*) *Eager v. Furnival*, 17 Ch. D. 115; *Hope v. Hope*, [1892] 2 Ch. 336; *Re Derbyshire*, 75 L. J. Ch. 95.

(*q*) *Re Hone's Trusts*, 22 Ch. D. 663.

his son B., and B. dies in his lifetime leaving issue, and having devised all his property to A., this latter devise lapses, because A. is by sect. 33 deemed to have died in his son's lifetime, and the land goes to B.'s heir (*r*). If a testator gives a legacy to his daughter, a married woman, who dies intestate in his lifetime, leaving surviving her a husband, who dies before the testator, and two children, who survive him, the effect of the fiction is that the daughter dies a widow, and the two children take the legacy (*s*). Again, probate duty (or, since 1st August 1894, estate duty) is payable on the death of the testator, not only in respect of the property which passes on his death, but in respect of the property which passes on the fictitious death of a legatee (or devisee) under sect. 33 (*t*). But the fiction does not prolong the life of the devisee or legatee for all purposes. Thus, an agreement to settle property which should come to the deceased legatee (testator's daughter) "during coverture," was held not to include property which had so come to her only by this fiction (*u*).

The question how far sect. 33 applies to powers of appointment is considered elsewhere (*v*). Powers of appointment.

VII.—Effect of Lapse.—It may be useful to state shortly the effect produced under the present law by the lapse of a testamentary gift. Effect of lapse.

If an ordinary specific devise lapses, the property passes under the residuary devise (*w*). If there is no residuary devise, the beneficial interest passes to the heir. So if the whole or a part of the residuary devise lapses, the property passes to the heir. Real estate.

If an ordinary specific, demonstrative or pecuniary legacy, or annuity lapses, it falls into residue and passes under the residuary bequest. If there is no residuary bequest, lapsed legacies go to the next-of-kin. So if the whole or a part of the residuary bequest lapses, it goes to the next-of-kin (*x*). Personal estate.

Where by reason of lapse a testator's will is rendered wholly inoperative, he dies intestate (*y*), or if the lapse only affects a part of his property there is said to be a partial intestacy in respect of that part (*z*). As a general rule, the beneficial interest in the property Intestacy produced by lapse.

(*r*) *Re Hensler*, 19 Ch. D. 612.

(*s*) *Re Allen's Trusts*, [1909] W. N. 181, following *In bonis Councill*, L. R. 2 P. & D. 314.

(*t*) *Re Scott*, [1901] 1 K. B. 228.

(*u*) *Pearce v. Graham*, 32 L. J. Ch. 359.

(*v*) Chap. XXIII.

(*w*) Post, Chap. XXV., where the restricted operation of a residuary devise under the old law is explained.

(*x*) Post, Chap. XXIX.

(*y*) *Re Ford*, [1902] 2 Ch. 605.

(*z*) See Chap. XXI.

CHAPTER XIII. undisposed of goes to the heir at law in the case of realty (a), and to the next of kin in the case of personalty, the devolution of it being governed by the Statutes of Distribution. But the Intestates' Estates Act, 1890, does not apply to a partial intestacy (b).

Where a person dies intestate by reason of his will wholly failing to take effect, the provisions of the Statute of Distributions, 1671, as to advances to children apply (c).

Lapse of charge.

If real or personal property is given subject to a charge, and the charge lapses, the general rule is that the devisee or legatee of the property takes the benefit of the lapse (d).

Particular estate.

If real property is given by way of remainder to persons in succession, and the gift to one of them lapses, the subsequent remainders are accelerated, and the same rule seems to apply in the case of personalty. But where an executory interest is limited after a contingent interest, and the prior interest lapses, there is an intestacy until it is ascertained whether the contingent interest will take effect or not (e).

Gift over made valid by lapse of prior absolute gift.

Property may be devised or bequeathed to A., with a gift over to B. which would be void if A. survived the testator, yet if A. predeceases the testator the gift over is good, the result being that the lapse of the gift to A. validates the gift to B. Thus if personal property is bequeathed to A. and the heirs of his body, and in case of the failure of issue of A., then to B. : this is an absolute gift to A. if he survives the testator, and in that case the gift to B. is void ; if, however, A. dies in the lifetime of the testator (apparently whether he leaves issue or not) the gift to B. takes effect (f). It has not been actually decided that the rule applies to land, but on principle it would appear that it does, and that the rule may be stated in general terms.

Consumable things.

On the same principle, it would seem that a gift of consumable articles to A. for life, with remainder to B., would not lapse by the death of A. in the testator's lifetime, but would take effect in favour of B. (g).

(a) As to charges on land, see above, pp. 439 seq.

(b) *Re Twigg's Estate*, [1892] 1 Ch. 579.

(c) *Re Ford*, supra. See Chap. XXXII.

(d) Supra, pp. 444 seq.

(e) Post, Chap. XXI. (Acceleration of Future Interests.)

(f) *Brown v. Higgs*, 4 Ves. 708 ; *Mackinnon v. Peach*, 2 Keen, 555 ; *Donn v. Penny*, 1 Mer. 20 ; *Williams v. Lewis*, 6 H. L. C. 1013 ; *Re Lowman*,

[1895] 2 Ch. 348, over-ruling *Hughes v. Ellis*, 20 Bea. 193 ; *Greated v. Greated*, 26 Bea. 621, and the dictum of Knight Bruce, V.-C., in *Harris v. Davis*, 1 Coll. 416.

(g) Theobald on Wills, 648, where *Andrew v. Andrew*, 1 Coll. 690, is referred to. The views expressed by Knight Bruce, V.-C., on this point, and his dictum in *Harris v. Davis*, 1 Coll. 416, are contrary to principle : *Re Lowman*, supra.

CHAPTER XIV.

UNCERTAINTY.

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I.—General Doctrine.—“In the construction of wills,” Mr. Jarman remarks (a), “the most unbounded indulgence has been shown to the ignorance, unskilfulness, and negligence of testators: no degree of technical informality, or of grammatical or orthographical error (b), nor the most perplexing confusion in the collocation of words or sentences, will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of its author, the faintest traces of which will be sought out from every part of the will, and the whole carefully weighed together (c); but if, after every endeavour, he finds himself unable, in regard to any material fact, to penetrate through the obscurity in which the testator has involved his intention, the failure of the intended disposition is the inevitable consequence. Conjecture is not permitted to supply what the testator has failed to indicate; for as the law has provided a definite successor in the absence of disposition, it would be unjust to allow the right of this ascertained object to be superseded by the claim of any one not pointed out by the testator with equal distinctness. The principle of construction here referred to has found expression in the familiar phrase, that the heir is not to be disinherited unless by express words or necessary implication; which, however, must not be understood to imply that a greater degree of perspicuity or force of language is requisite to defeat the title of the heir to the real estate of a testator, than

Indulgence shown to testators in the construction of wills.

(a) First ed. p. 315. The 4th section of this chapter, dealing with Misnomer and Misdescription, has been transferred to the new chapter (XXXV.) on “Description of Persons and Things.”

(b) See 3 Keb. pl. 49, 23; *Henniker*

v. *Henniker*, 12 Jur. 618; but see *Jackson v. Craig*, 20 L. J. Ch. 204, 15 Jur. 811; *Baker v. Newton*, 2 Beav. 112; *Langley v. Thomas*, 6 D. M. & G. 645.

(c) See *Minshull v. Minshull*, 1 Atk. 411.

CHAPTER XIV. would suffice to exclude the claim of the next of kin as the successor to the personalty; for though undoubtedly, on some points, a difference of construction has obtained in regard to these several species of property, that difference is ascribable, rather to the diversity in their respective nature and qualities, than to any disparity of favour towards the claims of the heir and next of kin (*d*).

"In modern times instances of testamentary gifts being rendered void for uncertainty are of less frequent occurrence than formerly; which is owing probably, in part, to the more matured state of the doctrines regulating the construction of wills, which have now assigned a determinate meaning to many words and phrases once considered vague and insensible, and in part to the more practised skill of the courts in applying these doctrines. Hence the student should be cautioned against yielding implicit confidence to any early cases (*e*), in which a gift has been held to be void for uncertainty, the principle whereof has not been recognised in later times.

"To the validity of every disposition, as well of personal as of real estate, it is requisite that there be a definite subject and object; and uncertainty in either of these particulars is fatal."

A condition may be void for uncertainty (*f*).

Uncertain
condition.
Uncertainty
as to opera-
tion of
limitation.

A gift may be void for uncertainty, not because there is any doubt as to the intention of the testator, but because it is uncertain when and how the gift will take effect. Thus in *Re Viscount Exmouth* (*g*), the testator, who was a peer, bequeathed chattels to trustees to go with the title as heirlooms, so far as the rules of law and equity would admit, and so that no person in existence at the testator's

(*d*) The rule in favour of the heir and next of kin to which Mr. Jarman refers is still occasionally cited (as in *Re Cameron*, 26 Ch. D. 19), but it may be doubted whether the rule has much, if any, real force at the present day. The presumption is rather the other way, namely, that when a man makes his will he does not intend to die intestate as to any part of his property (see *Goodman v. Goodman*, 1 De G. & S. 695). In *Re Roberts* (19 Ch. D. 520,) Jessel, M.R., said: "The modern doctrine is not to hold a will void for uncertainty unless it is absolutely impossible to put a meaning upon it. The duty of the Court is to put a fair meaning on the terms used, and not, as was said in one case, to repose on the easy pillow of saying that the whole is void for uncertainty."

Since this note was written, Mr. J. S.

Vaizey has been good enough to draw my attention to a passage in Lord Alvanley's judgment in *Booth v. Booth* (4 Ves. 407): "Every intendment is to be made against holding a man to die intestate, who sits down to dispose of the residue of his property." This doctrine, however, seems to have been originally confined to personal property, for there cannot be any doubt that the presumption in favour of the heir was stronger than in favour of the next of kin. [C. S.]

(*e*) *Pride v. Atwicke*, 1 Keb. 692, 754, 773; *Price v. Warren*, Skinn. 266, 2 Eq. Ca. Ab. 356, pl. 2.

(*f*) *Infra*, Chap. XXXIX.

(*g*) 23 Ch. D. 158, following the principles laid down in *Egerton v. Earl Brownlow*, 4 H. L. C. 1, and *Clavering v. Ellison*, 7 H. L. C. 707.

death, or born in due time afterwards, and afterwards coming to the title, should have any other than a life interest in the same, and so that no person should acquire an absolute interest in the same until the expiration of twenty-one years after the decease of all such persons as should be in existence at the time of the testator's decease and afterwards attaining the title; it was held that the latter clause of these limitations was void for uncertainty in operation, and that the first person born after the death of the testator who attained the title acquired an absolute interest in the chattels.

In *Re Moore* (*h*) the testatrix bequeathed a sum of stock to trustees upon trust to apply the dividends in maintaining and keeping in repair a certain tomb "for the longest period allowed by law, that is to say, until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death." It was held that the gift was void for uncertainty. It seems difficult to bring this decision within the principle of the cases cited above: there was no uncertainty in the operation of the limitation; the only difficulty was that of evidence. It is submitted, however, that the gift was an infringement of the Rule against Perpetuities (*j*).

II.—Uncertainty as to the Subject of Disposition.—Mr. Jarman remarks (*k*) that, "A simple example of a devise rendered void by uncertainty as to the intended subject-matter of disposition, is afforded by the early case of *Bowman v. Milbanke* (*l*), where the words, 'I give all to my mother, all to my mother,' were adjudged insufficient to carry the testator's land to his mother, as it was wholly doubtful and uncertain to what the word 'all' referred (*m*).

Gift of "all" held too indefinite.

"In *Mohun v. Mohun* (*n*), the will consisted merely of these words: 'I leave and bequeath to all my grandchildren, and share

(*h*) [1901] 1 Ch. 936.

(*j*) *Supra*, p. 297.

(*k*) First ed. p. 317.

(*l*) "1 Lev. 130, 1 Sid. 191, T. Raym. 97, s. c. But in another early case (*Taylor v. Web*, Styles, 301, 307, 319; s. c. nom. *Marret v. Sly*, 2 Sid. 75), the words, 'I make my cousin, Giles Bridges, my sole heir, and my executor,' were held to constitute the cousin devisee in fee of the testator's lands: it being observed, that the testator not only made him his heir, but his executor also; and if he should not have the lands, the word 'heir' was nugatory, for, by being executor only, he should have the goods. The word 'heir'

was said to imply two things: first, that he should have the lands; secondly, that he should have them in fee-simple." (Note by Mr. Jarman.) See also *Parker v. Nickson*, 1 D. J. & S. 177, "I acknowledge A. to be heir." Ante, p. 82 and post, Chap. XIX.

(*m*) This seems to be one of those early cases against which Mr. Jarman warns the student (ante, p. 454). One of the arguments which weighed with the Court was that "all" was an adjective and not a substantive: this shewed a remarkable ignorance of grammar on the part of the Court.

(*n*) 1 Sw. 201.

CHAPTER XIV. and share alike.' By a codicil the testator appointed certain persons to be trustees for his grandchildren and nieces: Sir T. Plumer, M.R., held that this was too uncertain to create a devise. It had been contended, he said, that the whole difficulty would be removed by the transposition of the word 'all,' which, in its present situation, was without effect, the word 'grandchildren' including all who correspond to that description; but his Honor observed that there was uncertainty both in the subject and object of the bequest, and the Court could not transpose words for the purpose of giving a meaning to instruments that had none.

Remark as to
transposition
of words.

"To authorize the transposition of words, it is clearly not enough (as hereafter shown (o)) that they are inoperative in their actual position: they must be inconsistent with the context. In the case just stated the word 'all,' though silent where the testator had placed it, was not repugnant; and it is observable that the transposition of the word 'all,' even if justifiable, would not, according to *Bowman v. Milbanke*, have supplied a definite subject of disposition."

"After legacies, &c., are paid, I leave to A.," residue held to pass.

At the present day, however, the Court is always anxious to give effect to the testator's intention, even if vaguely expressed. Thus in *Re Bassett's Estate* (p), after giving several legacies, the will proceeded, "after these legacies and my funeral expenses are paid, I leave to my sister A., without any power or control of her husband; in case of her death to be equally divided amongst her children or grandchildren": this was held by Bacon, V.-C., to be a good gift of the residue to A. And if a testator, after making specific and pecuniary bequests, proceeds thus: "and all the rest to be divided between A. and B.," this operates, without question, as a gift of the residue, real as well as personal (q).

"The said."

Sometimes uncertainty is caused by a testator disposing of various parts of his property and effects, and then referring to "the said property and effects" in such a way as to make it doubtful whether he means (1) the property and effects last disposed of, or (2) the share of all his property and effects previously given to a certain person, or (3) all his property and effects. In such a case, the intention must be collected from the whole will (r). As a general rule, "the said" refers to the immediate antecedent (s).

(o) Chap. XVIII. s. 2.

(p) L. R., 14 Eq. 54.

(q) *Attree v. Attree*, L. R., 11 Eq. 280.

In that case the question was not argued as to the personal estate; as to the real estate, see post, Chap. XXVII.

(r) *Re Willomier's Trusts*, 16 Ir. Ch. R. 389.

(s) *Healy v. Healy*, Ir. R., 9 Eq. 418, and other cases cited post, as to the meaning of "the said" when applied to persons.

Sometimes a gift may be void for uncertainty by reason of events which have happened during the testator's lifetime, since the execution of the will. Thus in *Re Gray (t)* a testator bequeathed fifty shares in a certain company; at the date of the will the testator held seventy shares of 100*l.* each in an unlimited company of that name; subsequently the company was turned into a limited company, and the testator's seventy shares were converted into 140 shares of 60*l.* each: it was held, the bequest being general, that it was impossible to ascertain what the legatees took, and that the gift consequently failed (*u*).

CHAPTER XIV.

Uncertainty
arising ex
postfacto.

A blank does not necessarily make a bequest void for uncertainty; thus a bequest of " hundred pounds " is a good bequest of 100*l.* (*v*).

Effect of
blank.

Where the intended subject-matter of disposition consists of an indefinite part or quantity, the gift necessarily fails for uncertainty. On this principle, a bequest of " some of my best linen " (*w*), or " of a handsome gratuity to each of my executors " (*x*), has been held void.

Gift of an
indefinite
part void

But a distinction seems to be taken where the will furnishes some ground on which to estimate the amount intended to be bequeathed. Thus, in *Jackson v. Hamilton (y)*, where the testator directed his trustees to retain a reasonable sum of money to remunerate them for the trouble they should have in carrying out the trusts of his will, it was referred to the master to ascertain what would be a reasonable sum. So, where the bequest is for the maintenance, support, and education of an infant, or for the maintenance and support of an adult person, or to set him up in business, although no amount be specified, the Court will determine the amount to be applied for that purpose (*z*), unless the amount is left to the discretion of a named person, in which case he can determine it (*a*), or unless the words used are too vague to furnish a basis of calculation (*b*). And a bequest of " 3,000*l.* or thereabouts," to be raised by accumulating annual income, has been

—except
where the will
furnishes
grounds for
estimating
the amount.

Bequest for
maintenance,
&c., of an
infant or
adult good,
though no
sum specified;

(*t*) 36 Ch. D. 205.

(*u*) As to the rule where a gift of shares or stock is specific, see *Re Slater*, [1906] 2 Ch. 480; [1907] 1 Ch. 665. See also Chap. XXX.

(*v*) *Makeown v. Ardagh*, Ir. R., 10 Eq. 445.

(*w*) *Peck v. Halsey*, 2 P. W. 387.

(*x*) *Jubber v. Jubber*, 9 Sim. 503.

(*y*) 3 J. & Lat. 702.

(*z*) *Broad v. Bevan*, 1 Russ. 511. n.; *Pride v. Fooks*, 2 Beav. 430; *Kilvington*

v. Gray, 10 Sim. 293; *Batt v. Anns*, 11 L. J. Ch. 52; *Thorpe v. Owen*, 2 Hare, 610; *Pedrotti's Will*, 27 Beav. 583; and see 1 Sim. N. S. 103, and other cases noticed along with the above, post.

(*a*) As to discretionary trusts for the benefit of a certain person, see *Lewis v. Lewis*, 1 Cox, 162; *Re Sander-son's Trust*, 3 K. & J. 497, and other cases cited in Chap. XXIV.

(*b*) *Abraham v. Alman*, 1 Russ. 509.

CHAPTER XIV.

—for found-
ing a school;

—for repair-
ing church,
&c.

Charitable
purposes
and other
purposes.

held good: the words “or thereabouts” being considered as used only to meet the difficulty which would arise in accumulating up to the exact limit, and to render any little excess, occasioned by the addition of an entire dividend, subject to the same disposition as the specified sum (c). So, where a Scotch testator expressed a wish (in effect) to establish in Dundee a hospital for one hundred boys, like, but less than, Heriot’s Hospital, but omitted to say how much was to be appropriated for the purpose, it was held in the House of Lords (d), that the testator had sufficiently defined his object to enable the Court to determine the amount required for it. And where a testator creates a trust for the repair of a tomb, or the like (e) (not forming part of a church), although this, as already noticed (g), is a void trust, the Court will determine what would have been required for it, if a determination on that point is needed in order to give practical effect to other parts of the will (h). So also, where (i) a testatrix bequeathed a sum of 2,000*l.* to be disposed of “in and about restoring, altering and enlarging, and improving the church, parsonage house, and school” at M., and as to the residue thereof upon the trusts declared by her will concerning the proceeds of sale of her real estate, it was held that the gift was good to the extent to which it might be ascertained that the money would be required for such of the specific objects as were already in mortmain, and an inquiry was directed for the purpose of ascertaining the amount so required.

Where there is a gift for charitable purposes and also for purposes of an indefinite nature not charitable, and no apportionment is made by the will, so that the whole might be applied for either purpose, the whole gift is void for uncertainty. But where there is a gift for a charitable purpose and for another ascertained object, it will either be apportioned between them, or equally divided. The cases have been already considered (j).

A bequest of a sum “not exceeding” 100*l.* (k), or of “50*l.* or 100*l.*” (l), will be construed in a manner most beneficial to the

(c) *Oddie v. Brown*, 4 De G. & J. 179, diss. K. Bruce, L.J.

(d) *Magistrates of Dundee v. Morris*, 3 Macq. 169; see also *Adnam v. Cole*, 6 Beav. 353.

(e) *Fisk v. Att.-Gen.*, L. R., 4 Eq. 521; *Re Birkett*, 9 Ch. D. 576; *Re Rogerson*, [1901] 1 Ch. 715. The decision in *Fowler v. Fowler*, 33 Beav. 616, contra, must be considered overruled.

(g) Ante, p. 221.

(h) See *Chapman v. Brown*, and other

cases cited ante, p. 228, and *infra*, p. 467.

(i) *Champney v. Davy*, 11 Ch. D. 949.

(j) *Re Vaughan*, 33 Ch. D. 187, and the cases there cited. *Supra*, pp. 228 seq.

(k) *Thompson v. Thompson*, 1 Coll. 395; *Cope v. Wilmot*, 1 Coll. 396, n.; *Gough v. Bult*, 16 Sim. 45.

(l) *Seale v. Seale*, 1 P. W. 290; and see *Haggar v. Neaiby*, Kay, 379.

legatee, and is, therefore, a good gift of the whole 100*l.*; and a bequest will not be void for uncertainty, merely because the amount is differently stated in different parts of the will, if the Court can collect that one statement was evidently a mistake, even though the mistake be contained in the very words of gift (*m*).

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Where the amount is differently stated.

An instance of uncertainty in the subject of gift occurred in *Jones d. Henry v. Hancock*, which underwent much discussion (*n*). The testator devised lands to his daughter, Ann Henry, for life, with remainder to her first and other sons in tail male, remainder to his other daughter Frances. The devise to Ann was upon condition that she married a man possessed of a property at least equal to, if not greater than, the one he left her. The testator then proceeded as follows: "And if she marries a man with less property than that, in that case I leave her only as much of mine as shall be equal to the property of the man she marries; and all the remainder of my property shall immediately pass over and be given up to my second daughter Frances Henry, to whom, in that case, I bequeath it." It was held in D. P., that the devise over was void for uncertainty, as the specific portion or share so given over did not appear in the will itself.

Uncertainty as to the share the devisee is to take.

The maxim "*id certum est quod certum reddi potest*," applies to gifts which would otherwise be void for uncertainty in the subject. Thus if a testator gives A. a power of selecting one of the testator's houses, and devises the other houses to B., this is a good gift to B. if A. exercises his power of selection (*o*). On this principle it has been held that a gift of portions to daughters, to be determined by the testator's wife and executors, according to the value of their services to the family, and, in the case of the marriage of a daughter, according to the match she might make, is not void for uncertainty, as the discretion given to the wife and executors removes that objection (*p*).

Where subject of gift is to be determined by third person.

A devise to two persons "in such shares as shall be determined by _____," would make them tenants in common in equal shares (*q*). On the same principle, an equal division is made where the donee of a power of distribution fails to exercise the power (*r*);

(*m*) *Philipps v. Chamberlaine*, 4 Ves. 51.

(*n*) 4 Dow, 145. See *Gibbon v. Warner*, Dyer, 281, n; *Hoffman v. Hankey*, 3 My. & K. 376, post; *Rickards v. Rickards*, 2 Y. & C. C. C. 419.

(*o*) See *Boyce v. Boyce*, 16 Sim. 476. As to the result of A. predeceasing the

testator, see post, p. 466, where *Jerningham v. Herbert*, 4 Russ. 388, is also stated.

(*p*) *Re Conn*, [1898] 1 Ir. R. 337.

(*q*) *Robinson v. Wheelwright*, 21 Beav. 214.

(*r*) *Salisbury v. Denton*, 3 K. & J. 529.

CHAPTER XIV. or where the gift consists of a general direction that the legatees should "participate" (s).

Where devisee is entitled to select.

Where the gift comprises a definite portion of a larger quantity, it is not rendered nugatory by the omission of the testator to point out the specific part which is to form such portion, the devisee or legatee being in such case entitled to select; by which means the subject of the gift is reducible to certainty; and "id certum est quod certum reddi potest" is a settled rule in the construction of wills (t). Thus, if a man devise two acres out of four acres that lie together, it is said that this is a good devise, and the devisee shall elect (u).

Where testator intends to select.

So, if a testator devise a messuage, and ten acres of land surrounding it, part of a larger number of acres, the choice of such ten acres is in the devisee (v). And if a testator devise to his son John one freehold close of land in R. and to his son George one freehold close of land in R., the devisees must elect: apparently John has the first choice (w). On the same principle, where a testator, having three houses in A., devised "two houses in A.," the devisee was held entitled to elect which two he would take (x). But in cases of this kind "it is essential that the will should not shew that the testator was bequeathing any particular one of the properties to the legatee who desires to select, for the selection by the testator is incompatible with the view that he intended the legatee to select. If a will shews that a testator intends to give a particular property to a legatee, and, owing to the testator having several properties answering the description in the will of the particular property given, you are unable to say, either from the will itself or from extrinsic evidence, which of the several properties the testator referred to, then on principle the gift must fail for uncertainty, and the Court cannot, in order to avoid an intestacy, change the will, or construe it as giving to the legatee the option of choosing any one of the properties. This principle was applied in the case of *Richardson v. Watson* (y), though whether that case would now be followed on its particular facts may be doubted" (z). In *Asten v. Asten* (a)

(s) *Liddard v. Liddard*, 28 Beav. 266. See also *Greville v. Greville*, 27 Beav. 594.

(t) *Peck v. Halsey*, 2 P. W. 387.

(u) *Grace Marshal's Case*, Dy. 281 a, n., 8 Vin. Abr. 48, pl. 11.

(v) See *Hobson v. Blackburn*, 1 My. & K. 574; *Jacques v. Chambers*, 2 Col. 441.

(w) *Duckmanton v. Duckmanton*, 5 H. & N. 219.

(x) *Tapley v. Eagleton*, 12 Ch. D. 683.

(y) 4 B. & Ad. 787.

(z) Per Romer, J., in *Asten v. Asten*, [1894] 3 Ch. at p. 263. Cited with approval in *Re Cheadle*, [1900] 2 Ch. 620.

(a) [1894] 3 Ch. 260.

the testator gave "all that newly built house being No. Sudeley Place" to A., "all that newly built house being No. Sudeley Place" to B., with similar gifts to C. and D. It was held that the devises were void for uncertainty. CHAPTER XIV.

In such cases the Court strives to ascertain by extrinsic evidence what the testator's intention was (b). Extrinsic evidence.

Where a testator bequeaths to A. a certain number of shares in a company, and it appears that at the date of his will he held shares in that company of two different classes, one of which is more valuable than the other, and either of which is sufficient to satisfy the bequest, then the legatee has, it seems, the right of selection (c). But if the shares of the more valuable class are not sufficient to satisfy the bequest, it is a question of construction out of which class the bequest ought to be satisfied. Thus in *Re Cheadle* (d) the testatrix bequeathed to A. "my 140 shares in the C. B. Company"; she had 280 shares, of which 40 were paid up in full and the remaining 240 were partly paid up: it was held that A. was not entitled to select which of the 280 shares she would take, and that the bequest must be satisfied out of the 240 partly paid shares. Different kinds of shares.

No question of selection arises if it appears that the testator meant to give the legatee the whole of a certain kind of property belonging to him. Thus where a testator bequeathed all his property in the Austrian and Russian funds, "and also that vested in a Swedish mortgage," the testator having several Swedish mortgages, they were all held to pass (e). And where a testator having five leasehold messuages in L., comprised in four leases, bequeathed "his four leasehold messuages in L.," it was held that all five messuages passed upon a context somewhat favouring that construction (f). Mistake in description.

Sometimes a testator gives a legatee an express power of selection or disposition (g), and the question may then arise how far the power extends. Thus, in *Edwardes v. Jones* (h), where a testator devised to his daughter a house and garden in X., to be built at the expense of his executors, the gift would apparently have been void for uncertainty, if the executor (who was also residuary legatee) Indefinite power of selection or disposition.

(b) *Richardson v. Watson*, supra; *Blundell v. Gladstone*, 3 Mac. & G. 692.

(c) *Jacques* (or *Jacques*) *v. Chambers*, 15 L. J. Ch. 225; 16 L. J. Ch. 243; *Millard v. Bailey*, L. R., 1 Eq. 378; *O'Donnell v. Welsh*, [1903] 1 Ir. R. 115. The report of *Jacques v. Chambers* in 2 Coll. 435, appears to be inaccurate, as the other three reports agree. It would seem from the report

in 16 L. J. Ch. 243, and 4 Rail. Ca. 499, that the case was compromised.

(d) [1900] 2 Ch. 620.

(e) *Richards v. Patteson*, 15 Sim. 501.

(f) *Sampson v. Sampson*, L. R., 8 Eq. 479.

(g) As to powers of appointment, see Chap. XXIII.

(h) 35 Bea. 474.

CHAPTER XIV.

had not built a house at the daughter's request. So, where a testator devised the residue of his property to his wife for life, "reserving to her power to will away any part" at her death, with a gift to his daughter of what his wife should not dispose of, it was held that the power extended to the whole estate (*i*). Where a testator bequeathed his household furniture, &c. on trust for sale, except such articles as his wife should wish to retain for her own use, which he thereby empowered her to appropriate, it was said that this intimated a confidence that the wife would make some selection, and would not take the whole; though to what extent short of that is not very clear (*j*). A more rational principle was laid down by Jessel, M.R., in a case where a testator gave his wife power to appropriate absolutely to herself such parts of his plate as she should desire to possess. The M.R. said, "Of course the widow takes the whole. Following the words literally she might take the whole of the plate with the exception of one article of probably no value, when the maxim *de minimis* would apply" (*k*). The same principle was followed in *Re Sharland* (*l*). The principle would probably not be applied where the things are few in number and of nearly equal value.

Gift of what shall remain or be left.

"It may be observed," says Mr. Jarman (*m*), "that in numerous instances a devise or bequest of *what shall remain or be left* at the decease of the prior devisee or legatee, has been held to be void for uncertainty (*n*). Some of these cases certainly had special circumstances, and the indefiniteness seems not to have been invariably considered to be such as to invalidate the gift (*o*). At all events, the expression is susceptible of explanation, where the property, or part of it, consists of household furniture, or other articles of a perishable nature, by considering these words as referring to the expected diminution of the property by the use and wear of the first taker. Such, it is clear, would be the construction, if the property (whatever were its nature) (*p*) were given to the first taker expressly for

(*i*) *Cooke v. Farrand*, 7 Taunt. 122. *Re Richards*, [1902] 1 Ch. 76, was the converse case; there the widow had a power of disposition during her life, but not apparently by will.

(*j*) *Kennedy v. Kennedy*, 10 Ha. 438.

(*k*) *Arthur v. Mackinnon*, 11 Ch. D. 385.

(*l*) 74 L. T. 664.

(*m*) First ed. p. 321.

(*n*) *Bland v. Bland*, 2 Cox, 349; *Wynne v. Hawkins*, 1 Bro. C. C. 179; *Sprange v. Barnard*, 2 Bro. C. C. 585; *Pushman v. Filliter*, 3 Ves. 7; *Wilson*

v. Major, 11 Ves. 205; *Bull v. Kingston*, 1 Mer. 314; *Eade v. Eade*, 5 Madd. 118. To these may be added *Lechmere v. Lavie*, 2 My. & K. 197; *Horwood v. West*, 1 Sim. & St. 387, and *Ex parte Payne*, 2 Y. & C. 636, considered by Mr. Jarman in connection with the subject of precatory trusts.

(*o*) *Duhamel v. Ardovin*, 2 Ves. sen. 162; *Hands v. Hands*, 1 T. R. 437 n.

(*p*) Except consumable articles: see *Andrew v. Andrew*, 1 Coll. 690, and Chaps. XXXIII and XXXVIII.

life; indeed there is not, it is believed, any case in which such expressions have been held to render the gift void, where the prior interest was expressly limited in such terms; and the case of *Cooper v. Williams* (g) is an authority against such a construction."

But the cases to which Mr. Jarman refers in the opening sentence of this passage, have little if anything to do with the question of uncertainty; they can be supported on a different ground altogether, namely, that if a testator makes an absolute gift of property to A., any gift over of what may be left undisposed of by A. is repugnant and void (r).

Even a gift to X. in trust for A., with a direction that any balance remaining in X.'s hands after the death of A. should go absolutely to B., operates as an absolute gift to A. (s).

But a gift over of a legacy, or of so much thereof as shall not have been paid to the legatee, is not void for uncertainty (t).

Gift over of so much as shall not have been paid.

The question whether a life interest can be implied from a gift of "what shall remain on the death of X.," is considered elsewhere (u).

Sometimes a testator gives property to A. absolutely, with a request or direction that he will at his death leave the "bulk" or "remainder" of the property to B.; this is void, being too uncertain to create a precatory trust (v).

Uncertain words will not create precatory trust.

In *Re Percy* (w), the testator made the following bequest: "I give to my wife 10,000*l.*, afterwards to go to the understated residuary legatee E.": it was held by Bacon, V.-C., that this was an absolute gift to the wife, and that the "inept words" which followed did not affect it. It is submitted that this case is distinguishable from the cases where there is an attempted gift over of what remains or is undisposed of by the prior legatee, and that the

(g) Pre. Ch. 71, pl. 64. Mr. Jarman also cites *Gibbs v. Tait*, 8 Sim. 132. The modern cases bearing on this point are cited below, p. 464.

(r) *Re Mortlock's Trust*, 3 K. & J. 456; *Weale v. Ollive*, 32 Bea. 421; *Perry v. Merritt*, L. R., 18 Eq. 152; *Re Wilcocks' Settlement*, 1 Ch. D. 229. Earlier cases are: *Malim v. Keighley*, 2 Ves. jun. 529 (disapproving *Upwell v. Halsey*, 1 P. W. 651); *Grey v. Montagu*, 2 Ed. 205; *Att.-Gen. v. Hall*, 1 Jac. & W. 158 n.; *Bourn v. Gibbs*, 1 R. & Myl. 614; *Phillips v. Eastwood*, Ll. & G. t. Sug. 270; *Watkins v. Williams*, 3 Mac & G. 622; *Ross v. Ross*, 1 Jac. & W. 154; *Re Yalden*, 1 D. M. & G. 53; *Holmes v. Godson*, 8 D. M. & G. 152; *Bowes v. Goslett*, 27 L. J. Ch. 249; *Henderson*

v. Cross, 29 Bea. 216; *Cuthbert v. Purrier*, Jac. 415; *Green v. Harvey*, 1 Ha. 428; *Lightburne v. Gill*, 3 Bro. P. C. 250. In *Bull v. Kingston*, 1 Mer. 314, the gift over ("in case she dies without a will") was held void on the ground of uncertainty. The case of *Borton v. Borton*, 16 Sim. 552, is considered elsewhere (Chap. XXXIV.).

(s) *Re Walker, Lloyd v. Tweedy*, [1898] 1 Ir. R. 5.

(t) *Re Chaston*, 18 Ch. D. 218; *Re Goulder*, [1905] 2 Ch. 100. These cases are considered in Chap. LVII.

(u) Chap. XIX.

(v) *Eade v. Eade*, 5 Madd. 118; *Palmer v. Simmonds*, 2 Dr. 221. See Chap. XXIV.

(w) 24 Ch. D. 616.

CHAPTER XIV. obvious intention of the testator was to give his wife only a life interest (x).

Trusts of an ascertained fund valid, though intended to embrace another unascertained.

Reference may here be made to the case of *Ford v. Fowler* (y), where the testator recommended (construed "directed") F. and his wife to settle a sum which he had bequeathed to the latter, "together with such sum of money of his (F.'s) own as F. shall choose," for the benefit of his wife and children. Lord Langdale, M.R., said that there being a certainty as to that which was in the testator's power, the trust as to that did not fail because the testator expressed a wish as to something over which he had no power.

Gift for life followed by gift over of unexpended capital.

Property may, of course, be given to a person for life, with power to appoint or expend the capital, followed by a valid gift over of the unappointed or unexpended part (z). But if a testator gives the income of property to his wife for life with a request that if it is more than she wants to live on, she will give the remainder to B., this request is too uncertain to create a trust in B.'s favour (a).

A gift to A. for life "and whatever she can transfer to go to her daughters B. and C.," is void for uncertainty as to B. and C. (b); so is a gift of what a tenant for life "can save out of the income" (c).

Power to expend capital.

In *Re Pedrotti's Will* (d), a testator bequeathed the income of property to his wife for life, and provided that "in case anything should occur that her income is not sufficient, she shall be at liberty to go to the principal"; it was held by Romilly, M.R., that she was only entitled to so much of the capital as with the income would afford her a maintenance suitable to her station in life. But in *Re Richards* (e), a power given by the testator to his wife to use such portion of the capital "as she may deem expedient," was held to give her a general power of appointment over the capital during her life. And in *Re Willatts* (f), a power given to the testator's wife to sell the testator's property, followed by a gift over of what was left at her death, was held to give the wife a life interest, with power to expend any part of the capital as she might think fit, what was left at her death passing under the gift over.

Gift over of what remains after life interest good.

The principle suggested by Mr. Jarman in the passage quoted above (g), namely that where property is given to A. for life with a gift over on his death of "what remains" to B., the gift over is good

(x) See *Re Hanbury*, [1904] 1 Ch. 415, where the question of repugnancy was much discussed.

(y) 3 Bea. 146.

(z) *Re Roland*, 86 L. T. 78, seems to have been decided on this principle.

(a) *Hudson v. Bryant*, 1 Coll. 681.

(b) *Flint v. Hughes*, 6 Bea. 342.

(c) *Cowman v. Harrison*, 22 L. J. Ch. 993.

(d) 27 Bea. 583.

(e) [1902] 1 Ch. 76.

(f) [1905] 2 Ch. 135. The order was made by consent.

(g) Ante, p. 462.

notwithstanding those words, has been applied in several modern cases (*h*). Thus, in *Re Thomson's Estate* (*i*), the testator gave all his property to his wife "for the term of her natural life, to be disposed of as she may think proper for her own use and benefit according to the nature and quality thereof," and "in the event of her decease, should there be anything remaining of the said property or any part thereof," he gave "said part or parts thereof" to certain persons: it was held by Hall, V.-C., and by the Court of Appeal, that the widow had no power to dispose of the property by will, and that on her death the gift over took effect as to any part of the property then existing; whether she had anything more than a right to enjoy the property in specie during her life was not decided. *Re Sheldon and Kemble* (*j*), and *Re Holden* (*k*), are to the same effect. But in *Re Jones* (*l*), the testator gave all his property to his wife "for her absolute use and benefit, so that during her lifetime for the purpose of her maintenance and support she shall have the fullest power to sell and dispose of my said estate," and after her death, as to such parts of his estate as she should not have sold or disposed of as aforesaid, he gave it in trust for other persons: it was held by Byrne, J., that the wife took an absolute interest. On the other hand, in *Re Sanford* (*m*), the testator by his will made certain dispositions concerning his property; by a codicil he revoked these provisions and gave all his property to his wife "so that she may have full possession of it and entire power and control over it, to deal with it or act with regard to it as she may think proper"; he then provided that in the event of her dying "without having devised or appointed the whole or any part of my said property," the dispositions contained in his will should take effect. It was held by Joyce, J., that the wife took a life estate with a general power of appointment, and that any part of it which she did not appoint passed under the testator's will. The decision no doubt gave effect to the intention of the testator.

It will be remembered that if property is given absolutely to A. with a gift over which is void for repugnancy, and A. dies in the testator's lifetime, the gift over will, as a general rule, take effect (*n*).

Where prior gift lapses.

Mr. Jarman points out (*o*) that "if the gift of *what shall be left*

Gift of what shall be left preceded by a special power of disposition.

(*h*) *Constable v. Bull*, 3 De G. & S. 411; *Re Adam's Trust*, 14 W. R. 18; *Re Stringer's Estate*, 6 Ch. D. 1; *Bibbens v. Potter*, 10 Ch. D. 733; *Re Sheldon and Kemble*, 53 L. T. 527. See *Scott v. Josselyn*, 26 Bea. 174 and *Gude v. Worthington*, 3 De G. & S. 389, referred to in Chap. XXXIII.

(*i*) 14 Ch. D. 263.

(*j*) 53 L. T. 527.

(*k*) 57 L. J. Ch. 648.

(*l*) [1898] 1 Ch. 438.

(*m*) [1901] 1 Ch. 939.

(*n*) *Re Stringer*, 6 Ch. D. 1; *Re Lowman*, [1895] 2 Ch. 348, ante, p. 452.

(*o*) First ed. p. 322.

CHAPTER XIV. is preceded by a power of disposition or appropriation reserved to the prior legatee in favour of particular objects, the expression evidently points at that portion of the property which shall be unappointed or unappropriated under the power. As in *Surman v. Surman* (p), where a testator bequeathed his personal estate to his wife for life or widowhood, with a power to her to apply the same to her own benefit and the maintenance of A. and B. during minority : and at her decease or second marriage, he gave the same, *or so much as should then remain*, to certain persons ; this was held to be a good bequest of the personal estate unapplied to the prescribed purposes."

Surman v. Surman.

It is equally clear that if property is given to trustees with a discretionary power to appropriate it or any part of it for certain purposes or in a certain way, and any part of it not so appropriated is given to A., this operates as an absolute gift to A. subject to an exercise of the power (q).

Distinction between a gift of the whole except an unascertained part and a gift of the remainder after deducting an unascertained part.

It will be observed, that in these cases the words seemed or were considered to provide for carrying over everything that was not disposed of under the power, and, consequently, nothing having been disposed of, the ultimate limitation carried the whole subject of gift. The next two cases, however, seem to shew that if the words are such as to point to a division into parts, and to amount to a gift of the individual parts, then, if one of the parts cannot be ascertained, the legatee of the other part is necessarily disappointed, since his part is undetermined, and the words are not sufficient to carry the whole to him.

Jerningham v. Herbert.

Thus, in *Jerningham v. Herbert* (r), the testatrix gave to A. such of her jewels as should at her decease be deposited with Messrs. R., and gave the rest of her jewels to B. ; at her decease there were no jewels deposited with Messrs. R. ; Leach, M.R., said that the will contained no present gift of the jewels, but referred to a future act to be done by the testatrix in order to complete her gift, and that act being prevented, the intended gift wholly failed.

Boyce v. Boyce.

Again, in *Boyce v. Boyce* (s), where the testator devised certain houses in S. to trustees upon trust for his wife for life, and after her decease upon trust to convey to his daughter M. in fee such one of the houses as she should choose, and to convey and assure all the others which M. should not choose to his daughter C. ; M. having died in the testator's lifetime, Sir L. Shadwell, V.-C., said it was only a gift of the houses that should remain, provided M.

(p) 5 Mad. 123.

(r) 4 Russ. 388.

(q) *Lancashire v. Lancashire*, 2 Ph. 657 ; 1 De G. & S. 288.

(s) 16 Sim. 476.

should choose one of them, that no choice had been or indeed could have been made by M., and therefore the gift in favour of C. failed. The decision seems somewhat technical, for the testator meant C. to take what M. did not take, and as M. could not take, it might well have been held that the gift in C.'s favour included the whole.

Where the bequest is of the residue or surplus of a specified fund remaining after providing for an object which is illegal or unattainable, and the exact amount to be laid out on which is not specified, the bequest is necessarily void for uncertainty, unless the purpose is such and so defined that the Court can determine what would have been the proper amount to be expended had the object been legal or attainable, or unless (according to some recent cases) the bequest of surplus carries with it all that is not otherwise effectually disposed of. Thus in *Chapman v. Brown* (t), the testatrix, after giving some legacies, gave all the residue of her real and personal estate to her executors to be applied for the purpose of building or purchasing a chapel where her executors should think it was most wanted, and if any overplus should remain from purchasing or building the same, she directed it to be applied to such charitable uses as her executors should think proper. The bequest for the chapel being void, Sir W. Grant, M.R., declared that the gift of the overplus was void also, since the amount could not be ascertained. "He thought it impossible to frame any direction that would enable the master to form any idea as to what would have been proper to expend upon the chapel. If the testatrix had pointed out any particular piece, that might have furnished some ground of inquiry as to what size would be sufficient for the congregation to be expected there, but the gift in question was so entirely indefinite, it was quite uncertain what the residue would have been." Again, in *Att.-Gen. v. Hinxman* (u), there was a devise of a house to be used as a school for poor persons of the parish of W.; the executors were directed to put the house in repair, and to invest a sum of money in stock in the name of the minister, churchwarden, and overseers, who were to apply the dividends for the purposes of the school, and to apply the surplus, if any, after payment of the expenses of the school, among poor parishioners of W., as the trustees should think fit. The devise of the house for the school being void, and the first trust declared of the stock having consequently failed, Sir T. Plumer decided that the gift of the

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Gift of the residue of a fund after providing for an illegal object is void, if the amount required for such object is unascertainable.

Chapman v. Brown.

Att.-Gen. v. Hinxman.

(t) 6 Ves. 404.

(u) 2 J. & W. 270; and see *Att.-Gen.*

v. Davies, 9 Ves. 535; *Att.-Gen. v.*

Goulding, 2 Br. C. C. 428; *Re Taylor*, 58 L. T. 538.

CHAPTER XIV. residue of the surplus dividends, being unascertainable, was void. Again, in *Limbrey v. Gurr* (v), where a testator bequeathed 7,000*l.* upon trust to pay the expenses of the testator's funeral and monument, and of building eight almshouses on a particular piece of ground, and to apply the residue to the trusts directed of a legacy of 8,000*l.*, which he bequeathed upon trust out of the income to pay certain weekly sums to the poor persons in the almshouses, to purchase a quatern loaf for twenty other poor persons, and to keeping the almshouses in repair, and to apply the residue in distribution of bread as therein mentioned; Sir J. Leach held that the residue of each sum was unascertainable, by reason of the gifts to the prior objects failing, and the gift of both residues therefore void.

Secus if the amount is ascertainable.

Mitford v. Reynolds.

But if the testator has so defined his object as to furnish fair and reasonable data, the Court will determine the amount which ought to have been expended on it if it had been legal, and thus at the same time ascertain the amount of the surplus. Thus, in *Mitford v. Reynolds* (w), the testator, after several bequests, directed the purchase of a particular piece of land, and the construction of a vault for the bodies of himself and his parents and sister, and of a monument, the expense of which purchase and construction was to be met and provided for from the surplus property after payment of debts and legacies. Then came a bequest of the remainder of his property to a valid charitable purpose; and it was held by Lord Lyndhurst that assuming the prior object to be void, yet it was not so uncertain as to the amount that would be required for it as to vitiate the gift to the charity. He thought the difficulties which existed in *Chapman v. Brown* had no existence here. The place was defined, the very spot pointed out, and the extent required for the purchase; there was no difficulty in directing a reference to the master for the purpose of ascertaining what would be a proper sum to carry that intention of the testator into effect. That sum, being once ascertained, would be deducted from the residue, the amount of which would then be rendered certain (x).

Principle of *Chapman v. Brown.*

The principle underlying *Chapman v. Brown* is that where the

(v) 6 Mad. 151.

(w) 1 Phil. 185, 706.

(x) The L.C. held that the direction as to the monument, &c., was a disposition of an integral part of the residue, and that the "remainder" was what was left of such residue after building the monument, 1 Phil. 199. But owing

to the peculiar wording of the L.C.'s declaration concerning the charitable gift, Shadwell, V.-C., afterwards thought himself bound to hold that the prior purpose having failed through the refusal of the owner to sell the land, the whole residue was well given to the charity, 16 Sim. 105.

whole of the fund may possibly be wanted for the primary object, there will probably be no surplus for the secondary object, and consequently an inquiry would be useless, and the gift of the surplus fails(y). Accordingly, in *Re Taylor* (z), where a testator bequeathed money to build and keep up an almshouse on a particular piece of land not in mortmain, and to maintain the inmates and pay any surplus income to poor persons as outdoor pensioners, it was held by Kay, J., that the gift of the surplus income was void for uncertainty.

But if the position of things is reversed, and the primary purpose is only intended to require a small part of the fund, so as to leave a substantial surplus for the secondary purpose, the gift of the surplus is good, and the only question is what it consists of. Formerly the principle was considered to be, that in such a case an estimate should be made of the amount required for the primary purpose, and that the balance should be applied to the secondary purpose (a). It is possible that this principle may still be applicable where the secondary purpose is not charitable, but where it is charitable the rule is now settled that if the primary purpose is illegal, the whole fund is given to the secondary purpose. This rule was first established by the decision in *Fisk v. Att.-Gen.* (b): there the testatrix bequeathed 1,000*l.* to the rector and churchwardens of a parish and their successors upon trust to apply such part of the dividends as should from time to time be required in keeping in repair her family grave, and to pay or divide the residue of the said dividends at Christmas in every year for ever, among the aged poor of the parish. Wood, V.-C., held that the rector and churchwardens took the whole fund for the charitable purpose discharged from the illegal trust. This decision has been criticized, but has never been overruled, and the rule may now be considered as settled that where a fund is given to trustees upon trust to apply the income in keeping a tomb in repair, and as to the remainder of the income for a charitable purpose, the result of the trust for the repair of the tomb being illegal is that

Where residue
is substantial.

(y) In *Chapman v. Brown*, "there was nothing to prevent the whole of the residue from being applied to the building of the chapel": per Jessel, M.R., in *Re Birkett*, 9 Ch. D. at p. 580.

(z) 58 L. T. 538.

(a) In the fourth edition of this work the decisions were examined at length: it has not been thought necessary to repeat Mr. Vincent's remarks in this edition, as the law is

now settled, at all events so far as courts of first instance are concerned.

(b) L. R., 4 Eq. 521. The decision of Romilly, M.R., in *Fowler v. Fowler*, 33 Bea. 616, is inconsistent with the later cases and may be disregarded. It will be noted that in that case the M.R., if unhampered by authority, would have decided the case in accordance with the principle established by *Fisk v. Att.-Gen.*

CHAPTER XIV. the whole of the income becomes applicable for the charitable purpose (c).

Charitable
gifts, when
void for
uncertainty.

Although the Courts always strive to give effect to charitable gifts, and never hold them void for uncertainty in the object (d), yet a charitable gift may be void if it is impossible to ascertain the amount of the fund required to give effect to it (e).

III.—Uncertainty as to Objects of Gift.—"Uncertainty in regard to the *objects* of gift," as Mr. Jarman points out (f), "arises either from the testator having described such objects by a term of vague and unascertained signification, or from his having specified a definite class or number of persons, but having shown that all are not to take, and then left it in doubt which of them he intended to select as the object or objects of his bounty. Examples of both kinds will be found in the sequel. It has been often laid down that if a devise be to *one* of the sons of J. S. (he having several sons), the devise is void for uncertainty, and cannot be made good (g). And if a man devise to twenty of the poorest of his kindred, this is void for the uncertainty who may be adjudged the poorest (h)." So where the devise was "to the testator's brother and sister's family," and the testator had two sisters, the devise was held void (i); and a bequest "to and amongst my nephews and nieces John and Nanny" (followed by a blank), or to such of them as should be living at the death of "the tenant of life," was held void for uncertainty, because although by using the plural number, "nephews and nieces," the testator showed he meant to include more than one of each sex, yet by his apparent intention to name those whom he intended for legatees, it was made doubtful whether he meant to include all (j).

Blank left for
names.

(c) *Re Rogerson*, [1901] 1 Ch. 715, following *Fisk v. Att.-Gen.* (supra); *Dawson v. Small*, L. R., 18 Eq. 114; and *Re Birkett*, 9 Ch. D. 576. See also *Hunter v. Bullock*, L. R., 14 Eq. 45; *Re Williams*, 5 Ch. D. 735; *Champney v. Davy*, 11 Ch. D. 949; *Re Vaughan*, 33 Ch. D. 187; and *Re Taylor*, 58 L. T. 538, where Kay, J., expressed his concurrence with Jessel, M.R., in the criticism of *Fisk v. Att.-Gen.*, made by the latter judge in *Re Birkett*.

(d) Post, p. 480.

(e) *Flint v. Warren*, 15 Sim. 626; stated in Chap. XXXV.

(f) First ed. p. 322.

(g) See *Strode v. Lady Falkland*, 2 Vern. 624, 625. So "one of my

sisters to be executrix," *In bonis Blackwell*, 2 P. D. 72; *Russell v. Russell*, 12 Ir. Ch. R. 377; *In bonis Baylis*, 2 Sw. & T. 613.

(h) *Webb's Case*, 1 Roll. Ab. 609, (D) 1; et vid. *Scrope's Case*, 49 Ed. 3, pl. 4, cited 2 Bulst. 180, nom. *Morris* and *Maule*.

(i) *Doe d. Hayter v. Joinville*, 3 East, 172; and see *Doe d. Smith v. Fleming*, 2 C. M. & R. 638.

(j) *Greig v. Martin*, 5 Jur. N. S. 329. See however the cases in Chap. XLII. A bequest to nephews and nieces may be void for uncertainty if it appears that the testator did not mean nephews and nieces: *M'Hugh v. M'Hugh*, [1908] 1 Ir. R. 155.

But in *Blackburn v. Stables* (*k*), a devise "for the sole use and benefit of a son of J. B.," who had no son born during the testator's lifetime, but whose wife was at the testator's death pregnant of a son, was held good. So a devise to "one of my cousin N.'s daughters that shall marry with a Norton within fifteen years," was held good, apparently on the ground that the testator meant the daughter who should first marry a Norton (*l*). A gift in favour of "one child of A." or "a son of A." may appear from the context to mean the eldest (or only) child of A. (*m*). And a gift "to the family of Gregory" is not void for uncertainty, if the person whom the testator intended to designate by the name of Gregory can be identified (*n*).

CHAPTER XIV.
Devise to "a son of A."

Gift "to the family of A."

In the case above put of a gift to "one of the sons of J. S.," he having several sons, parol evidence is not admissible to remove the uncertainty, because the uncertainty is apparent on the face of the will, "the terms of which suppose the existence of more than one son, and moreover shew that the testator had not determined which of them to make the object of his bounty" (*o*). If, however, the gift is to "the son of my brother A.," and it appears that A. has two or more sons, extrinsic evidence is admissible in the first instance to shew whether the testator had reasons for preferring one son, and if no such evidence is forthcoming, evidence is admissible to shew which son the testator intended to benefit (*p*).

Uncertainty caused by extrinsic facts.

The same rule applies where the gift is to "John Smith," or "the children of John Smith," and there are two John Smiths known to the testator (*q*). It is, of course, assumed that there is nothing on the face of the will to shew which John Smith was intended; if so there is no uncertainty. Thus, in *Healy v. Healy* (*r*), there was a gift to "my nephew Joseph Healy," and another gift to "Joseph Healy, only son of my brother Joseph"; the testator had two nephews named Joseph Healy, one the son of his brother James, and the other

Latent ambiguity.

(*k*) 2 V. & B. 367. The basis of the decision was that the gift was rendered certain by the event. *Ashburner v. Wilson*, 17 Sim. 204, was decided on the ground that the testator meant the first-born son.

(*l*) *Bate v. Amherst*, T. Raym. 82. This ground did not save the gift in *Smithwick v. Hayden*, 19 L. R. Ir. 490, from being held void: there the gift was to "any" female relative who married in accordance with the provisions of the will.

(*m*) *Powell v. Davies*, 1 Bea. 532; *Ashburner v. Wilson*, 17 Sim. 204; *Wilson v. Wilson*, 1 De G. & S. 152.

(*n*) *Gregory v. Smith*, 9 Ha. 708; *Commissioners, &c. v. Deey*, 27 L. R. Ir. 289. As to the meaning of "family" see Chap. XLI.

(*o*) Note by Mr. Jarman (first ed. p. 322). "No person in particular is intended by the will": Wigram, pl. 209.

(*p*) See Chap. XV.

(*q*) *Lord Cheyney's Case*, 5 Rep. 68b; *Re Stephenson*, [1897] 1 Ch. 75, and other cases cited in Chap. XV.

(*r*) Ir. R., 9 Eq. 418. Compare *Doe v. Morgan*, and *Doe v. Westlake*, stated in Chap. XV.

CHAPTER XIV.

Gift to class
except a
person not
named.

Mistake in
number of
class.

the son of his brother Joseph; it was held that the will itself shewed that "my nephew Joseph Healy" meant the son of James.

Again, a gift to a class, with the exception of one person of the class, who is not named, or cannot be ascertained, is not void, but takes effect in favour of the whole class (s). And where a testator, after devising property to his daughter A. in fee, and if she die under twenty-five without leaving any children, then over, gave other property on trust to be conveyed equally amongst "such" children of A., the context not showing what limit was intended to be put on the class of children, it was held that all took (t). So a gift to the testator's "aforesaid nephews and nieces," none having been previously named, was held to include all (u); and a bequest to the children of A., "including who the illegitimate of" A., was held, on the same principle, to be a good bequest to the legitimate children of A. (v), but to include no illegitimate child (w).

Where a testator gives a legacy to each of the children of A., and describes them as consisting of a specified number, which is less than the actual number at the date of the will, this misstatement is disregarded (x). The same rule is sometimes applied to other classes or descriptions of persons. Thus, in *Lee v. Pain* (y), under a bequest to the three sisters of A., the four sisters of A. were held to be entitled. And where a testator bequeathed "to the surgeon and resident apothecary of the Dispensary at B.," and to other persons, and amongst them the "surgeons" of other dispensaries, 19l. 19s. each, "or any who may hold the like situations at my decease," and it appeared that at the B. dispensary there was no apothecary, but two surgeons and a dispenser, those persons were each held entitled to a legacy of the specified amount (z). The general principle is that "if the Court comes to the conclusion, from a study of the will, that the testator's real intention was to benefit the whole of a class, the Court should not, and will not, defeat that intention because the testator has made a mistake in the number he has attributed to that class. The Court rejects an inaccurate enumeration" (a).

(s) *Illingworth v. Cooke*, 9 Hare, 37.

(t) *Hope v. Potter*, 3 K. & J. 206.

(u) *Campbell v. Bouskell*, 27 Beav. 325. The word "aforesaid" was thus rejected, the M.R. preferring that course to construing the gift as made to nephews and nieces by mistake for grandchildren, who were previously named.

(v) *Gill v. Bagshaw*, L. R., 2 Eq. 746.

(w) *Mason v. Bateson*, 26 Beav. 404.

(x) Post, Chap. XLII.

(y) 4 Ha. 249.

(z) *Ellis v. Bartrum*, 25 Bea. 109.

(a) Per Lindley, L.J., in *Re Stephenson*, [1897] 1 Ch. at p. 83.

CHAPTER XIV.

Devise to three, "the one to be heir to the other."

As an example of a devise being void for uncertainty, Mr. Jarman cites a case (b) "where one having three sons, J., E., and W., and lands in three counties, devised the lands in A. to J., the lands in B. to E., and the lands in C. to W.; and added, that if any of his said sons died, then *the one of them to be heir unto the other*. A., the eldest son, having died, the land devised to him was claimed by the other two; but the Court (the Chief Justice doubting) decided that nothing passed by the clause in question, as it was not certain what issue should have it. Some stress was laid on the fact that the original devise conferred only an estate for life.

"On the other hand, where (c) the testator devised to his eldest son Blackacre, to his second son Whiteacre, and to his third son Greenacre, in tail; and further willed that, in case any of his said sons should die without issue, *the survivor to be each other's heir*. The eldest son died without issue; and the question was, whether one or both the surviving brothers should have Blackacre? And the Court, on the first hearing of the case, was in great doubt; but it was afterwards holden that the surviving brothers were joint tenants; and, although the word 'survivor' was in the singular number, yet, in sense, upon the whole matter it should be taken and construed as for the plural number: (survivor should be each other's heir) i.e. each survivor, i.e. all the survivors.

"An instance of a bequest held void for uncertainty on account of the vague use of the word 'survivors' occurs in a case (d), where the words were, 'I give to my executors the sum of 1,000*l.* upon trust to be invested in the funds of the Bank of England, during the lives of the survivors or survivor, for the widows of John Sayce and Thomas Draper, to be divided between them, share and share alike.' It was contended for the two legatees that the words 'survivors or survivor' applied to the executors, and did not affect the gift to the widows, who, therefore, were absolutely entitled: but Sir J. Leach, M.R., observed that it was impossible

(b) First ed. p. 323, the case being *Wood v. Ingersole*, 1 Bulst. 61; s. c., but ill-reported, Cro. Jac. 260; see also Pollexf. 482; *Hill and Baker's Case*, cited 1 Bulst. 63; and see Saville, 92, 93.

(c) *Hambledon v. Hambledon*, 3 Leon. 262, Cro. El. 164, Owen, 25; see also Brook, title, Devise, pl. 38.

(d) *Hoffman v. Hankey*, 3 My. & K.

376. "Although the similarity of expression seemed, in some degree, to connect this with the preceding case, yet it rather belongs to the class of cases in which bequests have been held to be void on account of the uncertainty as to the extent of interest the gift was intended to comprise." (Note by Mr. Jarman.)

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In *Hudson v. Bryant* (e), the testator gave his property to his wife, and in the event of it being more than she wanted to live on, desired her to give the remainder to his daughters : and directed the money to be put in some bank trust as may be thought best "for her and those in trust": it was held that there was an intestacy after the widow's death.

Power of disposition void for uncertainty.

In *Re Hetley* (f) a testator appointed his wife sole executrix, and after giving her all his property for life, proceeded as follows : "And I desire and empower her by her will or in her lifetime to dispose of my estate in accordance with my wishes verbally expressed by me to her." It was held by Joyce, J., that parol evidence could not be admitted to shew what the testator's verbally expressed wishes were, and that the power of disposition given to the widow was void for uncertainty. The learned judge declined to extend the doctrine illustrated by *Re Fleetwood* (g).

Where gift is partly charitable.

On the same principle, where property is given to trustees for purposes which are partly charitable and partly of an indefinite nature not charitable, so that the whole might be applied for either purpose, the gift is void (h).

Gift wholly charitable.

A gift which is wholly charitable is never void for uncertainty in the object (i).

Trusts which fail from uncertainty.

The rules applying to cases in which property is given to trustees upon trusts which are too uncertain to be given effect to, are discussed elsewhere (j).

Words of reference.

Uncertainty is sometimes caused by the use of relative pronouns or words of reference; as where a testator gave property to his wife for life and after her death to M., "niece to my said wife. Item, I give the use of 500*l.* stock for and during her natural life": it was held on the context, that "her" referred to the wife (k).

A gift "amongst my relations hereafter named," where none are subsequently named, is void for uncertainty (l).

"The said."

The phrase "the said" generally refers to the immediate antecedent, but it is a question of construction on the whole will, and therefore if there are separate gifts to two persons each named A. B., and a subsequent reference to "the said A. B.," this may mean the one first named, if the context so requires.

(e) 1 Coll. 681, ante, p. 464.

(f) [1902] 2 Ch. 866.

(g) 15 Ch. D. 594, post, p. 496.

(h) Ante, p. 229.

(i) Ante, p. 226.

(j) Post, p. 481, and Chap. XXIV.

(k) *Castledon v. Turner*, 3 Atk. 257.

(l) *Crampton v. Wise*, 58 L. T. 718.

In such a case, the position in the will of the name of the legatee may prevent uncertainty. Thus, in *Fox v. Collins* (m), where legacies were given to S. C., A. C. of St. Ives, and S. B., and then a legacy to A. C. of Hereford, and others, and the residue was given "to the said S. C., A. C., and S. B.," it was held, that under the last gift A. C. of St. Ives was entitled, partly on the ground that the word "said" applied to the three persons taken together, and that in the previous part of the will A. C. of St. Ives was named between S. C. and S. B.

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Uncertainty avoided by position of name in will.

"Uncertainty," says Mr. Jarman (n), "is sometimes produced by the mention of several objects alternatively, as in the case of a gift to A. or B. (o).

Gift to several alternatively.

"In the early case of *Beal v. Wyman* (p), where a question arose on these words, viz., 'I give and bequeath one half of my lands to my wife, and, after her death, I give all my lands to the heirs males of any of my sons or next of kin'; it was contended that the words 'heirs males of any' of his sons were words certain enough to create an estate, for it was all one as if he had said, 'to the heirs males of all his sons, if they have heirs males, or to those who have heirs males (q)'; and the words, 'or to the next of kin,' were also certain

To "heirs males of any of my sons or next of kin."

(m) 2 Ed. 107. See also *Doe v. Westlake*, 4 B. & Ald. 57; *Healy v. Healy*, Ir. R., 9 Eq. 418.

(n) First ed. p. 324. No authority is cited by Mr. Jarman for the proposition that a simple gift to "A. or B." is void for uncertainty, nor, so far as the editor is aware, has the point ever been decided, but on principle the statement would seem to be correct. In *Longmore v. Broom*, 7 Ves. 124, Grant, M.R., said: "You must make some addition to the bequest: otherwise it would be void for uncertainty. A bequest to A. or B. is void; but a bequest to A. or B. at the discretion of C. is good, for he may divide it between them." Post, Chap. XVI. And in *Re Sibley's Trusts* (5 Ch. D. 494), Jessel, M.R., said: "There are authorities which shew that when you find a gift in a will to A. or B. that word 'or' is to have some meaning, and it is to have a meaning which depends upon what A. or B. really consists of. You cannot lay down a priori that the gift to A. or B. has any particular meaning; you must first of all know what A. and B. are." But the M.R. did not here have in mind the case of a simple gift to two individuals in the

alternative. According to the civil law the rule appears to have been the other way: see *Carey v. Carey*, 6 Ir. Ch. R. 255 (post, p. 476). In *In bonis Bradford*, 72 L. T. 267, effect was given to an appointment of "B. or F." as executors, on the theory that the testator intended to appoint "B., or him failing, F."

(o) "In the case of a gift to several persons alternatively, there is a fatal uncertainty unless the secondly named person can be considered as intended to be substituted for the first in some event, or unless the word 'or' can be changed into 'and,' which has been often vexata quæstio. (See Chap. [XVIII.]") (Note by Mr. Jarman.) (p) Styles, 240, 2 Danv. 514, pl. 4; and see *Marwood v. Darrel*, Lee's Ca. t. Hard. 91.

(q) "Such, it is probable, would now be held to be the construction of this devise. The other question, on the words 'sons or next of kin,' is more difficult. Probably they would be construed as meaning 'my sons, or such other persons as may happen to be my next of kin.'" (Note by Mr. Jarman.)

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enough, being joined with the preceding words, and should be meant to the next of kin and their heirs males, if his sons had no heirs males : for in a will, if there be words to express the meaning of a testator, it is sufficient, though the words be not apt. On the other side, it was argued that this devise was void ; for it appeared not what heir male should have the land, whether the heir male of his son, or the heir male of his next of kin, for the words were disjunctive ; and the Court seems to have inclined to this opinion, but how the case was ultimately disposed of does not appear.

To " next of kin or heir at law."

" So, in *Lowndes v. Stone* (r), where a testator, by an unattested will, gave the remainder of his estate to his next of kin or heir at law. The personalty was claimed by the next of kin and the heir respectively ; the latter contending that the testator used the term ' heir at law ' as explanatory of the former expression, meaning ' such next of kin as shall be my heir at law.' Lord Loughborough, ' You have a fair retort upon each other. On the one side it is contended that " next of kin " means " heir at law " ; on the other, that " heir at law " means " next of kin." It must be distributed according to the statute.'

To A. " or his heirs, executors, administrators, or assigns."

" Again, in *Waite v. Templer* (s), where a testator, resident in India, bequeathed a share of his personalty to A., ' who resided at L. when I left England, or to his heirs, executors, administrators, or assigns for ever' ; Sir L. Shadwell, V.-C., held that A., having died in the testator's lifetime, the legacy failed, his Honor being of opinion that the additional words were too uncertain to create a substitutional gift."

Substitutional gift created by word " or."

There are, however, several cases in which " or " has had the effect of making the latter branch of a gift substitutional.

Thus, in *Carey v. Carey* (t), a testator directed that a certain fund should be distributed share and share alike between his son R. and his nephew E. or his nephew P. ; it was held that " or " could not be read " and," but that it imported substitution, namely that P. was only to take in the event of E.'s death ; consequently, E. having survived the testator, the fund went in equal moieties to R. and E.

(r) 4 Ves. 649. And see 7 Sim. 363. Lord Loughborough's expressions are hardly reconcilable with the notion (2 K. & J. 735) that he construed the words as implying heirship according to the nature of the property, and as intimating an intention that the rule of the statute should prevail. According to Jessel, M.R., the decision turned on the use of the word " heir at law " in the

singular : *Re Thompson's Trusts*, post.

(s) 2 Sim. 524 ; see also *Stone v. Evans*, 2 Atk. 86 ; *Graftley v. Humpage*, 1 Bea. 46, post, Chap. XLI. *Waite v. Templer* was approved by Lord Brougham in *Gittings v. M'Dermott*, 2 My. & K. 69, but disapproved of by Lord St. Leonards, 3 H. L. Ca. 557.

(t) 6 Ir. Ch. Rep. 255.

The earlier part of the will contained a devise of real estate to R., and in case he died under twenty-one then to E., and in case he died under twenty-one then to P., but this does not seem to have influenced the decision.

The question whether "or" imports substitution arises most frequently in cases where the latter part of the gift is in favour of a class of persons related to the original devisee or legatee, such as "issue," "children," "heirs"; as, for example, where the gift is "to A. or his issue," or "to A. or in case of his death to his issue." The tendency of the modern cases is to construe such a gift as intended to substitute the issue for the original devisee or legatee in the event of the latter dying in the testator's lifetime (*u*).

In *Re Delmar Charitable Trust* (*v*), Stirling, J., doubted the accuracy of the general proposition that a gift in a will to A. or B. is *primâ facie* to be treated as a substitutional gift to B. in case A. cannot take the benefit which is intended for him. "Undoubtedly," said the learned judge, "there are many cases in which it has been decided that a gift to A. or B. is substitutional, and that conclusion has been arrived at more particularly in cases where the gift is in favour of A. or his children. A typical example is the case of *Carey v. Carey* (*w*) which was referred to in the argument, and which I have carefully considered since; but that case (and as it appears to me all the others which I have examined), was decided on a consideration of the whole will, and all the circumstances which can be taken into consideration upon the construction of a will."

Limitations
of rule as to
construction
of "or."

Sometimes "or" is used by a testator to shew that he uses two phrases to mean the same thing. Thus, in *Re Thompson's Trusts* (*x*), where, after a life estate to A., a testator directed his real and personal estate to be sold, and the proceeds paid, "one-third to the heirs or next of kin of B. deceased, one-third to the heirs or next of kin of C. deceased, one-third to the heirs or next of kin of D. deceased"; Jessel, M.R., held that the testatrix meant not to make an alternative gift, but that the terms "next of kin" and "heirs" should apply to one class; consequently the statutory next of kin were entitled (*y*).

Synonymous
construction
of "or."

(*u*) *Montagu v. Nucella*, 1 Russ. 165; *Turner v. Moor*, 6 Ves. 557; *Re Coley*, [1901] 1 Ch. 40; *Re Roberts*, [1903] 2 Ch. 200, and other cases referred to post, Chaps. XVIII., XXXVI., and XLII.

(*v*) [1897] 2 Ch. 163. As to the so-called "alternative" construction of

the word "or" which was adopted in this case, see post, Chap. XXXVI.

(*w*) *Supra*, p. 476.

(*x*) 9 Ch. D. 607.

(*y*) As to the construction of the word "heirs" when used in gifts of personal estate, see Chap. XL.

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Reference to uses of other estates, there being more than one.

Uncertainty sometimes arises from property being devised to the same uses as the testator's "other" estates, of which there are several, that are devised to different uses (z). It may also be occasioned by the testator's apparent misapprehension of the law regulating the devolution of property; as in *Thomas v. Thomas* (a), where a testator, after charging his real and personal estate with the payment of his debts, and giving it to his wife during widowhood, after her decease or marriage willed that all his real and personal estate "be divided according to the statute of distribution in that case made and provided"; and it was held that the real estate did not pass to the next of kin under this clause, the Court thinking it not clear that the testator intended the real estate to be distributed according to the Statutes of Distribution regarding personalty, but that he must have referred to some statute which he supposed applied to real estate.

No objection that beneficiary is to be ascertained by future act of testator.

"Id certum est quod certum reddi potest," Mr. Jarman remarks (aa), "is a rule no less applicable to the *objects* than (as we have seen) it is to the *subjects* of disposition; and, therefore, it is no objection to a gift that it is so framed as to make the objects dependent upon some extrinsic circumstance, though it be an act performed, or even to be performed, by the testator himself in his lifetime. As in *Stubbs v. Sargon* (b), where a testatrix directed her trustees to dispose of and divide the proceeds of certain property unto and amongst her partners, who should be in copartnership with her at the time of her decease, or to whom she might have disposed of her said business, in such shares and proportions as her said trustees should think fit and deem advisable. It was objected that the gift was void for uncertainty; but it appearing that the testatrix was, at the date of her will, in partnership with certain persons, to some of whom, conjunctively with another person, she, on the dissolution of such partnership, disposed of her business, Lord Langdale, M.R., [and on appeal, Lord Cottenham,] held that these latter persons were those among whom the trustees were to divide the property in such shares as they might deem advisable."

How far discretion may be given to trustees.

Another illustration of the same principle is to be found in the case of a trust for a class of persons which is valid, although the

(z) *Leslie v. Duke of Devonshire*, 2 Br. C. C. 187; *Re Buckley*, 8 T. L. R. 181. See *Re Smith*, 45 L. T. 246. The extreme complication of the beneficial trusts declared by a testator does not prevent the legal estate from passing

to the trustees: *Barclay v. Collett*, 6 Scott., 408.

(a) 3 B. & Cr. 825.

(aa) First ed. p. 326.

(b) 2 Kee. 258, 3 My. & Cr. 507.

shares and interests which they are to take are left to the discretion of the trustees (c). But the class must be limited or defined in some way, for if property is given to trustees to be distributed or disposed of in such manner as they think fit, this is a discretion which cannot be controlled by the Court, and there is a resulting trust for the persons entitled in default of disposition. The trustees cannot take beneficially, because the form of the gift implies that they are to exercise their discretion for the benefit of other persons (d).

Mr. Jarman continues (e) : " In many cases devised to several persons successively have been contended to be void on account of the uncertainty respecting the order in which the objects are to take (f). Where the devise is to several specified individuals in succession, the obvious rule is, to hold them to be entitled in the order in which their names occur. If it be to a class of persons, (constituted such in virtue of birth (g)), as to children, sons, or brothers (h), then priority according to seniority of age may be presumed to be intended (i). And the circumstance of a condition being imposed on the devisees has been held not to vary the order in which they are successively entitled.

Gift to several successively, 'not saying in what order.'

" Thus, where (j) a testator devised to A. and his brothers successively, but not to be entered on or enjoyed until one month after their marriages, it was held that the devise was not (as contended) void for uncertainty ; for as the testator named A. first, *who was the eldest son*, the word ' successively ' implied that the estate was to go to his next brother after him ; and the Court agreed that the clause about marriage made no alteration in the exposition of the will, but only added a restriction to the devise, which before was general ; and, therefore, if the second son had married before the eldest, yet he could not have taken.' "

On the other hand, in *Thomason v. Moses* (k), where the bequest

(c) See the cases on discretionary trusts, cited in Chap. XXIV. ; and such cases as *Re Conn*, [1898] 1 Ir. R. 337, ante, p. 459.

(d) See *Stubbs v. Sargon*, *Fowler v. Garlike*, *Corporation of Gloucester v. Wood*, and other cases, cited post, p. 481.

(e) First ed. p. 327.

(f) See an instance of a limitation in a deed held to be void on account of uncertainty of this nature, *Windsmore v. Hobart*, Hob. 313.

(g) " This qualification, though it may sound strangely, seems requisite in order to exclude from the position in the text gifts to some other classes,

such as executors." (Note by Mr. Jarman in the first ed.)

(h) *Ongley v. Peale*, 2 Ld. Raym. 1312, 2 Eq. Ca. Ab. 358, pl. 8 ; *Young v. Sheppard*, 10 Beav. 207.

(i) See *Eastwood v. Lockwood*, L. R., 3 Eq. 487, 495, where " next survivor according to seniority " was held on the context to mean next younger ; and *Crofts v. Beamish*, [1905] 2 Ir. R. 349.

(j) *Ongley v. Peale*, supra.

(k) 5 Beav. 77. See *Prestwidge v. Groombridge*, 6 Sim. 171, where effect was given to an extremely vague gift in favour of the testatrix's nephews in order of seniority.

CHAPTER XIV. was of the interest of a sum of money to the testator's father for life, then to his brother for life, and then to be continued to the testator's next nearest heir, and so on, and neither the father nor the brother was the testator's heir, the gift of the fund after the death of the brother was held void for uncertainty.

Where intended object cannot be identified, gift is void for uncertainty.

It must be remembered that with respect to charities gifts may be good, which, with respect to individuals, would be void. We have seen that charitable bequests are not void for uncertainty in the object (*l*); and where there are two charities of the same name, the legacy will be divided between them, or administered *cy-près*, if it cannot be ascertained which was the intended object (*m*). In the case of individuals, the gift would be void for uncertainty. The rule has occasionally been disregarded. Thus, in *Hare v. Cartridge* (*n*), the gift was "to my first cousins, the children of my father's brother of the name of Cartridge"; the father had two brothers of the name of Cartridge, both of whom had children, and the gift was held by Shadwell, V.-C., to take effect in favour of the children of both brothers, apparently on the ground that the testator had shewn an intention to benefit all his first cousins on the father's side, and that consequently the words "the children of my father's brother" were surplusage. As was remarked in the third edition of this work (*o*): "the decision seems opposed to all the other authorities on this subject." It was disapproved by the Court of Appeal in *Re Stephenson* (*p*). There the testator gave his property "unto the children of the deceased son (named Bamber) of my father's sister share and share alike." There were three deceased sons, all named Bamber, of the sister of the testator's father, and this fact was known to the testator: it was held that the gift was void for uncertainty.

Parol evidence.

Where a testator gives property to a person by a particular name or description, and it is found that there were at the date the will two persons answering to that name or description, parol evidence is admissible to shew which of them was intended (*q*).

(*l*) Ante, p. 226. It will be remembered that a gift for several purposes may be void for uncertainty, although some of the purposes are charitable; ante, p. 229.

(*m*) *Waller v. Childs*, Amb. 524; *Bennett v. Hayter*, 2 Beav. 81; *Simon v. Barber*, 5 Russ. 112; *Re Clergy Society*, 2 K. & J. 615; *Re Alechin's Trusts*, L. R., 14 Eq. 230; *Re Barnard*,

7 T. L. R. 73.

(*n*) 13 Sim. 167.

(*o*) By Messrs. Wolstenholme and Vincent, p. 348.

(*p*) [1897] 1 Ch. 75. It seems that evidence of intention would have been admissible: see *Estate of Hubbuck*, [1905] P. 129; post, p. 523.

(*q*) Chap. XV.

IV. Trusts and Powers.—With regard to trusts, the general rule is thus stated by Mr. Jarman^(r): “ Sometimes a testator distinctly shews an intention to create a trust, but does not go on to denote with sufficient clearness who are to be its objects ; the effect of which obviously is, that the devisees or legatees in trust (whom we suppose to be distinctly pointed out) hold the property for the benefit of the person or persons on whom the law, in the absence of disposition, casts it : in other words, the gift takes effect with respect to the legal interest, but fails as to the beneficial ownership.

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Effect where trust created, but object uncertain.

“ As in *Stubbs v. Sargon* (s), where a testatrix indorsed a promissory note for 2,000*l.* to Mrs. Sargon, which she accompanied with a letter, declaring the note to have been given to Mrs. Sargon for her sole use and benefit, independent of her husband, for the express purpose of enabling her to present to *either branch of her* (the testatrix’s) *family* any portion of the principal or interest, as she might consider the most prudent ; and, in the event of the death of Mrs. Sargon, by that bequest the testatrix empowered her to dispose of the said sum and interest by deed or will to those or either branch of her family she might consider most deserving ; and that to enable her (Mrs. Sargon) to have the sole use and power of the said sum of 2,000*l.* due by the above note of hand, she had specially indorsed the same in her favour. Lord Langdale, M.R., was of opinion, that the promissory note was not indorsed and delivered to Mrs. Sargon for her own absolute use, but for the purpose of the money secured by it being disposed of by her to such parts or members of the testatrix’s family as were intended to be thereby designated. Unfortunately, the letter was so expressed, that the objects could not be ascertained ; and the trust being too indefinite for the Court to act upon, the 2,000*l.* must be treated as part of the testatrix’s personal estate. On appeal, Lord Cottenham was of the same opinion ” (t).

Stubbs v. Sargon.

In *Corporation of Gloucester v. Wood* (u), one of several testamentary papers contained the following words : “ In a codicil to my will, I gave to the corporation of Gloucester 140,000*l.* In this I wish that my executors would give 60,000*l.* more to them for the same purpose as I have before named.” No codicil or testamentary paper containing any gift to the corporation could be found ; and it was decided by Sir J. Wigram that neither legacy

Corporation of Gloucester v. Wood.

(r) First ed. p. 333.

(s) 2 Kee. 255, 3 My. & Cr. 507. See also *Harland v. Trigg*, 1 Bro. C. C. 142 ; *Doe v. Joinville*, 3 East, 172 ; *Robinson**v. Waddelow*, 8 Sim. 134, stated post, Chap. XLI.

(t) 3 My. & Cr. 507.

(u) 3 Hare, 131.

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could be supported as a gift to the corporation for their own use (though he admitted that a gift to A. "for a purpose" may sometimes be equivalent to a gift to A. absolutely), nor as a general charitable legacy (though it was improbable that a corporation was intended to hold in trust for a private person): the purposes of the gift were therefore uncertain, and the corporation were trustees for the residuary legatees. This decision was affirmed in the House of Lords (*v*).

Where gift in trust though discretionary.

So if the gift be expressly "in trust," though to be disposed of in such manner and for such purposes as the donees think fit, they are trustees, and the beneficial interest results to the heir or next of kin (*w*): and a gift "to be expended and appropriated in such manner as the donees, or a majority of them, shall in their discretion agree upon," without the words "in trust," would probably produce the same result (*x*).

In *Buckley v. Buckley* (*y*), a gift of residue to trustees to be applied "to meet contingencies which may be caused by vacancies, repairs, or casualties in my family," was held void for uncertainty.

Precatory and undefined trusts.

The question of uncertainty often arises in connection with precatory trusts, and trusts without definite objects, both of which topics are considered in another chapter (*z*). It may however be useful to notice some distinctions which have been drawn.

Uncertainty in subject.

1. A testator may express a clear intention to create a trust, and yet his intention may fail to take effect, because he has not defined the subject-matter of the trust with sufficient certainty (*a*).

Uncertainty in subject and object.

2. "Wherever the subject to be administered as trust-property, and the objects for whose benefit it is to be administered, are to be found in a will not expressly creating trust, the indefinite nature and quantum of the subject, and the indefinite nature of the objects, are always used by the Court as evidence that the mind of the testator was not to create a trust" (*b*).

(*y*) 1 H. L. Ca. 272, and see *Aston v. Wood*, L. R., 6 Eq. 419.

(*w*) *Fowler v. Garlike*, 1 R. & My. 232. See also *Buckle v. Bristow*, 10 Jur. N. S. 1095.

(*x*) Per Wood, V.-C., *Buckle v. Bristow*, supra. The doctrine laid down by Sir W. Grant in *Gibbs v. Rumsey*, 2 V. & B. 294, is erroneous: see *Ellis v. Selby*, 1 Myl. & C. 294; *Buckle v. Bristow*, supra; *Yeap Cheah Neo v. Ong Cheng Neo*, L. R., 6 P. C. 381; *Fenton v. Nevin*, 31 L. R. Ir. 478.

(*y*) 19 L. R. Ir. 544.

(*z*) Chap. XXIV.

(*a*) *Abraham v. Alman*, 1 Russ. 509;

Lechmere v. Lavie, 2 My. & K. 197; *Horwood v. West*, 1 Sim. & St. 387; *Ex parte Payne*, 2 Y. & C. 636. Some of the cases referred to in the earlier part of this chapter (ante, pp. 455 seq.) were decided on this ground.

(*b*) Per Lord Eldon in *Morice v. Bishop of Durham*, 10 Ves. at p. 536; *Harland v. Trigg*, 1 Br. C. C. 142; *Knight v. Boughton*, 11 Cl. & F. 513; per Bowen, L.J., in *Re Diggles*, 39 Ch. D. 257, cited post, Chap. XXIV. The scope of the doctrine was examined by Wood, V.-C., in *Bernard v. Minshull*, John. 276.

3. A testator may shew an intention, either by mandatory or precatory words, that a person to whom he has given property by his will is to hold it upon trust for objects who are not ascertained: in such a case, although the intention of the testator cannot be carried out, yet the trust is not without effect. "Suppose, for instance, that by the precatory words in the will, the donee is requested to apply property, the amount of which is ascertained, 'for the benefit of—,' . . . there would be uncertainty enough as to the object, and yet such a trust would be created as would effectually exclude the donee from applying the property to his own use" (c). The effect of such a trust is considered in another chapter (d).

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Where object only is uncertain.

With regard to powers, the question of uncertainty arises chiefly Powers. in those cases where a person is empowered to appoint property among the "family" or "relations" of a person: the decisions on this point are referred to in the chapter on Powers (e). A power may also be void for uncertainty because the objects are not defined at all (f).

(c) Per Wood, V.-C., in *Bernard v. Minshull*, John. at p. 286.

(d) Chap. XXI.

(e) Chap. XXIII. See also *Harland v. Trigg*, 1 Bro. C. C. 142; *Williams v.*

Williams, 1 Sim. N. S. 358, both referred to in Chap. XLI.

(f) *Re Hetley*, [1902] 2 Ch. 866, referred to in Chap. XXIII., and ante, p. 474.

CHAPTER XV.

PAROL EVIDENCE, HOW FAR ADMISSIBLE.

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Parol evidence inadmissible to control will.

I.—Inadmissible to explain Contents of Will.—“As the law requires wills both of real and personal estate (with an inconsiderable exception (a)) to be in writing, it cannot, consistently with this doctrine, permit parol evidence to be adduced, either to contradict, add to, or explain the contents of such will; and the principle of this rule evidently demands an inflexible adherence to it, even where the consequence is the partial or total failure of the testator’s intended disposition; for it would have been of little avail to require that a will ab origine should be in writing, or to fence a testator round with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied, or its inaccuracies corrected, from extrinsic sources. No principle connected with the law of wills is more firmly established or more familiar in its application than this; and it seems to have been acted upon by the judges, as well of early as of later times, with a cordiality and steadiness which shew how entirely it coincided with their own views. Indeed, it was rather to have been expected that judicial experience should have the effect of impressing a strong conviction of the evil of offering temptation to perjury” (b).

There are numerous cases in which the Courts have refused

(a) Ante, p. 102.

(b) First ed p. 349. Mr. Jarman, it

is clear, would not have approved the decision in *Re Fleetwood*, post, p. 496.

to admit parol evidence to contradict the express terms of a will (c). But where a will contains an erroneous recital or statement of fact, parol evidence is sometimes admissible to contradict it (d). CHAPTER XV.

The application of the general principle stated by Mr. Jarman was much discussed in the case of *Higgins v. Dawson* (e), where it was contended that parol evidence of the state of the testator's property, at the time he made his will, was admissible to explain what he meant by words which in themselves were unambiguous, and capable of being construed without extrinsic aid. The evidence was therefore disregarded. The decision proceeded on the fundamental distinction between evidence simply explanatory of the words of the will themselves (as in *Fonnereau v. Poyntz* (f), *Colpoys v. Colpoys* (g), and other cases cited in a subsequent part of this chapter (h)), and evidence sought to be applied to prove intention itself as an independent fact.

On the same principle, evidence was not admissible, under the old law, to prove that a testator's personal property was insufficient to satisfy the dispositions of his will, and thus to shew an intention on his part to exercise a general power of appointment (i).

Among the older cases cited by Mr. Jarman in support of the general proposition laid down by him is *Strode v. Lady Falkland* (j); letters and oral declarations of the testator being offered to prove the intention to include a reversion in the words, "All other my lands, tenements, and hereditaments, out of settlement," it was unanimously agreed by Lord Cowper, C.J., Trevor, M.R., T. Trevor, C.J., and Tracy, J., that this kind of evidence could not be admitted, for that where a will was doubtful and uncertain, it must receive its construction from the words of the will itself; and no parol proof or declaration ought to be admitted out of the will to ascertain it.

Letters and oral declarations of testator rejected.

So, in *Brown v. Selwin* (k), (which is a leading authority), where the testator having bequeathed the residue of his personal estate

Evidence of mistake by person who drew the will rejected.

(c) *Hampshire v. Peirce*, 2 Ves. sen. 216; *Lowfield v. Stoneham*, 2 Stra. 1261; *Horwood v. Griffith*, 4 D. M. & G. 708; *Barrs v. Fewkes*, 34 L. J. Ch. 522; *Smith v. Conder*, 9 Ch. D. 170 (cited post, p. 500); *Re Aird's Estate*, 12 Ch. D. 291 (post, Chap. XVI.; *Wigram on Wills*, 5; *Re Boyd*, 63 L. T. 92.

(d) See *Re Taylor's Estate*, *Re Kelsey*.

(e) *Re Grainger*, [1900] 2 Ch. 756; [1902] A. C. 1, stated post, p. 507.

(f) 1 Bro. C. C. 42.

(g) Jac. 451.

(h) Post, p. 507, 516. See also *Re Glassington*, [1906] W. N. 128.

(i) See *Andrews v. Emmot*, 2 Br. C. C. 297, and other cases cited in Chap. XXIII.

(j) 3 Ch. Rep. 98. See also *Cheyney's case*, 5 Rep. 68; *Vernon's case*, 4 Rep. 4; *Lawrence v. Dodwell*, 1 Ld. Raym. 438; *Bertie v. Falkland*, 1 Salk. 232; *Towers v. Moor*, 2 Vern. 98; *Bennet v. Davis*, 2 P. W. 316; *Parsons v. Lanoe*, 1 Ves. 189; *Ulrich v. Litchfield*, 2 Atk. 374; *Parmiter v. Parmiter*, 1 J. & H. 135.

(k) Cas. t. Talb. 240, s.c. sub nom. *Selwin v. Brown*, 3 B. P. C. Toml. 607,

CHAPTER XV. to two persons, whom he appointed his executors, and one of whom was indebted to him by bond, it was attempted to be proved by the evidence of the person who drew the will, that he received the testator's written instructions to release the bond debt by the will, but that he refused to do so, under the impression that the appointment of the obligor to be one of the executors extinguished the debt: Lord Talbot held the evidence to be inadmissible; and his decree was affirmed in the House of Lords.

But a distinction has been established between such cases as *Selwin v. Brown*, and cases where the testator has, during his lifetime, independently of his will, shewn an intention to forgive a debt due to him by an executor, and it has been held that evidence is admissible to prove this intention (l).

Parol
evidence of
mistake.

It is explained elsewhere that if, by the mistake of the person who prepares or copies the will, a particular clause is inserted contrary to the intention of the testator, and his attention is not drawn to it, evidence of the fact is admissible, and if it is proved, the passage may be omitted from the probate (m). If, however, the testator knows the contents of his will, and erroneously supposes that it will not have the effect which the law gives it, the general rule applies, and evidence of his real intention is not admissible (n).

Devise inad-
vertently
omitted
cannot be
supplied.

Mr. Jarman continues (o): "A fortiori, parol evidence is not admissible to supply any clause or word which may have been inadvertently omitted by the person drawing or copying the will.

"Thus, in the much discussed case of *The Earl of Newburgh v. Countess of Newburgh* (p), where a testator gave instructions to his

(l) *Strong v. Bird*, L. R., 18 Eq. 315; *Re Applebee*, [1891] 3 Ch. 422; *Re Hyslop*, [1894] 3 Ch. 522, post, p. 498.

(m) Ante, p. 30, and post, p. 492. So if the will is wrongly dated the error may be corrected: *Reffell v. Reffell*, L. R., 1 P. & D. 139.

(n) In the previous editions of this work the leading case in support of the proposition stated in the text (*Walpole v. Cholmondeley*, 7 T. R. 138; s. c. *Lord Walpole v. Lord Orford*, 3 Ves. 402) is discussed at length. The general principle is so well settled that the present editor has not thought it necessary to reprint Mr. Jarman's observations. The cases are referred to ante, pp. 32, 190, 194.

(o) First ed. p. 353.

(p) "5 Mad. 364. In *Langston v. Langston*, 8 Bli. 167, 2 Cl. & Fin. 194, a nice question of construction arose, in consequence of the omission of a line by

the person copying the will for signature; and Lord Brougham called for and inspected the draft, with a view of informing himself of this fact, in spite of the protestations of the appellant's counsel. Its inadmissibility, however, was admitted by his Lordship, who, in his judgment, emphatically disclaimed all reliance on or influence from the information derived from this source. Perhaps, however, the principle which excludes such evidence was somewhat infringed by the inspection of the draft will, even with the disclaimer; for in such cases who can venture to affirm that his mind has not received a bias, by allowing the inadmissible evidence to have access to it?" (Note by Mr. Jarman.)

The principle laid down in *Newburgh v. Newburgh* was acted on in *Sullivan v. Sullivan*, Ir. R., 4 Eq. 457 (probate case).

solicitor to prepare a will, by which his wife was to take an estate for life in lands in the counties of Sussex and Gloucester. The solicitor prepared the draft, and laid it before a conveyancer to settle, by whom it appeared that the word 'Gloucester' had inadvertently been struck out, and the person who made the fair copy of the settled draft changed the word 'counties' into 'county'; and the will, therefore, omitted altogether the estate for life in the lands in the county of Gloucester. When the will was executed, the abstract of the will (which agreed with the instructions given by the testator), and not the will itself, was read to the testator, so that the mistake remained undiscovered. The widow filed a bill, praying to have the will corrected on this evidence; but Sir J. Leach, V.-C., refused it, because, admitting it to be clearly made out that the mistake existed, the Court had no authority to correct the will according to the intention. The will, executed with that omission, was certainly not the will of the deviser; and so it must be found by a jury upon the facts stated as to the Gloucester estate; but the Court could not, for that reason, set up the intention of the testator, which by mistake he had been prevented from carrying into execution, as if he had actually executed that intention in the forms prescribed by the Statute of Frauds. To assume such a jurisdiction would, in effect, be to repeal the Statute of Frauds in all cases where a testator failed to comply with the statute by mistake or accident. His Honor added, that he was willing to direct an issue, whether this was the will of the testator as to the Gloucester estate; and upon this issue the evidence tendered would be admissible (q). No such issue was asked. The case was afterwards reheard before the V.-C., when it was suggested, on the result of the conveyancer's evidence, that there was no omission in the will, but that the error was owing to the introduction of a passage which he had at first written, but afterwards struck through with a pen; but which had been copied by mistake in the fair will: and it was contended, therefore, that there ought to be an issue, to try whether those words so introduced by mistake were part of the will. The V.-C. thought that, if such a case had been originally

(q) Mr. Jarman here interpolates the following remark in parenthesis: "The reporter states that a case was cited at the bar, on the authority of Lord C. B. Richards, in which Lord Eldon had sent it to the jury upon the same description of facts." But Lord St. Leonards says (Law of Prop. 207) it could not be maintained that the omission of the word "Gloucester" in the

particular devise would render the whole will void as to the Gloucester estate: because although the will did not contain all that the testator intended as to this estate, it contained in the actual devise of it nothing but what he did intend. The case was ultimately decided in D. P. upon the construction of what still appeared on the face of the will. Law of Prop., p. 367.

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made, they would have been entitled to such an issue (r) ; but that, as it was opposed to the allegations on the record, he could not entertain it. The case was carried to the House of Lords, where the question, whether parol evidence was admissible to prove such mistake, for the purpose of correcting the will and entitling the appellant to the Gloucester estate, as if the word ' Gloucester ' had been inserted in the will, was submitted to the judges, who declared their unanimous opinion to be, that the evidence was not admissible " (s).

Construction
not to be
influenced
by parol
evidence
of actual
intention.

" It is clear," continues Mr. Jarman (t), " that parol evidence of the actual intention of a testator is inadmissible for the purpose of controlling or influencing the construction of the written will, the language of which must be interpreted according to its proper acceptation, or with as near an approach to that acceptation as the context of the instrument and the state of the circumstances existing at the time of its execution (which, as we shall presently see, forms a proper subject of inquiry), will admit of. No word or phrase in the will can be diverted from its appropriate subject or object by extrinsic evidence, showing that the testator commonly (u), or, on that particular occasion (v), used the words or phrase in a sense peculiar to himself, or even in any general or popular sense, as distinguished from its strict and primary import."

The rule as thus stated, must, however, as pointed out by Mr. Jarman (w) be taken subject to the qualification that it " supposes the existence of an appropriate subject or object ; otherwise it should seem evidence would be admissible of the testator having

(r) See as to the distinction here suggested, post, p. 492. Upon this Lord St. Leonards remarks—" This is a dangerous jurisdiction : for although no doubt the striking out of the two lines would have made the will what the testator directed, yet those lines, though inaccurate, were introduced in order to carry the instructions for the will into legal operation. It might on the same ground be contended that a mistake in a legal limitation made through carelessness or ignorance could be corrected by striking out the words improperly introduced." Law of Prop., p. 197. See also *Harter v. Harter*, L. R., 3 P. & D. 11 ; *In bonis Davy*, 1 Sw. & Tr. 262, 29 L. J. Prob. 161, 5 Jur. N. S. 252 ; *Rhodes v. Rhodes*, 7 App. Ca. (P. C.) 192. Moreover the effect of striking out the words in *Newburgh v. Newburgh*, would be the opposite of that in the decided cases : it would create a devise and not an intestacy. Per Sir J. Wigram, Wills, pl.

183, n. And see *Stanley v. Stanley*, 2 J. & H. 502.

(s) 1 M. & Sc. 352. See *Wade v. Nazer*, 12 Jur. 188.

(t) First ed. p. 358.

(u) See per Parke, B., *Shore v. Wilson*, 9 Cl. & Fin. 558 ; *Crosley v. Clare*, 3 Sw. 320, n. ; *Millard v. Bailey*, L. R., 1 Eq. 378.

(v) *Mounsey v. Blamire*, 4 Russ. 384 ; *Green v. Howard*, 1 Br. C. C. 31 ; *Strode v. Russell*, 2 Vern. 625 ; *Barrow v. Methold*, 1 Jur. N. S. 994 ; *Knight v. Knight*, 2 Giff. 616, is contra ; but the rule as stated in the text is firmly settled. See *v. Pain*, 4 Hare, 251, post ; *Douglas v. Fellows*, Kay, 118.

(w) First ed. p. 358, n. See also the rule as stated by Wood, V.-C., in *Bernasconi v. Atkinson*, 10 Ha. p. 348. As to the case of *Beaumont v. Fell*, 2 P. W. 141, cited by Mr. Jarman in support of the suggested exception to the general rule, see post, p. 513.

commonly described the object (and why not the subject also?), by the terms used in the will." Thus if a testator bequeaths a legacy to Percy the son of A. B., and A. B. has a son named Percy, evidence is not admissible to shew that the testator really intended the legacy for another son named Herbert; but if A. B. has no son named Percy, evidence is admissible to shew that A. B. had a son Herbert, commonly known as "Bertie" and from that fact the Court may infer that he was the person intended by the testator (x). In *Barrow v. Methold* (y), a testator, being possessed of a policy of assurance in the R. A. Company for 1,000*l.*, on which a bonus of 400*l.* had lately been declared, bequeathed to his wife "the premium of assurance with the R. A. Company." It was held by Wood, V.-C., that the word "premium" must be read as meaning "bonus," and that evidence was not admissible to shew that by the word "premium" the testator meant "policy"; if, however, there had been no bonus the case would have been different.

Evidence is also admissible in certain cases to explain words which have a peculiar, technical or local meaning (z).

Subject to these qualifications the rule is of general application.

Thus, in *Doe d. Brown v. Brown* (a), it was held that a devise of copyhold lands could not be extended to freeholds, by the production of evidence shewing that the testator had so described them in a deed executed by him, the will itself furnishing no distinct indication that the testator meant to give what was conveyed by the deed, and there being copyhold lands to satisfy the devise.

So, in *Doe d. Chichester v. Oxenden* (b), (which is a leading authority), where a testator devised his "estate of Ashton, in the county of Devon"; and evidence was adduced to shew that the testator was accustomed to distinguish by the appellation of his "Ashton estate" the whole of his maternal estate, including property in several contiguous parishes; the Court of Common Pleas, notwithstanding this evidence, held that only the property in the manor of Ashton passed; Sir James Mansfield observing, that this would give the will an effectual operation, and herein the

"Copyhold" not extended to freeholds by parol evidence.

Extent of "estate of Ashton" not enlarged by extrinsic evidence.

(x) *Re Hooper*, 88 L. T. 160. As to the use of nicknames, &c., see post, p. 502.

(y) 1 Jur. N. S. 994.

(z) Post, p. 501.

(a) 11 East, 441. See *Hughes v. Turner*, 3 My. & K. 666, where Sir C. Peyps, M.R., held that a revoked will could not be looked at for the purpose of influencing the construction of the subsequent unrevoked instrument. See

also *M'Leroth v. Bacon*, 5 Ves. 165; *Randall v. Daniel*, 24 Beav. 193. These cases must be distinguished from those in which a revoked will can be referred to for the purpose of correcting a mistake in the description of a legatee, &c., post, p. 512.

(b) 3 Taunt. 147. This case seems to have settled a point left in doubt by *Whitbread v. May*, 2 B. & P. 593.

CHAPTER XV. case differed from all others in which such evidence had been received: for in them, without it, the devise would have had no operation; and it was, he said, safer not to go beyond the line. This decision was affirmed in D. P. on the unanimous opinion of the judges (c); and the principle of it has been since repeatedly recognised. Thus, in *Doe d. Browne v. Greening* (d), the Court of K. B., on its authority, rejected evidence offered to shew that, under a devise of lands "at Coscomb," it was intended to include lands near Coscomb.

Construction of words not varied by evidence of actual intention. So, in *Doe d. Tyrrell v. Lyford* (e), where the testator devised lands at Sutton Wick, in the Parish of Sutton Courtney, which he purchased of S., the same Court would not allow it to be proved by extrinsic evidence that he intended to include certain pieces of ground not in the hamlet of Sutton Wick, but parcel of the estate purchased of S., and in the parish of Sutton Courtney.

Evidence to shew meaning in which testator used name. But cases of this kind must be distinguished from those cases in which a testator uses a general name to designate a property made up of parts, some of which do not properly answer the description. Such are the cases of *Doe v. Jersey* (f), and *Ricketts v. Turquand* (g), discussed in later sections of this chapter (h).

Words of will are those of the testator. The Courts always assume that the language of a will is the language of the testator. Even where, as is generally the case, the language of the will is not that of the testator, but is proposed to him by his professional adviser, by executing the will he adopts its language, and the words must therefore be taken to be his (i). Parol evidence that a will was or was not drawn by a skilled person is not admissible, though any evidence on the point apparent on the face of the will may be considered in construing it (j). But if the will contains technical terms of law, the technical is the primary meaning (k).

Words may be diverted from their primary acceptance by inconsistency of context. **II.—Admissible to reconcile Inconsistency in Will.—Mr. Jarman continues (l):** "If, however, the context of the will presents

(c) 4 Dow, 65, s. n. *Doe d. Oxenden v. Chichester*.

(d) 4 M. & Sel. 171. See also *Evans v. Angell*, 26 Beav. 202. But as to the meaning of "at," see *Homer v. Homer*, 8 Ch. D. 758.

(e) 4 M. & Sel. 550. See also *Doe d. Preedy v. Holton*, 5 Nev. & M. 391; *King v. King*, 13 L. R. Ir. 531. As to *Collison v. Gurling*, 4 My. & C. 63, 9 Cl. & Fin. 88 (*Collison v. Curling*), see Wigr. Wills, 43, 48 n., 4th ed.

(f) 3 B. & Cr. 870.

(g) 1 H. L. C. 472.

(h) Post, pp. 491, 510.

(i) Per Wood, V.-C., in *Bernasconi v. Atkinson*, 10 Ha. at p. 349. See *Weale v. Olive*, 32 Bea. 423; *Rhodes v. Rhodes*, 7 A. C. 199; *Parker v. Felgate*, 8 P. D. 171; *Re Dayrell*, [1904] 2 Ch. 496.

(j) *Richards v. Davies*, 13 C. B. N. S. 69, 861.

(k) *Theellusson v. Rendlesham*, 7 H. L. C. 449, 486; *Leach v. Jay*, 9 Ch. D. 42; *Re Fraser*, [1904] 1 Ch. 111.

(l) First ed. p. 361.

an obstacle to the construing of the terms of description in their strict and most appropriate sense, a foundation is thereby laid for the admission of evidence shewing that they are susceptible of some more popular interpretation, which will reconcile them with, and give full scope and effect to, such seemingly repugnant context.

“ To this principle, it is conceived, may be referred the important and much discussed case of *Doe d. Beach v. Earl of Jersey*” (m). In that case a testatrix, after reciting a power reserved to her by her settlement, on her marriage with G. V. P., devised, subject to the estate for life of her husband therein, all that her Briton Ferry estate, with all the manors, advowsons, messuages, buildings, lands, tenements, and hereditaments thereto belonging, or of which the same consisted. In a subsequent part she added : “ Also I give my Penlline Castle estate, which, as well as my Briton Ferry estate, is situate, lying, and being in the county of Glamorgan,” &c. A claim was laid under this devise to certain lands which were neither in the parish of Briton Ferry nor in the county of Glamorgan, but in a parish in the county of Brecon. It appeared by special verdict that the Glamorganshire lands contained 30,000 acres, part whereof consisted of the messuage and lands in the parish of Briton Ferry, comprising the whole of the parish ; and that the Brecon lands contained 4,000 acres : that there were six advowsons, of which the advowson of the parish of Briton Ferry was one, and one manor, and one undivided sixth of another manor in Glamorgan, and that there was no manor of Briton Ferry. Objections were made to the reception of certain evidence, consisting of old account-books, in which was the following entry : “ Briton Ferry Estate in the county of Brecon ” ; and of proof that the lands in question, together with the other property, had all gone by the name of the Briton Ferry estate. Abbott, C.J., delivered the opinion of the judges, namely, that the words “ all that my Briton Ferry estate, with all the manors, &c.” found in the will of this testatrix, in which mention also was made of “ her Penlline Castle estate,” denoted a property or estate known to the testatrix by the name of her Briton Ferry estate, and not an estate locally situate in a parish or township of Briton Ferry (n), and consequently that a question arising upon any particular tenement was properly a question of

Devise of the
“Briton Ferry
Estate.”

(m) 3 B. & Cr. 870; post, p. 510.

(n) The same case had previously been before the Court of K. B. on a somewhat different point; and there Bayley, J., said it was clear that the devise could not be confined to that part of the estate which was within the

parish of Briton Ferry, for the testatrix spoke of manors and advowsons, and in that part of the estate there was no manor and only one advowson; the devise, therefore, must extend to the whole of the Briton Ferry estate : 1 B. & Ald. 558.

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parcel or no parcel, and they therefore thought the several matters offered to be proved and given in evidence on the part of the defendant were admissible and ought to have been received. However, on account of an imperfection in the special verdict, the House of Lords awarded a venire de novo.

Words
"thereunto
belonging."

So, in *Doe d. Gore v. Langton* (o), it was contended that the words "thereunto belonging" must be taken in their primary sense, the consequence of which would be to exclude the lands in question by reason of the words being correctly applicable in every particular to other lands. But the Court of K. B. thought that it was to be collected from the face of the will itself, that the testator had not used the disputed words in their primary sense (p), and held that extrinsic evidence was therefore admissible to shew in what sense he had used them. Lord Tenterden, C.J., in delivering the judgment of the Court said: "The extrinsic facts in this case leave no room to doubt that the testator intended his newly-acquired property to pass by his will as part of his Barrow estate; but, nevertheless, it cannot pass unless that meaning can be collected from the will itself; and there are two clauses in the latter part of the will which appear to manifest that intention, and to be sufficient to authorize us to put such a construction on the words *thereunto belonging* as will accord with, and give effect to, that intention."

Clause im-
properly in-
troduced into
will may be
rejected on
issue devisa-
vit vel non.

III.—Admissible to shew Insertion of Words or Execution of Will through Mistake or Fraud.—In cases of mistake the authorities seem to have established this distinction (q), "that though you cannot resort to parol evidence to control the effect of words or expressions which the testator has used, by shewing that he used them under mistake or misapprehension, nor to supply words which he has not used, yet that you may, upon an issue devisavit vel non, prove that clauses or expressions have been inadvertently introduced into the will, contrary to the testator's intention and instructions, or, in other words, that a part of the executed instrument is not his will. In support of this doctrine may be adduced the case of *Hippesley v. Homer* (r), where a testator, having, by his will dated in 1800, devised his estate to certain limitations, by a codicil made in 1804, after empowering one of the devisees for life to make a jointure and charge portions for children, made certain variations in the

(o) 2 B. & Ad. 680.

(p) 2 B. & Ad. 693.

(q) So stated by Mr. Jarman, first ed. p. 355. See the distinction suggested by Leach, V.-C., in *Earl of Newburgh v. Countess of Newburgh*, ante,

p. 488.

(r) T. & R. 48 n. See also *Powell v. Mouchett*, 6 Mad. 216; *Lord Trimles-town v. D'Alton*, 1 D. & Cl. 85; *Lord Guillamore v. O'Grady*, 2 Jo. & Lat. 210.

limitations in the will, and gave certain additional powers of management to his trustees. The bill alleged, that the testator executed the codicil upon the representation and in the belief that it contained nothing but powers to the devisee for life to make a jointure and charge portions for children, and prayed that it might be set aside. The facts charged were admitted by the answer. Issues were directed—First, as to whether the testator did, by a paper writing, purporting to be a codicil to his will, devise in manner following: (Then follow the words of the codicil, by which only the powers of jointuring and charging portions were conferred). Secondly, whether the testator did, by the said codicil, devise in manner following: (Here was set forth the remaining part of the codicil). The jury found that the part of the codicil which was the subject of the second issue did not constitute the will of the testator; and that the part of the codicil which was the subject of the first issue did constitute the will of the testator. Whereupon the Court (not being able to direct the instrument to be delivered up, as part of it was good), declared that so much of the codicil as did not constitute the will of the testator was void.”

Under the modern practice, the question whether words have been introduced into a will by mistake is often considered by the Court of Probate, and if it is found that they do not form part of the will, the Court directs them to be omitted from the probate (s). The right words, however; cannot be inserted (t), although a clear mistake as to the name or residence of an executor may be corrected in order to avoid difficulties with banks, companies, &c. (u). And in *Birks v. Birks*, where a testator executed a new will, intending it to be a copy of his old will, with one clause omitted, parol evidence was admitted to shew that other parts had been omitted by mistake, and both wills were admitted to probate in order to rectify the mistake (v).

Probate practice.

When a will has been proved, evidence is not admissible in a

(s) *In bonis Duane*, 2 Sw. & Tr. 590; *In bonis Oswald*, L. R., 3 P. & D. 162; *Fulton v. Andrew*, L. R., 7 H. L. 448; *Rhodes v. Rhodes*, 7 App. Ca. at p. 198; *Morrell v. Morrell*, 7 P. D. 68; *Farrelly v. Corrigan*, [1899] A. C. 563; *Brisco v. Baillie Hamilton*, [1902] P. 234. See *Karunaratne v. Ferdinandus*, [1902] A. C. 405, where the nature of the evidence required to justify the Court in omitting words from probate was discussed.

(t) *In bonis Schott*, [1901] P. 190, overruling *In bonis Bushell*, 13 P. D.

7, and *In bonis Huddleston*, 63 L. T. 255. See also *Sullivan v. Sullivan*, Ir. R., 4 Eq. 457; *In bonis Walkeley*, 69 L. T. 419; *In bonis Durlacher*, 75 L. T. 664. As to omitting words by consent of all parties see *In bonis Boehm*, [1891] P. 247; *In bonis Schott*, [1901] P. 190.

(u) *In bonis Honeywood*, [1895] P. 341; *In bonis Baskett*, 78 L. T. 843; *In bonis De Rosaz*, 2 P. D. 66; *In bonis Cooper*, [1899] P. 193.

(v) 4 Sw. & Tr. 23.

CHAPTER XV. Court of Construction to shew that certain words contained in the probate copy were inserted in the original will by mistake (*w*).

Execution of wrong instrument; —of a pretended will; Parol evidence is admissible in the Court of Probate to shew that a document duly executed as a will was never intended to operate as the will of the deceased; as, if two persons, intending to make their wills, each by mistake executes the document prepared for the other (*x*): or to shew that a document was not intended to be testamentary, but only as a contrivance to effect some collateral object, e.g., to be shewn to another person to induce him to comply with the pretended testator's wish (*y*). In both these cases the animus testandi is wanting. So extrinsic evidence is admissible to prove that an incomplete will was intended to revoke a complete will of earlier date (*z*), or to shew what papers constitute the will, and for this purpose declarations made by the testator, whether before or after the execution of the will, are admissible (*a*). But if

—of a duplicate. probate is granted of two documents which are identical, or nearly identical, parol evidence is not admissible in the Court of Construction to shew that the later was intended to be a duplicate of the earlier one, and not a distinct instrument (*b*).

Presumptions as to testator's knowledge of contents of his will. The execution of a will by the testator is *primâ facie* proof that he knew and approved its contents (*c*), and if a testator knows that certain words are contained in his will and executes it under a mistaken belief as to their effect, they stand as part of the will (*d*). If a testator reads over his will, or has it read over to him, he is presumed to know its contents unless it can be shewn that the will was not read over in a proper way (*e*).

Mistake corrected by Court of Construction. Cases have occurred in which, after a will has been proved, the Court of Construction has arrived at the conclusion that a word forming part of the description of a person or thing has been inserted by mistake, and that a person or thing to which the description does not apply was intended to be referred to by the testator (*f*).

(*w*) *Re Bywater*, 18 Ch. D. 17.
(*x*) *In bonis Hunt*, L. R., 3 P. & D. 250; *Estate of Meyer*, [1908] P. 353.

(*y*) *Lister v. Smith*, 3 Sw. & Tr. 282.
(*z*) *Jenner v. Finch*, 5 P. D. 106; *Estate of Bryan*, [1907] P. 125; ante, p. 176.

(*a*) *Gould v. Lakes*, 6 P. D. 1.
(*b*) *Wilson v. O'Leary*, L. R., 7 Ch. 448. The decision in *Hubbard v. Alexander*, 3 Ch. D. 738, is obviously erroneous: the question whether the testator meant the legacies to be cumulative or substitutional must be decided by the wording of the will and codicils,

with evidence of the state of facts. See *Robley v. Robley*, *Coote v. Boyd*, *Whyte v. Whyte*, and other cases cited in Chap. XXX. In *Doe v. Strickland*, 8 C. B. 724, the will was a will of realty under the old law.

(*c*) *Beamish v. Beamish*, [1894] 1 Ir. R. 7.

(*d*) *Guardhouse v. Blackburn*, L. R., 1 P. & D. 109; *Collins v. Elstone*, [1893] P. 1.

(*e*) *Fulton v. Andrew*, L. R., 7 H. L. 448; *Garnett-Botfield v. Garnett-Botfield*, [1901] P. 335.

(*f*) Post, p. 512.

Mr. Jarman continues (g): "Parol evidence is also admissible for the purpose of counteracting fraud; for to reject it in such case would be to make a rule, whose main object is to prevent injustice, instrumental in producing it. As in *Doe d. Small v. Allen* (h), where it appeared that the testator, upon being pressed by some persons to execute a second will, inquired if it were the same as the former; and being told that *it was*, executed the will, which turned out to be different. The Court of King's Bench held that evidence of these facts ought to have been received. 'I agree,' said Lord Kenyon, 'that the contents of a will are not to be explained by parol evidence; but, notwithstanding the Statute of Frauds, evidence may be given to shew that a will was obtained by fraud; and the effect of the evidence offered in this case was to shew that one paper was obtruded on the testator for another which he intended to execute.'" And as a charge of fraud may be supported, so it may be rebutted by evidence of this nature. Thus, in *Doe v. Hardy* (i), where the defence to a claim under a codicil to the testator's will was, that the codicil was a forgery; an objection was made to the receipt of evidence offered by the plaintiff of declarations by the testator, that he intended the lessor of the plaintiff should have the property. But Littleale, J., thought the declarations of the testator were admissible to shew his intentions where the defence was either fraud, circumvention, or forgery.

CHAPTER XV.

Rule in cases of fraud.

One will surreptitiously obtruded for another.

If A. fraudulently induces a testator to include in his will a legacy or other provision in A.'s favour, probate will be granted of the rest of the will (j).

If a testator is induced by the fraud of A., the residuary legatee, to omit from his will a provision in favour of B., it seems that the Court of Probate may declare A. to be a trustee for B (k). A Court of Equity has no jurisdiction (l).

Whether person obtaining will by fraud is a trustee for persons defrauded.

IV.—Admissible to prove or repel Trusts, Double Portions, &c.—Mr. Jarman continues (m): "Another illustration of the principle occurs in the case suggested by Lord Eldon in *Stickland v.*

Promise by heir or devisee to testator enforced.

(g) First ed. p. 356.

(h) 8 T. R. 147,

(i) 1 Moo. & R. 525.

(j) *Farrelly v. Corrigan*, [1899] A. C. 563.

(k) See *Mitchell v. Gard*, 3 Sw. & Tr. 75; *Betts v. Dougherty*, 5 P. D. 26.

(l) *Allen v. M'Pherson*, 1 H. L. C.

191; *Meluish v. Milton*, 3 Ch. D. 27. An attempt to invoke the jurisdiction was made in *Re Birchall*, 44 L. T. 243, but there the defendant was executor and trustee of the will: the attempt failed in the absence of evidence of fraud.

(m) First ed. p. 356.

CHAPTER XV. *Aldridge* (n), 'of an estate suffered to descend, the owner being informed by the heir, that, if the estate is permitted to descend, he will make a provision for the mother, wife, or any other person, there is no doubt equity would compel the heir to discover whether he did make such promise. So, if a father devises to the youngest son, who promises that, if the estate is devised to him, he will pay 10,000*l.* to the eldest son, equity would compel the former to discover whether that passed in parol; and, if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the value of 10,000*l.*'

"And it is clear that, in such a case (and this, indeed, is the point which is chiefly material here), if the trust were denied by the heir or devisee, it might be proved aliunde" (o).

Trust appar-
ent on will.

In the cases cited by Mr. Jarman, the existence of a trust was not disclosed on the face of the will, but the principle applies also to those cases where the gift appears by its terms to be wholly or partially upon trust (p).

Re Fleetwood.

In *Re Fleetwood* (q), a testatrix bequeathed to B. her personal estate, "to be applied as I have requested him to do." Before the execution of the will the testatrix communicated to B. her wishes with regard to the disposition of the property. Hall, V.-C., upon the authority of decisions made before the Wills Act (which requires a will of personalty to be in writing), and of an Irish case, *Riordan v. Banon* (r), held that evidence of the parol trust thus communicated was admissible, and that the trust was valid against the next-of-kin. The correctness of the decision seems to have been questioned by Farwell, J., in *Re Huxtable* (s), but no doubt on this point was felt by the Court of Appeal (t). In that case a testatrix bequeathed 4,000*l.* to C, "for the charitable purposes agreed upon between us"; the Court of Appeal held that evidence was admissible to shew what the charitable purposes were, but not to shew that they were only to continue during the life of C.

Doctrine does
not apply to
powers.

The doctrine laid down in *Re Fleetwood* does not apply to powers. Accordingly in *Re Hetley* (u), where the testator gave his property to his wife for life, and empowered her to dispose of it "in accordance

(n) 9 Ves. 519. See also *Drakeford v. Wilks*, 3 Atk. 539. The question of undisclosed trusts is also discussed in Chap. XXIV.

(o) See *Oldham v. Litchford*, 2 Vern. 506; *Chester v. Urwick*, 23 Beav. 407; *Proby v. Landor*, 28 Beav. 504; *McCormick v. Grogan*, L. R., 4 H. L. 82; *Norris v. Frazer*, L. R., 15 Eq. 318, and

other cases cited in Chap. XXIV.

(p) *Podmore v. Gunning*, 7 Sim. 644; *Irvine v. Sullivan*, L. R., 8 Eq. 673; and other cases cited in Chap. XXIV.

(q) 15 Ch. D. 594.

(r) Ir. R., 10 Eq. 469.

(s) [1902] 1 Ch. 214.

(t) [1902] 2 Ch. 793.

(u) [1902] 2 Ch. 867.

with my wishes verbally expressed by me to her," it was held by Joyce, J., that evidence could not be admitted to shew what these wishes were, and that there was consequently an intestacy, subject to the widow's life interest. CHAPTER XV.

It is also clear that the doctrine in question does not allow a testator to create a trust by an unattested paper not incorporated in the will, and not communicated to the devisee or legatee during the testator's lifetime. Thus, where a testator by his will gave all his property to C. absolutely, and died without having communicated to C. any directions as to its disposal, but after the testator's death an unattested paper was found expressing the testator's wish that C. should hold the property as trustee for B. ; it was held by Sir E. Kay, J., that no valid trust in favour of B. was created ; and C. admitting himself to be only a trustee, he was declared to be trustee for the next-of-kin (v).

"It seems, too," says Mr. Jarman (w), "that parol evidence is admissible for the purpose of rebutting a resulting trust ; as in such case, it does not contradict the will, its effect being to support the legal title of the devisee against, not a trust expressed (for that would be to control the written will), but against a mere equity arising by implication of law" (x). But the doctrine in question is anything but clear. In *Gladding v. Yapp* (y), where it was contended that a direction to keep accounts made the executrix a trustee, Leach, V.-C., stated the rule thus : "Parol evidence is not admissible to contradict a will, and if the will contain express declarations that the executor is to be a trustee, evidence cannot be received against the effect of that declaration ; but if there be no express declaration of trust in the will, and only circumstances which afford inference or presumption of trust in the executor, there parol evidence is admissible to answer that inference or presumption." And in *Croome v. Croome* (z), Stirling, J., held that parol evidence was not admissible to rebut a resulting trust. Whether parol evidence is admissible to repel a resulting trust.

If a testator appoints his debtor as his executor, although this operates as a release of the debt at law, in equity the debt remains for the benefit of the testator's legatees. But this equity may be Imperfect release or gift to executor.

(v) *Re Boyes*, 26 Ch. D. 531.

(w) First ed. p. 357.

(x) *Mallabar v. Mallabar*, Cas. t. Talb. 79.

(y) 5 Madd. 56 ; *Barrs v. Fewkes*, 34 L. J. Ch. 522.

(z) 59 L. T. 582 ; 61 L. T. 814. The Court of Appeal and House of Lords held that there was no resulting trust, and consequently the point as to evidence became immaterial. See post, Chaps. XXI., XXIV.

CHAPTER XV. rebutted by evidence that the testator during his lifetime forgave the debt, without legally releasing it. Thus in *Strong v. Bird* (a), a testatrix appointed A. her executor. Some years before, A. had borrowed money from the testatrix, part of which he repaid. He alleged that she had forgiven him the balance, and adduced evidence which satisfied the Court that she intended to do so, and thought she had done so. It was held that as the appointment of A. as executor operated as a release of the debt at law, the intention of the testatrix to release it made the release complete in equity also.

On the same principle, if a testator makes an imperfect gift of personal property to A. in such a way as not to pass the property at law, but shewing a complete intention to do so, and appoints A. his executor, this makes the gift effectual (b).

It is immaterial whether the donee is sole executor, or one of several (c).

Parol evidence admissible to support claim of executor to residue against Crown.

Presumption raised by legacy to sole executor,

On the principle above stated, parol evidence was, under the old law, admissible to support the claim of an executor (now taken away by the Executors Act, 1830) to the undisposed of residue of a testator's personal estate, against the presumption in favour of the next-of-kin created by a legacy to the executor (d), and is still admissible in cases where a testator leaves no next-of-kin, so that there is a contest between the executor and the Crown. In such cases, the general rule is that the executor shall have "the undisposed of residue" (that is, all personal estate which is not disposed of, or attempted to be disposed of, by the will (e)), unless there is a strong presumption to the contrary. A legacy to him (specific or pecuniary), affords that presumption (f), but it is not so strong as to deprive

(a) L. R., 18 Eq. 315. *Re Applebee*, [1891] 3 Ch. 422; *Re Hyslop*, [1894] 3 Ch. 522; ante, p. 486.

(b) *Re Griffin*, [1899] 1 Ch. 408; *Re Stewart*, [1908] 2 Ch. 251.

(c) Ibid.

(d) The question is discussed in detail in Roper on Legacies, 4th ed., 1685 seq. Only the most important rules are here referred to. As to the effect of an express gift of the residue to an executor, see Chap. XXI.

(e) Consequently he does not take property comprised in a bequest which lapses or is void (*Androvin v. Poilblanc*, 3 Atk. 299; *Bennet v. Batchelor*, 3 Br. C. C. 28; *A.-G. v. Tomkins*, Ambl. 216), or property given to the executor upon a trust which is void or fails (*Powell v. Merrett*, 1 Sm. & G. 381; *Dacre v. Patrickson*, 1 Dr. & S. 182; *Johnstone*

v. Hamilton, 11 Jur. N. S. 777; *Chester v. Chester*, L. R., 12 Eq. 444): or upon trusts which are not declared (*Milnes v. Slater*, 8 Ves. 295; *Taylor v. Haygarth*, 14 Sim. 8; *Vezey v. Jamson*, 1 S. & St. 69; *Cradock v. Owen*, 2 Sm. & G. 241; *Read v. Stedman*, 26 Bea. 495; *Chester v. Chester*, L. R., 12 Eq. 444).

(f) *Nourse v. Finch*, 1 Ves. jun. 344; s. c., s. n. *Hornsby v. Finch* 2 Ves. jun. 78; *Southcot v. Watson*, 3 Atk. 226; *Seley v. Wood*, 10 Ves. 71; *Oldman v. Slater*, 3 Sim. 84; and *Lynn v. Beaver*, T. & R. 63 (three cases of reversionary legacies); *Zouch v. Lambert*, 4 Br. C. C. 326 (life interest to testator's wife); *Dicks v. Lambert*, 4 Ves. 725 (same case). As to a contingent reversionary interest, see *Jones v. Westcomb*, Prec. Ch. 316; *Lynn v. Beaver*, T. & R. 63. The executor's

him of the opportunity of proving, by parol evidence, that the testator intended him to take the residue beneficially (g). Where there are two or more executors, a similar presumption is raised by the fact that pecuniary legacies of equal amount are given to all of them, but not where the legacies are unequal; or where there are legacies to some and not to others (h); or where, although equal pecuniary legacies are given to all the executors, other interests in the personal estate are given them by the will, which result in their taking unequal beneficial interests (i). It seems that the presumption would arise if the executors took equal interests in the personalty, but unequal interests in the real estate (ii).

It may appear from the general tenour of the will, or from the terms in which the executor is appointed, that he is "only named for the sake of executing the will, and to have the trouble and not any benefit" (j). Again, if the testator "manifests an inchoate intention to appoint a residuary legatee," but fails to do so, this raises a presumption that the executor was not intended to take the residue for his own benefit, which may be rebutted by parol evidence (k). But if the testator gives a legacy to the executor (or to one of several executors) "for his care" or "for his trouble," or gives the residue upon a trust which fails, or clearly intends to create a trust although he does not do so, then it appears on the face of the will that the executor was intended to take the office only (l), and parol evidence to shew that he was intended to take

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—or equal legacies to several executors.

Intention to exclude executor shewn in other ways.

claim to the residue is not affected by a devise or bequest to his wife: *Wilson v. Ivat*, 2 Ves. sen. 166; *Fruer v. Bouquet*, 21 Bea. 33.

(g) *Clennell v. Lewthwaite*, 2 Ves. jun., 465; *Langham v. Sanford*, 2 Mer. 6. But if the legacy is given by way of exception out of another bequest, or as a particular interest (*Griffith v. Rogers*, Pr. Ch. 231; *Beaufort v. Granville*, 3 Bro. P. C. 37; *Newstead v. Johnston*, 2 Atk. 45), no presumption arises against the executor's claim. Where the presumption arises, it is not rebutted by the fact that legacies are given to the next-of-kin: *Randall v. Bookey*, 2 Vern. 425; *Dicks v. Lambert*, 4 Ves. 725; *Farrington v. Knightly*, 1 P. W. 544.

(h) *Saltmarsh v. Barrett*, 3 D. F. & J. 279; *Cradock v. Owen*, 2 Sm. & G. 241; *Re Hudson's Trusts*, 52 L. J. Ch. 789; *Bowler v. Hunter*, 1 Br. C. C. 328; *Oliver v. Frewen*, ib. 590; *Williams v. Jones*, 10 Ves. 77; *Griffiths v. Hamilton*, 12 Ves. 298; *Wilson v. Ivat*, 2 Ves. sen. 166; *Rawlings v. Jennings*, 13 Ves. 39; *Re Knowles*, 49 L. J. Ch. 625;

Pratt v. Sladden, 14 Ves. 193; *Russell v. Clowes*, 2 Coll. 648; *Omanney v. Butcher*, T. & R. 260.

(i) *Att.-Gen. v. Jefferys*, [1908] A. C. 411, affirming C. A. in *Re Glukman*, [1908] 1 Ch. 552, reversing [1907] 1 Ch. 171.

(ii) *Muckleston v. Brown*, 6 Ves. 64.

(j) *Androvin v. Poilblanc*, 3 Atk. 300; *Seley v. Wood*, 10 Ves. 71; *Braddon v. Farrand*, 4 Russ. 87; *De Mazar v. Pybus*, 4 Ves. 644; *Giraud v. Hanbury*, 3 Mer. 150; *Dillon v. Reilly*, 9 L. R. Ir. 57; *Sadler v. Turner*, 8 Ves. 617.

(k) *Bishop of Cloyne v. Young*, 2 Ves. sen. 91; *North v. Purdon*, 2 Ves. sen. 495; *Mordant v. Hussey*, 4 Ves. 117; *Mence v. Mence*, 18 Ves. 348; *Re Bacon's Will*, 31 Ch. D. 460.

(l) *Seley v. Wood*, 10 Ves. 71; *White v. Evans*, 4 Ves. 21; *Milnes v. Slater*, 8 Ves. 295; *Ellicock v. Mapp*, 3 H. L. C. 492; *Taylor v. Haygarth*, 14 Sim. 8; *Read v. Stedman*, 26 Bea. 495; *Dawson v. Clarke*, 15 Ves. 409; 18 Ves. 247; *Re Roby*, [1908] 1 Ch. 71, post, Chap. XXI. In *Dawson v. Thorne*, 3 Russ. 235, it was held that the bequest to one

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the residue beneficially is not admissible (*m*). The executor's claim is also excluded, if the testator declares his intention of disposing of a part only of his personal estate (*n*), or directs that his residue shall go as if he were to die intestate (*o*), or if there is a secret trust which fails (*p*). In all these cases the executor is trustee for the next-of-kin, or if there are none, for the Crown (*q*).

Specific trust. But if the executor is only appointed trustee for a specific purpose, this does not exclude his claim (*r*).

To rebut presumption against double portions and legacies, satisfaction, &c.

Parol evidence may also be adduced to repel the presumption that two legacies given to the same person by the same instrument were intended to be substitutional (*s*); and the presumption against double portions (*t*); in other words, to shew that a legacy by a parent to his child was intended not to be (as the general rule would make it) a satisfaction of a portion previously due to such child by the testator, or that a subsequent advancement to the child was not to be (as it would be, according to the general doctrine) a satisfaction or ademption, entire or partial, according to its amount (*u*), of a legacy to such child (*v*). It is hardly necessary to say that, where a will contains an express direction to bring advances into hotchpot, parol evidence is not admissible to shew that the testator afterwards agreed to treat the advances as gifts (*w*). So evidence is admissible to rebut the presumption that a debt is satisfied by a legacy of greater amount (*x*), or that a legacy given for a purpose has been adeemed by a payment for the same purpose (*y*).

Other examples.

It is clear, also, that parol evidence is admissible to prove the fact that the testator intended to place himself in loco parentis towards a legatee, who was not his child (*z*); or to prove that gifts have been made to the legatee by the testator in his lifetime, and that they

of the executors was for services not incident to the office.

(*m*) *Lynn v. Beaver*, T. & R. 68; *Re Hudson's Trusts*, 52 L. J. Ch. 789; *Rachfield v. Careless*, 2 P. W. 158; *Roper on Legacies*, 1702, 1739. If the intention to create a trust is not clear, parol evidence is admissible: *Gladding v. Yapp*, 5 Madd. 56.

(*n*) *Urquhart v. King*, 7 Ves. 225.

(*o*) *Cranley v. Hale*, 14 Ves. 307.

(*p*) *Johnstone v. Hamilton*, 11 Jur. N. S., 777.

(*q*) *Taylor v. Haygarth*, 14 Sim. 8; *Johnstone v. Hamilton*, supra; *Read v. Stedman*, supra; *Chester v. Chester*, L. R., 12 Eq. 444.

(*r*) *Batteley v. Windle*, 2 Br. C. C. 31; *Griffiths v. Hamilton*, 12 Ves. 298;

Pratt v. Sladden, 14 Ves. 193.

(*s*) See Chap. XXX.

(*t*) The old cases will be found in *Roper on Legacies*, 391 seq.; among modern cases may be mentioned *Re Tussaud's Estate*, 9 Ch. D. 363; *Montagu v. Earl of Sandwich*, 32 Ch. D. 525; *Re Lacon*, [1891] 2 Ch. 482; *Re Ashton*, [1898] 1 Ch. 142; *Re Scott*, [1903] 1 Ch. 1. See Chap. XXXII.

(*u*) *Pym v. Lockyer*, 5 My. & C. 29.

(*v*) *Roper on Legacies*, 367 seq.

(*w*) *Smith v. Conder*, 9 Ch. D. 170.

(*x*) *Wallace v. Pomfret*, 11 Ves. 542.

(*y*) *Re Pollock*, 28 Ch. D. 552. See the rule stated in Chap. XXXII.

(*z*) *Powys v. Manfield*, 3 My. & C. 359.

were of a nature to bring them within the equitable presumption (a), or within the terms of an express declaration contained in the will (b), that advancements should be in satisfaction of legacies. And for this purpose contemporaneous declarations of the testator's intentions are admissible; since the rule which would exclude them, if the intention had been committed to writing, does not apply.

In all these cases, where parol evidence is admissible to repel the presumption, counter-evidence is also admissible in support of it; the evidence on either side being admissible, not for the purpose of proving, in the first instance, with what intent the writing was made, but simply with the view of ascertaining whether the presumption, which the law has raised, is well- or ill-founded (c). But evidence in support of the presumption is not admissible, unless evidence to rebut it has been first admitted; still less is evidence admissible to create a presumption not raised by the law; in the former case it is unnecessary (d), and in both cases its effect would be to contradict the apparent meaning of the will (e).

Counter-evidence.

V.—Admissible to explain Technical Terms, Foreign Words, Nicknames, &c.—If a testator make his will in a foreign language, or introduce therein certain terms or characters which are not understood by the Court, recourse may be had to persons conversant with the subject, for the purpose of translating the will, or deciphering the characters (f). And where the testator makes use of words which in their ordinary sense are intelligible, but which are used by a certain class of persons to which the testator belonged (g), or in a certain locality where he dwelt (h), in a peculiar sense, parol evidence

As to translating or deciphering peculiar characters,

—and explaining local or technical terms.

(a) *Rosewell v. Bennet*, 3 Atk. 77; *Kirk v. Eddowes*, 3 Hare, 509; *Twining v. Powell*, 2 Coll. 262.

(b) *Whateley v. Spooner*, 3 K. & J. 542; *McClure v. Evans*, 29 Beav. 422.

(c) *Kirk v. Eddowes*, 3 Hare, 517.

(d) *Kirk v. Eddowes*, 3 Hare, 520; *White v. Williams*, 3 V. & B. 72.

(e) *Hall v. Hill*, 1 D. & War. 94; *Lee v. Pain*, 4 Hare, 216; *Palmer v. Newell*, 20 Beav. 39.

(f) *Masters v. Masters*, 1 P. W. 421; *Norman v. Morrell*, 4 Ves. 769; *Kell v. Charmer*, 23 Beav. 195; *Clayton v. Lord Nugent*, 13 M. & W. 206, per Alderson, B.; *Goblet v. Beechey*, 3 Sim. 24, 2 R. & My. 624, Wig. Wills, App. In the last case the question was, whether the word "mod." occurring in the codicil to the will of a sculptor, applied to his models. The opinions of sculptors and persons skilled in handwriting differed

on this point; and the ultimate conclusion of Lord Brougham was, that the formal bequest in the will could not be revoked by an imperfectly-expressed and doubtful word introduced into the codicil. An attempt was made to explain the testator's meaning by the evidence of a person who attested his will; but this, of course, was inadmissible.

(g) *Clayton v. Gregson*, 5 Ad. & Ell. 302; *Shore v. Wilson*, 9 Cl. & Fin. 525.

(h) Per Parke, B., *Richardson v. Watson*, as reported 1 Nev. & M. 575; *Smith v. Wilson*, 3 B. & Ad. 728; *Anstee v. Nelms*, 1 H. & N. 225. In the last case, the devise was of "lands in the parish of D.," and evidence was admitted to shew that a part of the testator's lands which was in another parish was generally reputed to be in the parish of D. But where a word has received a legal signification by statutory definition evidence

Meaning of contraction used by testator.

CHAPTER XV. may be given to shew the fact of such usage, unless it also appears on the face of the will that the testator used the word in the ordinary sense. Generally speaking, for instance, evidence would be admissible to shew that the word "close" meant the same thing as "farm" in the country where the property was situate; but if the testator has in another part of the will used the word "closes" (in the plural), it is manifest that he has used the word "close" in its ordinary sense as denoting an "inclosure"; and then such evidence is not admissible; for that would be to contradict the words of the will (j).

In *Re Rayner (k)*, it was held that a testator, in using the word "securities" meant investments, and evidence was admitted to shew that the word was commonly used in this sense by stock-brokers and men of business, but the decision seems to have turned on the language of the testator.

In *Re Glassington (l)*, a testatrix devised all her "real estate"; she never had any real estate to which she was beneficially entitled, but there was vested in her as trustee of her father's will certain real estate upon trust for sale, and she was beneficially entitled to a moiety of the proceeds of sale; it was held that this moiety passed by the devise (m). Evidence was tendered to the effect that she had before the execution of her will stated that she was entitled to real estate; this evidence was not used, but Joyce, J., inclined to think that it was admissible.

Nicknames.

Again, the testator may have habitually called certain persons by peculiar or nicknames, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence, to shew the sense in which he used them, just as if his will were written in cypher or in a foreign language (n). Thus, in *Lee v. Pain (o)*, a testatrix, by a codicil dated in 1836, bequeathed "to Mrs. and Miss Bowden, of H., widow and daughter of the late Rev. Mr. Bowden, 200*l.* each." The legacies were claimed by Mrs. and Miss Washbourne, the widow and daughter of Mr. D. Washbourne, who had been a dissenting minister at H. The evidence proved that Mrs. Washbourne was the daughter of Mr. Bowden, who died leaving a widow, which

is not admissible to shew that a testator has used that word in a different sense: thus it has been held that extrinsic evidence was not admissible to shew that a testator who devised forty-five acres of land in Ireland meant Irish, not statute, acres: *O'Donnell v. O'Donnell*, 13 L. R. Ir. 226.

(j) *Richardson v. Watson*, 1 Nev. & Man. 575, cited post, p. 518, on another

point. As to the actual decision in this case, see ante, p. 460.

(k) [1904] 1 Ch. 176.

(l) [1906] 2 Ch. 305.

(m) In accordance with the doctrine stated post, Chap. XXXV, where this case is referred to.

(n) Per Lord Abinger, C.B., *Doe v. Hiscocks*, 5 M. & Wels. 368.

(o) 4 Hare, 251.

latter died in 1820; that the testatrix had been intimately acquainted with Mr. Bowden, and with the claimants, whom she had been in the habit of calling by the name of Bowden, and, on the mistake being pointed out, had acknowledged it. Sir J. Wigram, V.-C., held that the evidence was admissible, and, there being no other Mrs. and Miss Bowden, decreed the legacies to the claimants (p).

If there is no person strictly answering the description used by the testator, evidence is admissible to shew that there is a person commonly known by the name used by the testator, although it is not his real name (q).

It frequently happens that a testator gives property to persons by some generic description—such as “children,” “nephews,” &c.—which has a well-defined meaning, but the extrinsic circumstances shew that the testator used the description in an inaccurate sense. These cases are referred to in the next section.

Gifts to relations inaccurately described.

VI.—When the State of Facts at the Date of the Will may be regarded.—“Though it is (as we have seen) the will itself (and not the intention, as elsewhere collected) which constitutes the real and only subject to be *expounded*, yet, in performing this office, a Court of construction is not bound to shut its eyes to the state of facts under which the will was made; on the contrary, an investigation of such facts often materially aids in elucidating the scheme of disposition which occupied the mind of the testator. To this end, it is obviously essential that the judicial expositor should place himself as fully as possible in the situation of the person whose language he has to interpret (r); and guided by the light thus thrown on the testamentary scheme, he may find himself justified in departing from a strict construction of the testator’s language, without (to borrow the words of an elegant writer) allowing ‘conjectural interpretation to usurp the place of judicial exposition’ (s). Thus, if it appears (and of course it can only appear by extrinsic evidence), that there is no subject or object answering

State of facts at the date of will proper to be regarded.

(p) See also Wigr. Wills. pl. 65, and n.

(q) *Dowset v. Sweet*, Amb. 175; *Re Hooper*, 88 L. T. 160, and other cases cited in Chap. XXXV. And see the remarks on the case of *Beaumont v. Fell*, *infra*, p. 514.

(r) “You may place yourself, so to speak, in [the testator’s] armchair, and consider the circumstances by which he was surrounded when he made his will to assist you at arriving at his inten-

tion”: per James, L.J., in *Boyes v. Cook*, 14 Ch. D. p. 56. See also per Lord Cairns in *Charter v. Charter*, L.R., 7 H. L. 377.

(s) “Vide Wigram on ambiguities in Wills, and the Admissibility of Parol Evidence, 2nd ed. 75; a work which should be perused by every person who wishes to acquire an intimate acquaintance with this intricate subject.” (Note by Mr. Jarman.)

CHAPTER XV. to the description in the will, strictly and literally construed, but that there is a subject or object precisely answering to such description, interpreted according to the popular and less appropriate sense of the words, the conclusion that the testator employed them in the latter sense is irresistible. Examples of this principle of construction are widely scattered through the present treatise" (t). It may be discerned in those cases in which a disposition of property operates as an appointment under a special power, where it would otherwise be nugatory for want of property on which to operate (u). It is also exemplified in those cases in which a devise of lands at a given place has been extended to property not strictly answering to the description, because there is none which does precisely correspond to it (v), or in which an apparently specific bequest of stock in the public funds has been held to authorize payment of the legacy out of the general personal estate, the testator having no such stock when he penned the bequest (w). Again, we discover traces of the doctrine in the rule (hereafter discussed) which construes a gift to the children of a deceased person, or the children "now born" of a living person, as comprising illegitimate children, there being no legitimate child to supply the gift with a more appropriate object; or a gift to the testator's nephews, as a gift to his wife's nephews, he having none, and there being, at the date of his

(t) The rule as thus stated by Mr. Jarman (first ed. p. 363), is clearly established. See *Doe d. Templeman v. Martin*, 4 B. & Ad. 771, per Parke, J.; *Smith v. Doe d. Lord Jersey*, 2 Br. & B. 553, cit. 5 B. & Ald. 387, per Bayley, J.; *Doe d. Freeland v. Burt*, 1 T. R. 701; *Guy v. Sharp*, 1 My. & K. 602, per Lord Brougham; *Att.-Gen. v. Drummond*, 1 Dr. & War. 367, per Sugden, C.; *Shore v. Wilson*, 9 Cl. & Fin. 555, per Parke, B.; *Doe d. Thomas v. Beynon*, 12 Ad. & Ell. 431; *Blundell v. Gladstone*, 3 Mac. & G. 692; *Phillips v. Barker*, 1 Sm. & Gif. 583; Wigr. Wills, Prop. V. But in *Pilcher v. Hole*, 7 Sim. 210, the V.-C. said he could not look at the price of stocks for the purpose of putting a construction on a will. How far it may be assumed that a testator, when he makes his will, has the material circumstances in his mind, see *Hopwood v. Hopwood*, 22 Beav. 494, 495; *Re Herbert's Trusts*, 1 J. & H. 121. If he shews by the will that he has taken a mistaken view of the circumstances, that view must govern the construction; see *Hannam v. Sims*, 2 De G. & J. 151. As to the cases in which a legatee is allowed to adduce evidence to contra-

dict an erroneous statement in a will, see under "Estoppel," in Chap. XVI.

(u) See Chap. XXIII.

(v) *Doe v. Roberts*, 5 B. & Ald. 407; see *Baddeley v. Gingell*, 1 Exch. 319; but learn the limits of this doctrine from *Miller v. Travers*, 1 M. & Scott, 342.

(w) *Selwood v. Mildmay*, 3 Ves. 306; see, on this much-discussed case, *Miller v. Travers*, ubi sup. (where Tindal, C.J., refers it to the head "falsa demonstratio non nocet"). In *Lindgren v. Lindgren*, 9 Beav. 358, Lord Langdale, M.R., followed it, and said of it, "The absence of the fund purported to be given shewing that a specific legacy was not intended, other evidence was admitted to shew how the mistake arose: and this being clearly shewn, it was held that the legatees were entitled to payment out of the general personal estate." See also Wigram, Wills, pp. 102, 103, 164, 167; *Auther v. Auther*, 13 Sim. 422, where the V.-C. took the context for his sole guide. If in another part of the will the testator correctly described the subject, the inference that he meant to include it in the incorrect description would be rebutted, *Waters v. Wood*, 5 De G. & S. 717.

will, no possibility of his ever having any (*x*), or a gift "to the children of A. and B." (living persons), as meaning "to B. and the children of A." in equal moieties, it appearing that for some years before the date of the will A. had not lived with his wife and family (*y*); and lastly, in the rule which reads a devise or bequest as applying to a person or thing imperfectly answering the name and description in the will, there being no person or thing more precisely answering to them. The application of this last rule is discussed elsewhere in connection with the question of misnomer and misdescription (*z*), and in connection with the question what passes by a bequest of "real estate," "stock," "shares," "debentures," &c. (*a*). Extrinsic evidence is rarely admissible to explain the operation of a residuary bequest, but it was admitted in *Re Cadogan* (*b*), in order to assist the Court in determining whether a bequest of the testatrix's "money" passed the whole of her personal estate. In these instances, and many more which might be adduced, the application of the rules of construction evidently depends on and is governed by the state of extrinsic facts (*c*).

"It would be dangerous, however," as Mr. Jarman points out (*d*), "to place this statement of the doctrine in the hands of the reader, unaccompanied by a caution against the mistaken application of it to gifts comprising a subject or object, or a class of objects, which, by the rules of construction, is to be ascertained at the death of the testator, or at any other period posterior to the date of the will. In such cases, it would be manifestly improper to admit the state of facts existing when the will is made to have any influence upon the construction; for instance, since a residuary bequest comprehends all the personal property of which the testator is possessed at the time of his decease, the absence of any given species of property, or of any property whatever, at the date of the will, to satisfy such bequest, ought not, in the slightest degree, to affect its construction,

State of facts at date of will, when not to influence construction.

(*x*) *Sherratt v. Mountford*, L. R., 8 Ch. 928.

(*y*) *Re Walbran*, [1906] 1 Ch. 64.

(*z*) See Chap. XXXV, and also, in the case of charities, ante, p. 227.

(*a*) See Chap. XXXV.

(*b*) 25 Ch. D. 154. See *Higgins v. Dawson* (infra, p. 507), where the will was construed without recourse to extrinsic evidence; and compare *Re Glassington*, [1906] 2 Ch. 305, where the admissibility of evidence in the case of a gift of "real estate" was discussed: ante, p. 502.

(*c*) "Observe that, in all the above cases, the parol evidence is not adduced

to shew that the testator actually intended the devise to have the operation which is given to it, but merely to supply facts from which the Court infers such to be the intention; and this inference would not be allowed to be controlled by the production of evidence shewing that the construction thus put on the will is at variance with the testator's real intention." (Note by Mr. Jarman, first ed. p. 365.) See *Stringer v. Gardiner*, 27 Beav. 35, 4 De G. & J. 468; *Sherratt v. Mountford*, L. R., 8 Ch. 928, and the cases cited in the next section.

(*d*) First ed. p. 365.

CHAPTER XV. by extending the bequest to property not strictly belonging to the testator, or over which he has not any power of disposition. On the same principle, if a testator bequeaths all the stock of a particular denomination, of which he may be possessed at the time of his decease, no argument is supplied for extending the bequest to stock of any other denomination by the circumstance that the testator had at the making of the will no stock answering to the description (e). Again, as a devise or bequest to the children of a living person as a class will comprise all who come in esse before the death of the testator, the fact of there being no child properly so called, i.e., no legitimate child, at the date of the will, raises no necessary inference that the testator had in his contemplation then existing illegitimate children" (f). And in every case it must be remembered that, whatever the surrounding circumstances, it is still the will that is to be construed. In the words of an eminent Judge (g), "when the Court has possession of all the facts which it is entitled to know, they will only enable the Court to put a construction on the instrument consistent with the words; and the Judge is not at liberty, because he has acquired a knowledge of those facts, to put a construction on the words which they do not properly bear."

Where will is unambiguous.

The reader will have gathered from the foregoing discussion of the general principle, that if the words of the will are definite and free from doubt, parol evidence is not admissible to shew that they meant something different (h). Thus in *Maybank v. Brooks* (i), a testator bequeathed a legacy to A., "his executors, administrators and assigns:" A. was dead at the date of the will, which, however, took no notice of the fact: but the personal representative of A. claimed the legacy, insisting that the terms of the bequest made it transmissible, and in support of his claim proposed to read (amongst other) evidence of the testator's knowledge that A. was dead: but Lord Thurlow rejected it, saying, "The only fact to which evidence is afforded is, that the death of A. was within the knowledge of the testator. The end to which it is to be read is, that the legacy was meant to be transmissible: that could not be

(e) The foregoing statement of the general principle must, of course, be read subject to the qualification that if there is any ambiguity in the description of the property, parol evidence as to the state of the testator's property is admissible, vide supra, pp. 503 seq.

(f) Post, Chap. XLIII., and see *Doe d. Allen v. Allen*, 12 Ad. & E. 451.

(g) Per Sugden, C., *Att.-Gen. v. Drummond*, 1 D. & War. 367. And

see per Cotton, L.J., *Everett v. Everett*, 7 Ch. D. 433, 434.

(h) Compare the rule that where there is a person answering the description of a legatee, &c., in the will, parol evidence is not admissible to shew that the testator meant some one else who does not answer to the description: post, p. 527.

(i) 1 Br. C. C. 84.

from a legatee who had been dead several years. . . . I must accordingly decree the legacy to be lapsed." Again, where a testator, after directing payment of his debts and funeral and testamentary expenses, bequeathed a number of pecuniary legacies, and then gave "all the residue and remainder" of two specified mortgage debts then due to him, after payment of his funeral and testamentary expenses, to three persons named, it was held that parol evidence could not be admitted to shew the state of the testator's property in order to found on it the inference that the testator meant his legacies, as well as his debts, &c., to be paid out of the mortgage debts (j). The earlier authorities (elsewhere referred to) of *Fonnereau v. Poyntz*, *Colpoys v. Colpoys*, *Att.-Gen. v. Grote*, *Barksdale v. Gilliat*, and *Druce v. Denison*, in each of which evidence of the condition of the testator's property was admitted, were examined by Rigby, L.J., and shewn to be either cases in which property had been bequeathed by an unintelligible description (k), or cases in which the testator had, by a testamentary document, referred to the state of his property as explaining the dispositions of his will. Unless some such question arises, it is clear that evidence as to the amount or state of the testator's property is inadmissible to influence the construction of the will, whether the gift is specific (l) or residuary (m), and whether the property alleged to be disposed of or affected is the testator's own property, or property over which he has a power of appointment (n).

For the same reason, extrinsic evidence is not admissible to shew that a plain and unambiguous direction in a will is founded on a mistake on the part of the testator. Thus, where a testator, after reciting that he had advanced to A. 4,000*l.*, directed that 4,000*l.* should be brought into account and deducted from his share of the residue, it was held that A. was bound by the recital, although the

Evidence inadmissible to prove recital, &c. to be erroneous.

(j) *Higgins v. Dawson*, [1902] A. C. 1, reversing the decision of Lord Alverstone and Collins, L.J. (Rigby, L.J., dissenting), in *Re Grainger*, [1900] 2 Ch. 756.

(k) Where a gift is *primâ facie* specific, evidence of the state of the property at the date of the will is admissible: *Sayer v. Sayer*; *Innes v. Sayer*, 7 Ha. 377; 3 Mac. & G. 607. See *Horwood v. Griffith*, 4 D. M. & G. 708.

(l) *Horwood v. Griffith*, 4 D. M. & G. 708. The decision of Lord Brougham in *Boys v. Williams*, 3 Sim. 563; 2 R. & M. 689, seems to be erroneous.

(m) *Stephenson v. Heathcote*, 1 Ed. 38; *Cave v. Cave*, 2 Ed. 144; *Sibley v.*

Perry, 7 Ves. 532; *Lord Inchiquin v. French*, Amb. 40; *Abbott v. Middleton*, 7 H. L. C. 68; Wigr. Wills, p. 81, 3rd ed. *Doe v. Gillard*, 5 B. & Ald. 788, is contra: sed qu. But it is otherwise if it appears by the will that the testator is estimating the amount of his property and its sufficiency for the payments he directs; *Barksdale v. Gilliat*, 1 Sw. 565; *Colpoys v. Colpoys*, Jac. 451, 457; and see *Singleton v. Tomlinson*, 3 App. Ca. 418, 425. And as to real estate see *Stanley v. Stanley*, 2 J. & H. 503: with which compare *Davenport v. Coltman*, 12 Sim. 605; *Tennent v. Tennent*, 1 J. & Lat. 384.

(n) See *Re Huddleston*, [1894] 3 Ch. 595.

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amount advanced to him was less than 4,000*l.* (o). In *Re Taylor's Estate* (p), the direction to bring advances into account was so worded as, if literally followed, to lead to a palpable absurdity ; the Court therefore held that evidence was admissible to shew that the statements of fact contained in the will were inaccurate. This decision, therefore, turned on the special words of the will, and does not affect the general principle laid down in *Re Aird's Estate* (q).

Inadmissible to define what is indefinite.

It also follows that if the language of the testator is vague and indefinite, parol evidence is not admissible to shew that he had something definite in his mind. Thus, if he gives property to be held on trusts contained and specified in any memorandum amongst his papers, parol evidence is inadmissible to shew that he had in his mind an existing document (r).

Effect of the Wills Act on the cases under consideration.

" And it is material to observe," says Mr. Jarman (s), " that the recent enactment [stat. 1 Vict.] which (we have seen) makes the will speak as to both real and personal estate from the death of the testator, will tend greatly to narrow the practical range of the rule which authorizes the application of words to a less appropriate subject, on account of the non-existence of one, strictly and in all particulars answering to those words. If, therefore, a testator, by a will made or republished since 1837, should devise all his lands in the parish of A., the fact of his *then* not having lands in that parish will supply a much less forcible and conclusive argument than heretofore, for holding the words to apply to lands in a contiguous parish, seeing that a testator not only *may* extend his devise to after-acquired estates, but that a devise is to be construed as speaking at his death, unless the contrary appears ; so that the testator may have contemplated, and is to be presumed to have contemplated, the future acquisition of lands in the parish in question, to satisfy the terms of the devise in their strict and proper acceptation."

Parol evidence admissible to shew what is comprised within a given description.

VII.—Admissible to Identify Subject or Object of Gift.—

Mr. Jarman continues (t) : " Of course, parol evidence is admissible, (and that, without intrenching on the doctrine of *Doe v. Oxenden*) (u), in order to ascertain what is comprehended in the terms of a given description, referring to an extrinsic fact.

" Thus, if a testator devise the house he lives in (v), or his farm

(o) *Re Aird's Estate*, 12 Ch. D. 291.

(p) 22 Ch. D. 495.

(q) *Re Wood*, 32 Ch. D. 517.

(r) *University College of North Wales v. Taylor*, [1908] P. 140.

(s) First ed. p. 366.

(t) First ed. p. 367.

(u) Ante, p. 489.

(v) *Doe d. Clements v. Collins*, 2 T. R. 498.

called Blackacre (*w*), or the lands which he purchased of A., parol evidence must be adduced to shew what house was occupied by the testator, what farm is called Blackacre, or what lands were purchased of A.; such evidence being essential for the purpose of ascertaining the actual subject of disposition. The distinction obviously is, that although evidence dehors the will is not admissible, to shew that the testator used his terms of description in any peculiar or extraordinary sense, yet it may be adduced to ascertain what the description properly comprehends.

“Of this principle we have a useful example in *Sanford v. Raikes* (*x*), decided by Sir W. Grant, a Judge whose exposition of the principles of law was ever marked by a perspicuity and felicity of illustration peculiarly his own. A testator by codicil devised in these words, ‘I give the house in Seymour Place, which I have given a memorandum of agreement to purchase (and which is to be paid for out of timber, which I have ordered to be cut down), to the Rev. John Sanford.’ It happened that the testator had shortly before entered into an agreement to purchase the house in question for 7,350*l.*, and had, two days after that contract, given an order in writing to his steward, to cut down timber on a particular estate, to the amount of 10,000*l.* One of the objections made by the heir to this devise was, that the codicil did not refer to any particular timber, and could not be made good by evidence aliunde; and reliance was placed upon the cases deciding that a will to incorporate another instrument must so describe it, that the Court could be under no mistake. But the M.R. conclusively answered this reasoning. ‘I had always understood,’ he observed, ‘that where the subject of a devise was described by reference to some extrinsic fact, it was not merely competent, but necessary, to admit extrinsic evidence to ascertain the fact; and through that medium, to ascertain the subject of the devise. I do not know what this has to do with cases where there is a reference to some paper which is to make part of the will. There it may be considered that the will itself must specify the paper that is to be incorporated into it. Here, the question is not upon the devise, but upon the subject of it. Nothing is offered in explanation of the will, or in addition to it. The evidence is only to ascertain what is included in the description which the testator has given of the thing devised. Where there is a devise of the estate purchased of A., or of the farm in the occupation of B., nobody can tell what is given, until it is

Reference to
an extrinsic
document.

(*w*) *Goodtitle v. Southern*, 1 M. & Sel. 299; see also *Buck d. Whalley v. Norton*, 1 B. & P. 53.
(*x*) 1 Mer. 646.

CHAPTER XV. shewn by extrinsic evidence, what estate it was that was purchased of A., or what was in the occupation of B. In this case, the direction with regard to payment for the house, amounted in effect to a devise of so much of the produce of the timber ordered to be cut down, as should be sufficient to pay for the house. What is there in the fact here referred to, namely, an antecedent order for cutting down timber, that makes it less a subject of extrinsic evidence, than such a one as I have alluded to ? The moment it is shewn that it was a given number of trees growing in such a place, or 10,000*l.* worth in value of the timber on such an estate, that the testator had ordered to be cut down, the subject of the devise is rendered as certain, as if the number, value, or situation of the trees, had been specified in the will.'

"So, in *Ongley v. Chambers* (y), where a testator devised the rectory or parsonage of M., with the messuages, lands, tenements, tithes, hereditaments, and all and singular other the premises thereunto belonging, with their and every of their rights, members and appurtenances ; it was held, that lands, and a messuage (in addition to the parsonage house) in the same parish, which had been acquired by the owners of the rectory about two centuries ago, and had been uniformly demised and occupied with it since that period, and had been so purchased by and conveyed to the devisor, passed : Lord Gifford, C.J., observed, that the expression was 'messuages' ; whereas, strictly speaking, there was but one messuage belonging to the rectory, namely, the parsonage-house. The having recourse to the leases and other extrinsic evidence, to shew what lands had been usually enjoyed with the rectory, was objected to on the authority of *Doe v. Brown* and the class of cases before stated ; but the distinction between the cases is obvious. Here it was a question of parcel or no parcel, the description referred to the fact, and it was governed by the same principle as the case suggested by Sir W. Grant of a devise of lands in the occupation of A."

Remark on
Ongley v.
Chambers.

Devise of
"my estate
called A."

In *Ricketts v. Turquand* (z), a testator who had purchased a house and lands, which, together, were generally called and known as the "Ashford Hall estate," devised as follows :—"As it is my wish and desire that all my estate in Shropshire, called Ashford Hall, should be sold, I do, therefore, give and devise the same unto" A. and B.,

(y) 8 J. B. Moo. 665.

(z) 1 H. L. Ca. 472 ; see also *Doe d. Gore v. Langton*, 2 B. & Ad. 680 ; *Doe v. Jersey*, 1 B. & Ald. 550, 3 B. & Cr. 870 ; *Goodtitle v. Southern*, 1 M. & Sel. 299 ;

Purchase v. Shallis, 2 H. & Tw. 354 ; *Webb v. Byng*, 1 K. & J. 580, stated post ; *Gauntlett v. Carter*, 17 Beav. 586 ; *Ross v. Veal*, 1 Jur. N. S. 751 ; *Harrison v. Hyde*, 4 H. & N. 805.

“in trust to sell,” &c. Parol evidence was admitted to shew in what sense the testator was in the habit of using the term “my estate called Ashford Hall.”

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Difficulty is sometimes caused by the fact that the testator has, subsequently to the date of his will, added to property devised by it. In such cases, the question arises whether evidence is admissible to shew that the testator treated the after-acquired portions as part of the property. It seems clear that if the description of the property is sufficiently wide, the after-acquired part will pass by the devise by virtue of sect. 24 of the Wills Act; as where the testator devises “all my land at Stour Wood” (a) or “my dwelling-house in B., with the appurtenances thereto belonging” (b). But if the description is ambiguous, the case is more difficult. In *Webb v. Byng* (c), the testatrix devised “all my Q. H. Estates in Essex”; this term was not a recognized description of any particular property. Wood, V.-C., admitted evidence to shew what Estates the testatrix understood to be comprised in that description; but there does not appear to have been any evidence to shew that the testatrix treated the after-acquired property as part of the Q. H. Estates, and he held that it did not pass by the devise. In *Castle v. Fox* (d), the testator devised his “mansion and estate called Cleeve Court, with the appurtenances”; Malins, V.-C., admitted evidence shewing what property the testator designated by the description up to the time of his death, and held on that evidence that parts of the estate acquired after the date of the will passed by the devise.

After-acquired property.

Mr. Jarman continues (f): “Upon the same principle, of course, it is not essential to the validity of the gift, either of real or personal estate, that the person who is the intended object of the testator’s bounty should be actually pointed out on the face of the will; it is enough that the testator has provided the means of ascertaining it, according to the maxim, *id certum est quod certum reddi potest*. Nor is it material that the description makes the objects of gift to depend upon circumstances or acts of persons which are future and contingent, or even upon the future acts of the testator himself,

Sufficient to testator provide means of ascertaining the object of gift.

(a) Per Cotton, L.J., in *Re Portal and Lamb*, 30 Ch. D. at pp. 52-53; per Lindley, L.J., *ib.* at p. 56.

(b) *Re Midland Railway Co.*, 34 Bea. 525. The question discussed in this case was as to the effect of the words “wherein D. C. now resides”: see ante, p. 418, and post, Chap. XXXV.

(c) 2 K. & J. 669.

(d) L. R., 11 Eq. 542; *Jennings v. Jennings*, 1 L. R. Ir. 552 is to the same effect; *Ricketts v. Turquand*, 1 H. L. C. 472 is cited in the judgment, but in that case the point did not arise; ante, p. 510. See also *Re Potter*, 83 L. T. 405, stated ante, p. 415.

(f) First ed. p. 369.

CHAPTER XV. though this is sometimes resisted as contravening the principle of the statutory requisition of attesting witnesses. There seems, however, to be no valid ground for the objection. Every description must more or less involve inquiry into extrinsic facts; and there is no reason why the ascertainment of the objects may not depend as well upon the facts or conduct, past or future, of the testator, as upon any other contingent circumstance (*g*). Hence it was recently decided (*h*), that a devise in favour of the persons who might be partners of the testatrix, or to whom she might sell her business, was valid; Lord Langdale observing, that if the description be such as to distinguish the devisee from every other person, it is sufficient, without entering into the consideration of the question, whether the description was acquired by the devisee after the date of the will, or by the testator's own act in the course of his affairs, or in the ordinary management of his property."

Latent ambiguity.

Even where the intended object of the testator's bounty is described by name on the face of the will, uncertainty may be caused by extrinsic circumstances, as where the gift is to "John Smith," and it appears that there are two John Smiths known to the testator. In such a case evidence is admissible to shew which John Smith was meant by the testator (*i*).

Misnomer and misdescription.

The rule admitting evidence of the nature now under consideration is frequently applied in those cases in which the subject or object of gift is erroneously described in the will. They are referred to in detail in another chapter (*j*), and it is unnecessary to repeat them here. But as an illustration of the nature of the evidence admissible in such cases, reference may be made to the case of *Re Feltham's Trusts* (*k*), in which there was a bequest to "Thomas Turner, of Regency Square, Brighton," the facts being that there was a James Turner of Regency Square, surgeon, and a Rev. Thomas Turner, of Daventry, both nephews of the testatrix's husband; an old will containing a bequest to "Thomas Turner, of Regency Square, Brighton, surgeon," was admitted to prove the fact that the testatrix always called the surgeon Thomas. From that fact the Court inferred that the actual will (which was not strictly applicable to either claimant), erred in the name and not in the

Prior will referred to.

(*g*) The question is whether the supplementary act is testamentary; *supra*, p. 134.

(*h*) [1837] *Stubbs v. Sargon*, 2 Kee.

255; 3 My. & Cr. 507; ante, p. 478.

(*i*) Post, p. 518.

(*j*) Chap. XXXV.

(*k*) 1 K. & J. 528.

description. Again, in *Re Gregory's Settlement* (l), where the testator bequeathed a legacy to "the youngest son of A. B.," by the wrong name, a former will was held admissible in evidence to prove that the testator knew of the state of the family of A. B. And in *Re Ofner* (m), a memorandum in the testator's handwriting (being instructions for his will), was admitted in explanation of a misdescription of a legatee.

Re Waller (n) is another illustration of the same principle. There the testator bequeathed legacies to the unmarried daughters "of my late friend, Ignatius Scholes, deceased." There was a person called Ignatius Scholes, known to the testator, but he was alive at the date of the will and was a Jesuit priest. The testator had, however, been an intimate friend of Joseph John Scholes, the father of Ignatius Scholes; he was dead at the date of the will, and left five unmarried daughters, who were referred to by name in a former will of the testator, and it was held that these facts put it beyond doubt that the name "Ignatius Scholes" was a mistake for "Joseph John Scholes."

Where there is a gift to A. B., without any addition or description by which he can be distinguished or identified, and it cannot be found that there is any person of that name known to the testator, it seems that evidence is admissible to shew that there is a person of a somewhat similar name known to the testator, and thus to lead to the inference that he is the person intended by the gift. In *Masters v. Masters* (o), the testator bequeathed a legacy to "Mrs. Sawyer," and as it could not be found that any person of that name was known to the testator, it was referred to the Master to inquire whether a Mrs. Swapper, by whom the legacy was claimed, was the person intended. So in *Beaumont v. Fell* (p), a testator bequeathed £500 to "Catherine Earnley," which was claimed by a person whose name was Gertrude Yardley; it appeared that there was no such person as Catherine Earnley; that the testator's voice, when he made his will, was hardly intelligible; that the testator usually called Gertrude Yardley by the name of "Gatty," and that he had often declared that he would do well for her. The M.R. admitted the evidence, and held Gertrude Yardley to be entitled. It seems clear that the evidence of the testator's intention to benefit Gertrude

No person
answering
description.

(l) 34 Bea. 600. Other cases in which prior wills have been admitted in evidence are *Blundell v. Gladstone*, 1 Ph. 279; s.c., *Lord Camoys v. Blundell*, 1 H. L. C. 778; *Reynolds v. Whelan*, 16 L. J. Ch. 434; *Re Waller*, 68 L. J. Ch. 526;

Flood v. Flood, [1902] 1 Ir. R. 538.

(m) [1909] 1 Ch. 60.

(n) 68 L. J. Ch. 526.

(o) 1 P. W. 425.

(p) 2 P. W. 141.

CHAPTER XV. Yardley was wrongly admitted, the case not falling within the rule which allows the admission of such evidence (g), but the decision itself seems to be in accordance with the principle on which *Dowset v. Sweet* and *Re Hooper* were decided (r). The authority of *Beaumont v. Fell* has indeed been questioned (s), and in *Mostyn v. Mostyn* (t), Lord Brougham treated it as having been overruled by *Miller v. Travers* (u). But it is submitted that the two cases rest on different principles; for in *Miller v. Travers* the evidence tendered would have contradicted the will, while in *Beaumont v. Fell* the evidence explained what was otherwise unintelligible (v). If in *Miller v. Travers* the testator had devised all his estates in the county (let us say) of Clane (there being no such county), would not evidence have been admissible to shew that he had estates in the county of Clare, and thus to lead to the inference that he meant them to pass by the devise? It is sometimes said that the admission of such evidence is an infraction of the rule which requires wills to be in writing, but if so the rule is equally infringed by the admission of evidence to supply a partial blank in the name of a legatee (w).

Total blanks for names not to be supplied.

"But though, as we have seen," says Mr. Jarman (x), "cases may be adduced in which legacies have been decreed to persons to whom not any part of the description in the will applies, yet in no instance has a total blank for the name been filled up by parol evidence (y). In such cases, indeed, there is no certain intent on the face of the will to give to *any* person: the testator may not have definitely resolved in whose favour to bequeath the projected legacy (z).

(g) Post, p. 516.

(r) Chap. XXXV.

(s) By Mr. Jarman, in the first edition of this work, p. 383; and by Lord Abinger, in *Doe v. Hiscocks*, 5 Mee. & W. p. 371. Mr. Wigram seems to think that the decision in *Beaumont v. Fell* was correct, except so far as the M.R. admitted evidence of the testator's declarations. In that respect the decision was, it is submitted, clearly erroneous.

(t) 5 H. L. C. p. 168.

(u) Supra.

(v) The distinction is clearly stated by Sir J. Strange in *Hampshire v. Peirce*, 2 Ves. sen. 216.

(w) *Infra*, p. 515.

(x) First ed. p. 383.

(y) See Roper, 186, citing *Winne v. Littleton*, 2 Ch. Ca. 51; *Baylis v. Atk.-Gen.*, 2 Atk. 239; *Ulrich v. Litchfield*, ib. 372; *Taylor v. Richardson*, 2 Drew.

16. The decision in *Re Bacon's Will*, 31 Ch. D. 460, appears to contradict the statement in the text. But the circumstances in that case were very peculiar. The testatrix, who was illegitimate and left no next-of-kin, made her will on a printed form, whereby, after giving certain legacies, she gave all her residue "unto to and for own use and benefit absolutely," and she nominated C. "to pay all my debts, &c., to be executor of this my will." Probate of the will was granted to C. as executor. It was held by Kay, J., that under the special circumstances of the case, parol evidence was admissible to rebut the presumption against the executor, and that C. was beneficially entitled to the residue. As to the general rule in such cases, see ante, p. 498.

(z) Per Parke, B., *Doe v. Needs*, 2 M. & Wels. 139.

"The effect of partial or imperfect descriptions, however, has often come under consideration. In the case of *Hunt v. Hort* (a), where the bequest was to Lady _____, Lord Thurlow considered it as equivalent to a total blank, and, therefore, that the name could not be supplied by parol evidence. But in *Price v. Page* (b), where the Christian name only was omitted, the bequest being to Price, son of _____ Price, Sir R. P. Arden, M.R., admitted the claim of a son of the testator's niece of that name, on parol evidence by which it appeared that the claimant had been brought up by the testator, (who had no other relation of the name of Price,) and had promised to provide for him (bb). And in *Abbot v. Massie* (c), where the bequest was to Mr. and Mrs. G., Lord Loughborough directed an inquiry as to who Mrs. G. was. Of course, if there had been more than one person answering to the imperfect description in the will, and the evidence had failed to point out which of them was the intended object of the testator's bounty, the bequest would, in both the preceding cases, have been void for uncertainty" (d).

It is clear that blanks may be supplied by reference to the context of the will, and for this purpose the Court is entitled to look at the original will as well as at the probate copy (e).

At the conclusion of his judgment in *Blundell v. Gladstone*, the V.-C. said he decided the case upon the words of the will, coupled with that evidence only which had been given as to the state of the Weld family at the date of the will, and which he thought was the only part of the evidence which ought to be received (f). But besides that evidence, there was parol evidence (g) of the testator having, both before and after making his will, and even after the correction of his mistake, repeatedly called the possessor of Lulworth by the name of Edward Weld. This evidence had been received in the Master's office, and in delivering the opinion of the judges in

Evidence
sometimes
admissible
though im-
material.

(a) 3 Br. C. C. 311; see also 1 M. & Sc. 351.

(b) 4 Ves. 680. Compare *Gill v. Bagshaw*, L. R., 2 Eq. 746; ante, p. 472.

(bb) Sic in the original text. It will be noticed that the M.R. admitted evidence that the testator had promised to provide for his niece's son, but this would probably not be allowed at the present day. See post, p. 516.

(c) 3 Ves. 148; see *Clayton v. Lord Nugent*, 13 M. & W. 200.

(d) The same rule was followed in *Phillips v. Barker*, 1 Sm. & G. 583. In *In bonis De Rosaz*, 2 P. D. 66, the sur-

name was left blank, the bequest being to "Percival _____, of Brighton," and evidence was admitted to shew who was intended; and in *Estate of Hubbuck*, [1905] P. 129, where the testatrix gave all her property "unto my granddaughter _____," and appointed her executrix, evidence was admitted to shew which of the testatrix's three granddaughters was intended. See also *Phelan v. Slattery*, 19 L. R. Ir. 177.

(e) *Re Harrison*, 30 Ch. D. 390; *Furniss v. Phear*, 36 W. R. 521.

(f) 11 Sim. 488.

(g) *Ib.* 470.

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D. P. (where the suit was carried), Parke, B., said, they thought it was rightly received (*h*). Hence it is to be inferred that evidence (to which, upon the principles discussed in this chapter, there is per se no objection) of facts connected with the case, and which may by possibility influence the construction of the will, is admissible, although ultimately it is found to be immaterial and has to be excluded from consideration (*i*).

Rule as to patent and latent ambiguities, how far conclusive in deciding on admissibility of evidence.

VIII.—Ambiguity—Evidence of Intention (*ii*).—The admission or rejection of parol evidence is commonly said to depend in all cases on the canon, which rejects it in the case of *patent* ambiguities, or those which appear upon the face of the will, and admits it in the case of *latent* ambiguities, or those which seem certain, for anything that appears upon the face of the will, but there is some collateral matter, out of the will, that breeds the ambiguity (*j*). And this ambiguity being raised by parol evidence, may, it is said, be fairly removed by the same means. But upon examination the maxim proves not to be an universal guide; for, on the one hand, there are many recognized authorities for the admission of parol evidence to explain ambiguities appearing on the face of the will (*k*), while, on the other hand, the existence of a latent ambiguity will certainly not, as appears sometimes to have been supposed, warrant the admission in all cases indiscriminately of parol evidence to shew what the testator meant to have written as distinguished from what is the meaning of the words he has used (*l*). It is to the admissibility of this species of evidence that attention is now to be turned. To say that such evidence is admissible, because the ambiguity complained of has been raised by the extrinsic facts, is to lose sight of the essential difference between the nature and effect of the evidence which raises the ambiguity, and that by which it is to be removed; for the former is confined to a development of facts with reference to which the will was written, and to which the language of the will expressly or tacitly refers; and, therefore, it lies within the strict limits of exposition,

(*h*) 1 H. L. Ca. 778, nom. *Camoy's v. Blundell*.

(*i*) See also *Lowe v. Lord Huntingtower*, 4 Russ. 532, n.; *Sayer v. Sayer*, 7 Hare, 381, Wigr. Wills, pl. 103.

(*ii*) The two following paragraphs are taken verbatim from the third edition of this work, by Messrs. Wolstenholme and Vincent, pp. 399 seq. Note (*o*) on p. 517 has been added by

the present editor.

(*j*) Bacon's Maxims, Reg. 23.

(*k*) *Doe d. Gord v. Needs*, 2 M. & Wels. 129; *Doe d. Smith v. Jersey*, 2 B. & B. 553; *Fonnereau v. Poyntz*, 1 Br. C. C. 472; *Colpoys v. Colpoys*, Jac. 451, Wigr. Wills, 65, 66, 178, whence the views expressed in the text have been adopted.

(*l*) See cases, ante, p. 485, n. (*j*).

which it cannot be denied that the latter transgresses (*m*). To render the ground tenable, it must be taken to support the proposition only so far as it asserts, that, if an ambiguity is introduced into an otherwise unambiguous will by parol evidence of the state of the testator's family, or other circumstances, that ambiguity may be removed by further evidence of *the same nature* (*n*). But in admitting this interpretation of the rule, all distinction between patent and latent ambiguities is lost, for in *every* case the Judge by whom a will is to be expounded is entitled to be placed, by a knowledge of all the material facts of the case, as nearly as possible in the situation of the testator when he wrote it. A patent ambiguity, it is true, may not be explained by any other kind of evidence, and so far the first branch of the canon is undoubtedly true (*nn*). But by our hypothesis to this precise extent, and no further, is the latter branch true also. We come, therefore, to the conclusion either that the distinction taken by the canon between latent and patent ambiguities is an unsubstantial one, or that the proposition does, in its second branch, assert the admissibility of evidence to shew the testator's intention (as distinguished from the meaning of his written words); and that, consequently, if true, its application must be confined to a special class of cases.

It remains for us to see in what cases, if any, such evidence is admissible. Suppose, then, that evidence has been given of all the material facts and circumstances of the case, and that these have ultimately raised an ambiguity by disclosing the existence of more than one object or subject to which the words are equally applicable (*o*). The uncertainty as to which of these was in the testator's contemplation would, if the investigation stopped here, necessarily be fatal to the gift. Under these peculiar circumstances, however, declarations of the testator or other direct evidence of his intention are admissible to clear up the ambiguity, by pointing

(*m*) See Wigr. Wills, 121; per Romilly, M.R., *Stringer v. Gardiner*, 27 Beav. 38.

(*n*) Per Alderson, B., 13 M. & Wels. 204.

(*nn*) *Cheyney's Case*, 5 Rep. 68b; *Castledon v. Turner*, 3 Atk. 257; *Clayton v. Lord Nugent*, 13 M. & Wels. 200; *Strode v. Russell*, 2 Vern. 625.

(*o*) [It is hardly necessary to point out that, in accordance with the general principle stated ante, p. 488, if there is an object or subject which correctly answers the description in the will, parol evidence is not admissible to shew that the gift was intended to include

another object or subject which it does not accurately describe; evidence of intention was rejected on this ground in *Horwood v. Griffith*, 4 D. M. & G. 700. See also *Re Mayo*, [1901] 1 Ch. 404, where a testator bequeathed property to the three illegitimate children of Mrs. A. B. In fact, A. B. had four illegitimate children, but in the absence of any evidence to shew that the testator knew of the existence of the eldest child, no ambiguity arose, and it was held that the other three were entitled. Farwell, J., seems to have doubted whether, if the ambiguity had arisen, evidence of intention would have been admissible.]

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"Equivocation."

Effect where there are two subjects or objects answering to description.

Evidence admitted to shew which of two persons answering to the name was intended.

out (if they can) the actual subject or object of gift, among the several properties or persons answering to the description. Of this nature are the examples given by Lord Bacon, in illustration of the maxim, "Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur"; and are styled by him cases of equivocation (*p*).

Thus, where a testator devises his manor of Dale, and it is found that he had at the date of his will two manors, North Dale and South Dale, evidence may be adduced to shew which of them was intended (*q*). Again, if a testator, having two closes in the occupation of A., devises all that his close in A.'s occupation, evidence is admissible to prove which of the two closes he meant to devise (*r*).

If no sufficient evidence is forthcoming, the gift is void for uncertainty (*s*).

The same principle, of course, is applicable (and it has been most frequently applied) to the objects of a devise. Thus, in *Lord Cheyney's Case* (*t*), it was resolved that if a man have two sons, both baptized by the name of John, and, conceiving that the elder (who had been long absent) is dead, devises his lands, by his will in writing, to his son John, generally, and in truth the elder is living; in this case the younger son may produce witnesses to prove his father's intent, that he thought the other to be dead, or that he, at the time of the will made, named his son John the younger; for, observes Lord Coke, no inconvenience can arise, if an averment in such case be taken (*u*); because he who sees such will, ought at his peril to inquire which John the testator intended; which may easily be known by him who wrote the will, and others who were privy to his intent.

So, in *Jones v. Newman* (*v*), where a testatrix devised to John Cluer of Calcot. There were two persons, father and son, of that name, and evidence was admitted to shew which was intended. One of them had subsequently died in the testatrix's lifetime; but, of course, that could not influence the construction. So,

(*p*) See, as to the meaning of the word *ambiguity*, Wigr. Wills. pl. 210; Cic. Q. Tusc. III. 9.

(*q*) Per Tindal, C.J., in *Miller v. Travers*, 1 M. & Sc. 346.

(*r*) *Richardson v. Watson*, 4 B. & Ad. 787 (where the evidence was insufficient); *Asten v. Asten*, [1894] 3 Ch. 260; ante, pp. 460, 502.

(*s*) *Richardson v. Watson*, supra.

(*t*) 5 Rep. 68 b.

(*u*) "But the effect of the doctrine is

to render it necessary to the completeness of a title derived under a devise, that it should be ascertained that there is not more than one person answering to the description; but this is seldom attended to in practice, unless some discrepancy occurs between the terms of the will and the actual name or addition of the claimant." (Note by Mr. Jarman, first ed. p. 372.)

(*v*) W. Bl. 60.

where a testator bequeathed a legacy to "W. R., his farming man," and it appeared he had two farming men of that name, evidence of the testator's declarations in favour of one of them was admitted (*w*).

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Declarations
of testator
admitted.

Again, in *Doe d. Morgan v. Morgan* (*x*), where a testator devised certain property to his nephew Morgan Morgan, and then in the same will devised other property to his nephew Morgan Morgan, of the village of Mothvey. It appeared that the testator had two nephews of this name, one of whom lived at Mothvey, and the other elsewhere; it was contended that as the first devise was to Morgan Morgan simpliciter, and the second devise to Morgan Morgan of Mothvey, it was to be presumed that the testator in making this distinction had different persons in his contemplation, and that, this being apparent on the face of the will, parol evidence to the contrary was inadmissible; but the Court held that evidence of the testator's oral declarations, made at the time of the will, was admissible.

In *Doe d. Gord v. Needs* (*y*), there was a devise to George Gord, the son of John Gord; another to George Gord, the son of George Gord; and a third to George Gord, the son of Gord. The Court of Exchequer held, that evidence of the testator's declarations, that he intended George Gord, the son of George Gord, to take the property devised to George Gord, the son of Gord, was admissible: that it was clear the testator had selected a particular object of his bounty; though if there had been a blank before the name of Gord the father, that might have made a difference: that if there had been no mention in the will of any other George Gord, the son of a Gord, evidence of the testator's declarations would undoubtedly have been admissible, upon the authorities, which were all characterized by the fact that the words of the will did describe the object or subject intended, and the evidence of the testator's declarations had not the effect of varying the instrument in any way whatever; it only enabled the Court to reject one of the subjects or objects to which the description applied, and to determine which of the

(*w*) *Reynolds v. Whelan*, 16 L. J. Ch. 434. The evidence was that by an earlier will, made before the unsuccessful claimant entered his service, the testator gave W. R., "one of my farming men," a legacy, and that before the date of his last will he told a witness that he had given "Old Will" 50*l.*, and intended to leave him 100*l.*; if the Court relied on the evidence as to the earlier will, the case does not properly belong

here: see per Wood, V.-C., in *Re Feltham*, 1 K. & J. 532, ante, p. 512.

(*x*) 1 Cr. & M. 235. Compare *Healy v. Healy*, Ir. R., 9 Eq. 418.

(*y*) 2 M. & Wels. 129. See also *Phillips v. Barker*, 1 Sm. & Gif. 583. In *Re Mayo*, [1901] 1 Ch. 404, Farwell, J., expressed doubts whether *Doe v. Needs* would be followed by the Court of Appeal at the present day.

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two the devisor understood to be signified by the description which he used in the will : that the mention in other parts of the will of two persons, each answering the description of George the son of Gord, had no more effect for this purpose than proof by extrinsic evidence of the existence of such persons, and that they were known to the devisor, would have had : and that though the claimant under the devise in question was more perfectly and fully described in another part of the will, still he was correctly, however imperfectly, described by that devise.

In *Doe d. Allen v. Allen* (z), a testatrix devised her land to her brother T. A. for his life, and after his decease to John A., grandson of her said brother T. A., his heirs and assigns, charged, nevertheless, with the bequest of 100*l.* to each and every of the brothers and sisters of the said John A. At the time of making the will, there were two grandsons of T. A., each named John ; but one of them, the lessor of the plaintiff, had brothers and sisters ; the other, the defendant, had none : it was held, that the bequest to the brothers and sisters of the said John A. did not contain a description of the devisee, so as to exclude extrinsic evidence in favour of the defendant's claim, as it would have applied to after-born brothers and sisters ; and that a declaration by the testatrix, of her intention in the defendant's favour, was admissible.

Contra, where ground for preferring either is afforded by the will ;

On the other hand, in *Doe d. Westlake v. Westlake* (a), where the devise unto " Matthew Westlake, my brother, and to Simon Westlake my brother's son " ; and it appeared by the evidence, that the testator had three brothers, Thomas, Richard, and Matthew, each of whom had a son named Simon ; Thomas and Richard were mentioned in previous parts of the will : the Court of King's Bench held (and that in perfect consistency with the preceding cases (b)), that the fact of there being several brothers' sons named Simon did not raise a latent ambiguity, so as to let in evidence of oral declarations made by the testator respecting his intention ; it being clear, on the face of the will, that the nephew intended was the son of Matthew. " My brother's son " evidently meant the son of that brother who was then particularly in his mind.

(z) 12 Ad. & Ell. 451. In *Bennett v. Marshall*, 2 K. & J. 740, the case of two persons, one with several Christian names, the other with only one, that one being identical with the first Christian name of the former, was considered to be the same as the case of two persons bearing the same name. It is not stated, however, what was the nature of

the parol evidence admitted. See also per Malins, V.-C., *Webber v. Corbett*, L. R., 16 Eq. 518.

(a) 4 B. & Ald. 57 ; see also *Douglas v. Fellows*, Kay, 114 ; *Webber v. Corbett*, L. R., 16 Eq. 518 ; and cf. *Fleming v. Fleming*, 1 H. & C. 242 ; *Healy v. Healy*, Ir. R., 9 Eq. 418.

(b) See Wigram, Wills, pl. 144.

And the result would doubtless be the same where the evidence of surrounding circumstances disclosed reasons for the testator preferring one person to another of the same name (c) : for there is properly no "ambiguity" until all the facts of the case have been given in evidence, and found insufficient for a definite decision (d).

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—or by surrounding circumstances.

Again, if the person intended to be benefited can be ascertained by some definite rule of construction, evidence of intention is, it seems, inadmissible (e). For example, as Mr. Jarman observes (f), "relative pronouns, which have no independent force or signification, but whose effect depends wholly upon the position which they occupy in the instrument, cannot, by means of parol evidence, be shifted, so as to relate to a different antecedent. Thus, in *Castledon v. Turner* (g), where a testator had made dispositions in his will to several, and but two women were mentioned throughout the whole will, viz. his wife and his niece, and, in the latter part of the will, a particular estate was devised to 'her' for and during her natural life—Lord Hardwicke refused to receive parol evidence for the purpose of shewing to which of the two women 'her' referred; his Lordship thinking that the offering it was an attempt contrary to the principles of the Court, because it would tend to put it in the power of witnesses to make wills for testators. And his Lordship held, that, although 'her' was a relative term, it related to the wife, upon the ground that, throughout the will, in other places, 'her' seemed to relate to the wife" (h). So, where the gift is to "the two children of A.," and A. has four children, and there is nothing in the context of the will or the circumstances to shew which two are meant, the ordinary rule applies (i), and all four children share in the gift: evidence of intention is therefore not admissible (j).

Evidence of intention not admitted against rule of construction.

The rule that extrinsic evidence is admissible to prove that two legacies given by the same instrument to the same person were

(c) *Careless v. Careless*, 1 Mer. 384; *Jefferies v. Michell*, 20 Beav. 15.

(d) Wigr. Wills, Prop. VI. and VII.

(e) "Where the presumption arises from the construction of words simply, *quâ* words, no evidence can be admitted": per Lord Thurlow, *Coote v. Boyd*, 2 Br. C. C. p. 527.

(f) First ed. p. 361.

(g) 3 Atk. 257, cit. 2 Ves. sen. 216.

(h) Parol evidence is also inadmissible for the purpose of raising a case of election, *Clementson v. Gandy*, 1 Kee. 309, post, pp. 541 seq.; or of shewing that a person to whom property is

upon terms which imply a trust was intended to take beneficially; *Barrs v. Fewkes*, 34 L. J. Ch. 522.

(i) Post, Chap. XLII, s. 10.

(j) *Matthews v. Foulshaw*, 11 L. T. 82, citing *Daniell v. Daniell*, 3 De G. & S. 337, where, however, the point was not decided. In *Re Mayo*, [1901] 1 Ch. 404, the point did not arise, but Farwell, J., expressed an opinion that evidence of intention is not admissible in these cases. *Hampshire v. Peirce*, 2 Ves. sen. 216, was wrongly decided on this point: 5 M. & W. 371.

CHAPTER XV. intended to be cumulative, but not to prove that two legacies given by different instruments to the same person were intended to be substitutional, rests on the same principle (*k*).

Doubtful
decision of
Malins, V.-C.

In *Webber v. Corbett* (*l*), there was a specific bequest to "my niece Clara" and another to "my niece Laura" both of them being described as daughters "of my brother John Webber"; in a later part of the will there was a legacy of 50*l*. "to each of my nieces Kate G., Hannah T., Harriet Bird, and Laura Webber," and a bequest of 100*l*. to "each of my nieces the said Clara Webber, Laura Webber," and others, and "the said Laura Webber" was one of the residuary legatees; in addition to Laura Webber, the daughter of John, the testatrix had a niece Laura F. T. Webber, whom she was in the habit of calling Laura; this Laura Webber and Kate G., Hannah T., and Harriet Bird were daughters of William Webber. Malins, V.-C., held that Laura, the daughter of John Webber, was entitled under all the gifts. The decision seems open to question; the V.-C. himself thought that the fact of the legacies of 50*l*. being given to persons who were all daughters of William, and the absurdity of giving separate legacies of 50*l*. and 100*l*. to the same person, pointed strongly to the conclusion that the legacy of 50*l*. was intended for Laura F. T. Webber, but he laid it down as a general rule of construction that where a legatee is once accurately described in a will, every subsequent reference to a person of that name must mean the legatee so described. It is submitted that there is no such rule.

To "my
brother," &c.,
the testator
having
several
brothers.

"There seems to be no doubt," says Mr. Jarman (*m*), "though it has never been distinctly decided, that the principle of the preceding cases (*n*) applies to a devise to a person sustaining a given character, as 'to my brother, son,' &c., without specification of name; so that if the fact should happen to be, that there were more persons than one to whom the description applied, parol evidence would be admissible to shew which of them was the intended object of gift; for, as the uncertainty does not appear until the parol evidence discloses the plurality of persons answering to the terms of the will, it seems to be an instance of the *ambiguitas latens*. In several reported cases, indeed, devises of this kind have failed, on account of the uncertainty of the object; but in none of them does parol evidence appear to have been offered to remove the ambiguity.

(*k*) *Hurst v. Beach*, 5 Madd. 351; *Lee v. Pain*, 4 Ha. 201. "In all these cases the evidence is received in support of the apparent effect of the instrument, and not against it," per Leach, V.-C., *Hurst v. Beach*, *supra*. As to *Hubbard*

v. Alexander, 3 Ch. D. 738, see Chap. XXX. s. 7.

(*l*) L. R., 16 Eq. 515.

(*m*) First ed. p. 375.

(*n*) *Lord Cheyney's case*, *Jones v. Newman*, and *Doe v. Morgan*.

“ Thus, in *Dowset v. Sweet* (o), a bequest to the son and daughter of W. W. was held to be void as to the son, on account of there being more than one. So, in *Doe d. Hayter v. Joinville* (p), one of the grounds on which the devise to the testator’s ‘ brother and sister’s family ’ failed was, that there were children of two sisters of the testator, one living and one dead, and it did not appear which of them was intended.”

In *Phelan v. Slattery* (q), where a testator devised property to “ my nephew,” evidence was admitted to shew which nephew was intended. But in *Estate of Hubbuck* (r), where the gift was to “ my granddaughter _____,” evidence of intention was admitted on the ground of the blank, and Gorell Barnes, P., seemed to think that if the gift had been to “ my granddaughter ” simply, the evidence would have been inadmissible. It is submitted, however, that Mr. Jarman’s statement of the principle is correct, and that it is supported by the authority of Lord Thurlow (s).

Mr. Jarman continues (t) : “ Sometimes it happens that one part of the description applies to each of the several claimants in common, and another part to neither of them ; as in the case of *Still v. Hoste* (u), where a testator bequeathed a legacy to *Sophia Still*, daughter of Peter Still. Still had two daughters only, *Selina* and *Mary Anne* ; and, upon evidence of *Selina* being intended by the testator, she was held to be entitled. It is clear that, if *Selina* had been the only daughter, her claim might have been supported on the terms of the will, without the aid of extrinsic evidence.”

Where part of description applies to each of several persons, and part to neither, evidence admitted.

So, in *Price v. Page* (v), where a testator gave a legacy to ——— Price, the son of ——— Price. The report states that the plaintiff was the only person who claimed the legacy, but the executors raised the question whether the father of the plaintiff, to whom the description was equally applicable, was not intended. Evidence was admitted and relied on by Sir R. P. Arden, M.R., that the testator had said that he had or would provide for the plaintiff, and that he had left him something by his will.

Of the two cases last cited, it was said by Lord Abinger, C.B. (w),

(o) Amb. 175.

(p) 3 East, 172. The decision in *Re Stephenson*, [1897] 1 Ch. 75, also seems to have proceeded on the absence of evidence of intention.

(q) 19 L. R. Ir. 177.

(r) [1905] P. 129 ; supra, p. 515, n. (d).

(s) In *Delmare v. Robello*, 1 Ves. jun. 415.

(t) First ed. p. 378.

(u) 6 Mad. 192. The evidence was that of the attorney who made the will, and another person : the question was referred to the Master. See also *In bonis Brake*, 6 P. D. 217.

(v) 4 Ves. 679.

(w) In *Doe v. Hiscocks*, 5 M. & Wels. 370. His remarks included *Careless v. Careless*, 1 Mer. 384, but in that case evidence of intention was not required : ante, p. 521.

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that they did not materially differ from the class immediately preceding. That they differed indeed in this, that the equivocal description was not entirely accurate (x); but they agreed in its being (although inaccurate) equally applicable to each claimant; and that they all concurred in this, that the inaccurate part of the description was either, as in *Price v. Page*, a mere blank, or, as in the other two cases, applicable to no person at all. That these, therefore, might fairly be classed also as cases of equivocation, and in that case evidence of the intention of the testator seemed to be receivable.

Where part of description applies to one and part to another, evidence of intention is inadmissible.

There is yet another class of cases in which it has been made a question, whether evidence of the nature now under consideration can be legally admitted, namely, where the description in the will, taken altogether, answers to no person or thing, but part of it applies to one, and part to another. Cases are to be met with, supporting the conclusion, that a testator's declarations are admissible to shew which of the imperfectly-described persons or things he intended to be the object or subject of the gift (y). But in *Doe d. Hiscocks v. Hiscocks* (z), where part of the description in the will applied to one person and part to another, the Court of Exchequer rejected evidence of the testator's declarations, at the time of giving instructions for his will, respecting his actual intention. The devise was to the testator's son John H. for life, and on his decease to his (testator's) grandson John H., eldest son of the said John H. for life, and on his decease to the first son of the body of his said grandson John H., in tail male, with other remainders over. At the time of making the will, the testator's son John H. had been twice married; he had by his first wife one son, Simon; by his second wife an eldest son John, and other younger children, sons and daughters. It was held, that evidence of the instructions given by the testator for his will, and of his declarations after its execution, was not admissible to shew which of these two grandsons was intended by the description in the will. Lord Abinger, in delivering the judgment of the Court, reviewed most of the principal cases on this subject. In the opinion of the Court there was but one case, in which evidence was admissible, of the testator's declarations, of the instructions given for his will, and other circumstances

(x) Legal certainty, not perfect accuracy, is required, see Wigr. Wills, pl. 186.

(y) *Thomas d. Evans v. Thomas*, 6 T. R. 678; *Bradshaw v. Bradshaw*, 2 Y. & C. 72; in *Doe d. Le Chevalier v. Huthwaite*, 8 Taunt. 306, 2 Moo. 304, 3 B. & Ald.

632, sometimes cited in support of the same doctrine, it does not appear that any declarations by the testator were offered in evidence. The case is said to have been ultimately compromised, per Lord Brougham, 1 H. L. Ca. 797.

(z) 5 M. & Wels. 363.

of the like nature, which were not adduced for explaining the words or meaning of the will, but either to supply some deficiency or remove some obscurity or ambiguity. That case was where the meaning of the testator's words was neither ambiguous nor obscure, and where the devise was, on the face of it, perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arose as to which of the two or more persons or things, each answering the words in the will, the testator intended to express. Though it was clear he meant one only, both were equally denoted by the words, whence there arose an "equivocation," and evidence of previous intention might be received to solve this latent ambiguity; for the intention shewed what he meant to do; and when you knew that, you immediately perceived that he had done it by the words he had used, and which in their ordinary sense might properly bear that construction. It appeared to them that in all other cases parol evidence of what was the testator's intention ought to be excluded. This case is generally considered to have settled the law upon this subject (a), and to decide that "the only cases in which evidence to prove intention is admissible, are those in which the description in the will is unambiguous in its application (i.e., equally applicable in all its parts) to each of several subjects."

The rule stated.

So in *Re Taylor* (b), a testatrix gave a share of her residuary property to her "cousin Harriet Cloak"; the share was claimed by two persons, viz., Harriet Crane, whose maiden name was Cloak, and who was a first cousin of the testatrix, and Harriet Cloak, who was herself not related to the testatrix, but had married Thomas Cloak, who was a first cousin of the testatrix; it was held that extrinsic evidence of the intimacy between the testatrix and the respective claimants was admissible, and that Harriet Cloak, the wife of T. Cloak, was entitled to the share. Sir H. Cotton, L.J., in that case observed as follows (c):—"Evidence of the testatrix's expressions of intention before and after the making of the will is not admissible. Such evidence of intention is only admissible where the words are equally applicable to two or more persons, which is not the case here, where the words are not strictly applicable to any person. But evidence of the surrounding circumstances and of the knowledge of the testatrix is admissible."

(a) Wigr. Wills, pl. 215; *Blundell v. Gladstone*, 11 Sim. 467, 470, 1 Phil. 282; *Thomson v. Hempenstall*, 13 Jur. 814; *Drake v. Drake*, 8 H. L. C. 172; *Bernasconi v. Atkinson*, 10 Hare, 348; *Charter v. Charter*, L. R., 7 H. L. 364, 377; *In bonis Brake*, 6 P. D. 217; *In*

bonis Chappell, [1894] P. 98. In *Re Blackman*, 16 Beav. 377, the rule was transgressed, but the decision seems right without the questionable evidence: see Chap. XXV.

(b) 34 Ch. D. 255.

(c) *Ibid.* at p. 258.

CHAPTER XV.

Declarations need not be contemporaneous with will.

Where evidence of intention is admissible, it is no objection to its reception that the declarations relied on were subsequent to the making of the will. In the case of *Doe v. Allen* (*d*), the declarations admitted as evidence had been made by the testatrix ten months after the date of her will, and were objected to on that account. Lord Denman, C.J., concluded the judgment of the Court by saying, that "none of the cases which were referred to in the books to shew that declarations contemporaneous with the will were alone to be received, established such a distinction. Neither had any argument been adduced which convinced the Court that those subsequent to the will ought to be excluded wherever any evidence of declarations could be received. They might have more or less weight according to the time and circumstances under which they were made, but their admissibility depended entirely on other considerations." The same remarks would apply to declarations made before the will (*e*).

Rule where there is a person answering to the description.

It was stated in a former page that evidence of all the material facts of the case was admissible to assist in the exposition of the will. And this statement was necessarily qualified by the insertion of the word "material," because though the rules specially applicable to the subject now under consideration, may not raise any peculiar obstacle to the admission of evidence tendered in support of a given fact; yet if that fact, supposing it to be proved, ought not to influence the construction of the will, the evidence in support of it is immaterial, and therefore inadmissible. Thus it is a well-known rule, that words shall be interpreted in their primary sense, if the context and surrounding circumstances do not exclude such an interpretation, even though the most conclusive evidence of intention to use them in some popular or secondary sense be tendered (*f*).

(*d*) 12 Ad. & El. 455; Wigr. on Wills, 162.

(*e*) *Langham v. Sanford*, 19 Ves. 649; 2 Tayl. Evid. p. 1009, 7th ed. Lord Kenyon's dictum, *Thomas v. Thomas*, 6 T. R. 677, seems therefore to be overruled.

(*f*) Wigr. Wills, Prop. II. supra. And see *Horwood v. Griffith*, 4 D. M. & G. 708. In *Grant v. Grant*, L. R., 5 C. P. 727, Blackburn, J., cited with approval "Blackburn on Contracts," where it is said that in applying the rule a distinction must be observed between contracts and wills, and a greater latitude allowed in construing wills, because in them the testator soliloquized, but that in a contract each party

spoke to the other: and accordingly it was held in that case that "nephew" meant "wife's nephew," although it would not have been insensible with reference to extrinsic circumstances if it had been strictly interpreted. The decision in *Grant v. Grant* seems to have been approved by James, L.J., in *Sherrott v. Mountford*, L. R., 8 Ch. 928. However, in *Wells v. Wells*, L. R., 18 Eq. 505, Sir G. Jessel, M.R., reaffirmed Sir J. Wigram's proposition and declined to follow *Grant v. Grant*. See also the doubt thrown on *Grant v. Grant*, by Cotton, L.J., in *Re Taylor*, 34 Ch. D. at p. 257, and in *Re Parker*, 17 Ch. D. 262, and the discussion in *In bonis Ashton*, [1892] P. 83.

Therefore a person, to whom the terms of the description are imperfectly applicable, may not, by parol evidence of facts tending to prove an intention in his favour, support his claim against another person exactly or more nearly answering to all the particulars in the description.

Thus, in *Delmare v. Robello (g)*, where a testator in 1785 bequeathed the residue of his estate, in trust to pay the interest for life to all the children of his two sisters, Reyne and Estrella; in case of the death of any, their issue to have their respective shares, with benefit or survivorship for want of issue. The testator died in 1789, leaving three sisters: Reyne, who was never married, but in 1757 changed her profession of religion from the Jewish to the Roman Catholic persuasion, and became a professed nun, and was baptized by the name of Maria Hieronyma, and lived at Genoa; and Estrella and Rebecca, who were married, and lived at Leghorn. Rebecca had several children, who set up a claim on the ground that the testator intended Rebecca when he named Reyne. Parol evidence of the circumstances as well as of the testator's declarations in support of this claim was rejected by Lord Thurlow, who suggested that Maria Hieronyma might have changed her mind, and have escaped into this country, and have married and had children, notwithstanding her vow. He decided, therefore, that the claim of the children of Rebecca was untenable, inasmuch as there was a sister answering to the name in the will; for he considered that the assumption of the conventual name did not prevent the applicability of the former name: it was a part of the profession, and was not meant for the rest of the world; the former name, therefore, continued, and by that such persons were always spoken of.

So, in *Andrews v. Dobson (h)*, where the bequest was to "James, son of Thomas Andrews, of Eastcheap, printer." There was no person by the name of Thomas Andrews in Eastcheap, but there was James Andrews, a printer, who lived there: he had one son, named Thomas, by his first wife, who was related to the testator; he had also a son by a second wife, named James, who was in no manner related to the testator. The son by the first wife claimed the legacy, insisting that the testator meant "Thomas, the son of James," instead of "James, the son of Thomas"; and prayed some inquiry respecting the circumstances; but Sir. L. Kenyon, M.R., said that though there were cases in which legacies were left to persons by nicknames, and evidence had been admitted to shew

Evidence not admissible to exclude a person answering to description.

(g) 1 Ves. jun. 412.

(h) 1 Cox, 425.

CHAPTER XV. that the testator usually called them thereby, yet he thought that this was beyond all precedent, and dismissed the bill.

In this case there could have been no doubt as to the identity of the father : but the difficulty was in admitting the claim of a son of a different name, there being a son of the name used by the testator.

In *In bonis Peel* (i), the testator appointed as one of his executors Francis Courtenay Thorpe, of Hampton, gentleman ; it appeared that this description applied to a youth of twelve years of age ; the Court refused to admit evidence to shew that the testator intended to appoint the father of the youth, whose name was Francis Corbet Thorpe.

Again, in *Holmes v. Custance* (j), where there was a legacy to the children of Robert Holmes, "late of Norwich, but now of London." It appeared that, at the date of the will, the testator had no relative named Robert, but that a person of this name, who was related to the testator, and had gone from Norwich to London, at the age of fourteen or sixteen, had died in London, a few years before, leaving a child. It was contended that the legacy did not apply to the child of this person, but to the children of George Holmes, who was a relative of the testator, had been formerly of Norwich, and was then resident in London, and had several children, some of whom were in habits of intimacy with the testator ; but Sir W. Grant held that the description was not so inapplicable to Robert, as to let in evidence that George was the person intended ; that the sense of "late" was not "recently" but "formerly" ; and as to his being dead at the time, that the testator might not have known or might have forgotten it, he being at a distance.

And in *Wilson v. Squire* (k), where a testator bequeathed a legacy to "The London Orphan Society in the City Road," and it appeared that there was no institution precisely answering this description, but there was one in the City Road called the Orphan Working School, which claimed the legacy : evidence was tendered that there was a society called the London Orphan Asylum at Clapton, and that the testator was many years a subscriber to it, and in his lifetime avowed his intention of leaving it a legacy ; but Sir J. K. Bruce held, that the Orphan Working School was sufficiently described by the will, and therefore that none of the evidence was admissible.

(i) L. R., 2 P. & D. 46.

(j) 12 Ves. 279 ; see also *Doe v. Westlake*, 4 B. & Ald. 57, ante, p. 520 ;

Re Ingle's Trust, L. R., 11 Eq. 578 ; *Re Chenoweth*, 17 T. L. R. 515.

(k) 1 Y. & C. C. C. 654.

On the same principle, if a testator refers to "my nephew A. B.," and it appears that he has two nephews of that name, one legitimate and the other illegitimate, there is as a general rule no ambiguity, for *primâ facie* "nephew" means a legitimate nephew, and therefore in such a case evidence is not admissible to shew that the testator intended to refer to his illegitimate nephew (*l*). But it may appear from the language of the will that the testator applied the description of "nephew" to his legitimate and illegitimate nephews indiscriminately, and in such a case evidence is admissible to shew that in referring to "my nephew A. B." the testator intended to refer to his illegitimate nephew of that name (*m*).

CHAPTER XV.

Two claimants, one legitimate, the other illegitimate.

This doctrine was carried even farther in the case of *Henderson v. Henderson* (*n*). There the testator gave property for the benefit of his grandson, Robert William Henderson; he had a grandson of that name, and also a grandson named William Robert Henderson; it was held that evidence was admissible to shew that the testator was in the habit of calling the latter Robert William, and also to shew that he intended to benefit William Robert, and not Robert William. The decision seems contrary to the principle recognized in *Charter v. Charter*. It is true, as Lord Selborne remarked in that case, that the principle does not rest on a rational foundation, but it is clearly established.

Henderson v. Henderson.

And even where no person actually answers to any part of the description in the will, it would seem, upon principle, to be impossible to admit parol evidence of intention in support of the claim of one to whom the description is in every respect inapplicable: for the will ought to be made in writing; and if the testator's intention cannot be made to appear by the writing, explained by the circumstances, there is no will (*o*).

Evidence of intention inadmissible to support claim of one to whom no part of description applies.

Thus, Sir John Strange (*p*), in citing a case where the executor constituted in a will was "my nephew Robert New," which in the engrossing was written "Nune," and parol evidence was admitted, and thereupon New was declared the person meant, observed, that this would hardly have done, if it had not been for the relative words "my nephew," and its appearing that New was the testator's nephew, and that he had no such nephew as Robert Nune.

Again, in *Miller v. Travers* (*q*), a testator devised all his

Same rule as to subject of gift.

(*l*) *Re Fish*, [1894] 2 Ch. 83

(*m*) *In bonis Ashton*, [1892] P. 83.

(*n*) [1905] 1 Ir. R. 353. See *Re Bowman*, 8 T. L. R. 117.

(*o*) Per Lord Abinger, *Doe v. Hiscocks*, 5 M. & Wels. 369.

(*p*) *Hampshire v. Peirce*, 2 Ves. 218

(*q*) 8 Bing. 244, 1 M. & Sc. 342. The judgment of Tindal, C.J., contains a full and able examination of the authorities. See also *Okeden v. Clifden*, 2 Russ. 309; *Re Clergy Society*, 2 K. & J. 615; *Re Mayo*, [1901] 1 Ch. 404; *Barber v. Wood*, 4 Ch. D. 885.

CHAPTER XV. freehold and real estates whatsoever, situate in the county of Limerick, and in the city of Limerick, to trustees and their heirs. At the time of making his will, the testator had no real estate in the county of Limerick, but he had considerable real estates in the county of Clare : and it was held by Lord Brougham, L.C., assisted by Tindal, C.J., and Lord Lyndhurst, C.B., that evidence to prove that the testator intended his estates in the county of Clare to pass by the devise, and that the word "Limerick" was inserted by mistake instead of "Clare," was not admissible.

Evidence of
state of facts
admissible in
such a case.

But this rule does not prevent the admission of parol evidence to shew that the description in the will was inserted by mistake, and that there is a person answering a similar name or description who stood in such a relation of friendship or intimacy to the testator as to lead to the conclusion that he is the person whom the testator intended to benefit (*r*).

The limits of the doctrine are also illustrated by the case of *Re Ofner* (*s*), where a contemporaneous memorandum in the testator's handwriting was admitted as evidence to identify a person wrongly described in the will ; the fact that this memorandum happened to be instructions for the will was held not to make it inadmissible.

(*r*) *Supra*, p. 512.

(*s*) [1909] 1 Ch. 60.

CHAPTER XVI.

ELECTION AND ESTOPPEL.

ELECTION.

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I.—Nature and Extent of the Doctrine.—Although Mr. Jarman states the general doctrine of election, he does not deal with it except so far as it is applicable to a particular class of cases, namely, where a testator disposes of his own property, and also professes to dispose of property which does not belong to him. There are, however, other classes of cases to which the doctrine is applicable. Some of them are referred to in connection with appointments under powers (*a*). Questions with regard to election also arise where persons to whom benefits are given by will have claims on the testator arising out of a transaction entered into by him during his lifetime; as in the case where a father, on the marriage of one of his children, covenants to settle property on the child, and afterwards gives benefits to that child by his will. This subject is considered elsewhere (*b*).

Extent of the
general
doctrine.

The limits of the general doctrine were discussed in *Wollaston v. King* (*c*), where James, V.-C., said: "The rule laid down by the

Limits of the
doctrine.

(*a*) Chap. XXIII.

(*b*) Chap. XXXII. The cases where an infant is put to her election whether she will take under or against a settlement made on her marriage (as in *Barrow v. Barrow*, 4 K. & J. 409; *Codrington v. Codrington*, 1. R., 7 H. L. 854; *Carter v. Silber*, [1891] 3 Ch. 553:

[1892] 2 Ch. 278; *Edwards v. Carter*, [1893] A. C. 360; *Viditz v. O'Hagan*, [1899] 2 Ch. 569; [1900] 2 Ch. 87, and cases there cited), do not fall within the scope of this work.

(*c*) L. R., 8 Eq. 165, 174. See Gray, *Perp.* § 561a.

CHAPTER XVI. Master of the Rolls in *Whistler v. Webster* (*d*), is, in general terms, 'that no man shall claim any benefit under a will without conforming, so far as he is able, and giving effect to everything contained in it whereby any disposition is made shewing an intention that such a thing shall take place.' This rule, expressed in these terms, was certainly not applied in the case of *Carver v. Bowles* (*e*) and the cases which followed it. There it was clear that certain persons were intended to take benefits under the will, and other persons were allowed to take other benefits without conforming to, and giving effect to, the first dispositions, and, in fact, after defeating them. But why? The only intelligible principle which I can find is that it was held that the failure of the first dispositions, so far as they failed, did, under the will itself, enure for the benefit of the legatees; that the legatees were allowed to retain both benefits because they took both as legatees under the will itself without calling in aid any other instrument or any adverse title. It results in this, that the rule as to election is to be applied as between a gift under a will and a claim dehors the will, and adverse to it, and is not to be applied as between one clause in a will and another clause in the same will."

Condition. Questions of election sometimes arise where a testator makes a bequest or devise to A. on condition that A. releases some right or transfers some property of his to B.; here A. must elect whether he will comply with the condition or forfeit the gift under the will (*f*).

Right of selection. The cases in which one of several houses, pieces of land, chattels, or other kinds of property, is devised or bequeathed in such a way that the devisee or legatee has a right to elect which he will take, are discussed elsewhere (*g*).

Doctrine of election, what. "The doctrine of election," says Mr. Jarman (*h*), "may be thus stated: That he who accepts a benefit under a deed or will, must adopt the whole contents of the instrument (*i*), conforming to all its

(*d*) 2 Ves. jun. 367.

(*e*) 2 Russ. & My. 301.

(*f*) *Wilkinson v. Dent*, L. R., 6 Ch. 339, where *East v. Cook*, 2 Ves. sen. 30, is explained; *Boughton v. Boughton*, 2 Ves. sen. 12; *Coote v. Gordon*, Ir. R., 11 Eq. 279; *Thornton v. Thornton*, 11 Ir. Ch. 474; *Cosby v. Lord Ashtown*, 10 Ir. Ch. 219; *Re Earl of Sefton*, [1898] 2 Ch. 378. A condition that a certain fund or property shall be brought into hotchpot obviously does not give the legatee a right of election: *Middleton v. Windross*, L. R., 16 Eq. 212.

(*g*) Ante, p. 460.

(*h*) First edition of this work, p. 385. The two leading cases of *Noys v. Mor-daunt*, 2 Vern. 581, and *Streatfield v. Streatfield*, C. t. Talb. 176, are given in White and Tudor's L. C. with valuable notes.

(*i*) The "instrument" may consist of several documents carrying out one entire disposition: *Re Woodleys*, 29 L. R. Ir. 304, in which *Kirkham v. Smith*, 1 Ves. sen. 258 and *Bacon v. Cosby*, 4 De G. & S. 261 are cited.

provisions, and renouncing every right inconsistent with it. If, therefore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition; but if, on the contrary, he choose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights.

"An anonymous case in *Gilb. Cas. in Eq. (j)* furnishes a simple illustration of the principle. A. seised of two acres, one in fee, and the other in tail, and having two sons, by his will devised the fee-simple acre to his eldest son, who was issue in tail, and the entailed acre to his youngest son, and died. The eldest son entered upon the entailed acre, whereupon the younger son brought his bill against his brother, that he might enjoy the entailed acre devised to him, or else have an equivalent out of the fee acre; because his father plainly designed something for him. Lord Cowper said, 'The devise of the fee acre to the elder must be understood to be upon the tacit condition, that he shall suffer the younger son to enjoy quietly, or else that the younger son shall have an equivalent out of the fee acre.' And he decreed the same accordingly." This case is the more remarkable, as shewing the length to which the doctrine of election has been carried; because the elder son was actually entitled to both acres by his better title as general or special heir, and took nothing under the will. Yet the mere intention to give him property by the will was held sufficient to put him to his election (*k*).

But a devisee or legatee is not precluded from claiming derivatively, through another, property which such other person has taken in opposition to the will. Thus, a man may be tenant by the curtesy, in respect of an estate of inheritance taken by his wife in opposition to a will under which he has accepted benefits, without affecting his title to those benefits (*l*). For compensation having once been made by the wife (*m*) cannot be exacted a second time.

Does not extend to derivative claims.

(j) *Anon.*, *Gilb. Cas. Eq.* 15; see also *Pre. Ch.* 351; *Belt's Suppl. to Ves.* 250; 2 *P. W.* 199; 1 *Ves. sen.* 234; 1 *Br. P. C. Tom.* 300; 3 *ib.* 167; *Amb.* 388, 1 *Ed.* 532; 3 *Br. C. C.* 316; *Blake v. Bunbury*, 4 *Br. C. C.* 21; *Wilson v. Lord Townshend*, 2 *Ves. jun.* 693; 5 *Ves.* 515; *Thellusson v. Woodford*, 13 *Ves.* 209; 1 *Dow*, 249; *Dillon v. Parker*, 1 *Sw.* 359, and *Gretton v.*

Haward, *ib.* 409, with Mr. Swanston's celebrated notes; *Abdy v. Gordon*, 3 *Russ.* 278; 2 *Drew.* 93.

(k) See *Schroder v. Schroder*, *Kay*, 584-586. But 9 *Pri.* 573, *Richards*, *C. B. dub.*

(l) *Lady Cavan v. Pulleney*, 2 *Ves. jun.* 544, 3 *Ves.* 384.

(m) 2 *Ves. jun.* 555,

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And a devisee or legatee who claims derivatively through another to whom the will gave nothing is equally free ; for whether the true owner took subject to an obligation which he has discharged, or subject to no obligation whatever, can make no difference : thus one co-heiress electing to take under a will, may retain a share which since the testator's death has descended to her from a deceased co-heiress, although bound to give up her own original share (n).

It must however be understood that the obligation attaches on whoever at the testator's death is true owner of the property wrongfully disposed of, and to whom also a benefit is given by the will. This is the point of time to be regarded. And it matters not from whom, or by what previous acts or devolutions, such owner's title was derived (o).

Intention of
testator.

The doctrine does not depend on any supposed intention of the testator, but is based on a general principle of equity. Consequently the obligation of election extends to the whole of the benefits taken under the two instruments or titles (p).

Election by
several
persons.

If the property which the testator affects to dispose of belongs to several, as tenant for life and remainderman, each has a separate right of election (q). And if the person on whom the obligation to elect is cast dies without having elected, and his property devolves on several persons, each of them has a separate right of election (r). If A., the person who is bound to elect, elects to take against the will but dies before B., the disappointed legatee or devisee, asserts his rights, A.'s estate is liable to make compensation to B. to the extent of the benefits which A. was entitled to receive under the will (s). In *Pickersgill v. Rodger* (t), a testatrix bequeathed a sum of 15,000*l.* (which really belonged to her four children, W., J., R., and H. in equal shares, subject to the testatrix's life estate) to R. and H. in equal shares, and devised her real estate to J., subject to the payment thereout of a sum of 10,000*l.* to W. The son J. died before his mother, having by his will given his real estate to one person and his personal estate to others ; he left issue, so that the

(n) *Wilson v. Wilson*, 1 De G. & S. 152. And see *Howells v. Jenkins*, 2 J. & H. 706 ; *Grissell v. Swinhoe*, L. R., 7 Eq. 291. But see per Lord Moncrieff, L. R., 7 H. L. 79.

(o) *Cooper v. Cooper*, L. R., 6 Ch. 15, 7 H. L. 53. In that case a person who, if he had survived the testatrix, would have been put to his election, died intestate in her lifetime, leaving children, who were his next-of-kin : it was held that they were bound to elect, an allowance being made for the debts of the

deceased.

(p) *Cooper v. Cooper*, L. R., 7 H. L. 53.

(q) *Ward v. Baugh*, 4 Ves. 623.

(r) *Fytche v. Fytche*, 19 L. T. 343. The report of this case in L. R., 7 Eq. 494, is so incomplete as to be almost worthless. See also *Harris v. Watkins*, 2 K. & J. 473.

(s) *Rogers v. Jones*, 3 Ch. D. 688 ; 7 Ch. D. 345 ; *Re Carpenter*, 51 L. T. 773.

(t) 5 Ch. D. 163.

devise to him of the real estate under the original testatrix's will did not lapse : it was held by Jessel, M.R., that the disappointed legatees under that will were entitled to compensation out of the real estate devised to J., but that no case of election arose against his residuary legatees.

Where several were disappointed, the sequestered property is divided among them in proportion to the value of the interest of which they are disappointed (*u*).

In all cases of election, the amount of compensation is ascertained as at the date of the testator's death (*v*).

The practical working of the rule as to compensation in cases of election is exemplified in *Re Booth* (*w*). In that case a testator was absolutely entitled to certain lands, and was also tenant for life of other lands, without any power of disposition over them, the persons entitled to them subject to his life interest being such of his children as attained twenty-one. By his will he devised his own lands and the settled lands to some of his children and to other persons in various shares, the shares of the children under the will not corresponding to their shares under the settlement. Consequently the interests of three classes of persons had to be considered, namely (A) persons entitled under the settlement to whom the testator gave part of his own property and also purported to give shares in the settled property ; (B) persons entitled under the settlement, to whom the testator gave no part of his own property, but purported to give shares in the settled property ; and (C) persons not entitled under the settlement, to whom the testator purported to give shares in the settled property. All the persons comprised in classes (A) and (B) elected to take against the will, the result being that some of them were deprived of the shares in the settled property purported to be given them by the will. It was held (first) that the members of class (A) were entitled to compensation inter se, so that every member of class (A) was bound to make compensation not only to class (C) but also to every other member of class (A) ; and (secondly) that all compensation received by any member of class (A) formed part of the benefits received by him under the will.

If the property which the testator professes to dispose of does not belong to the legatee, no case of election arises. In *Re Lord Chesham* (*x*), certain heirlooms were settled by deed upon trusts

When compensation is ascertained.

Where property belongs to a class and testator purports to give it to some members of the class and to strangers.

Compensation of parties electing inter se.

Where property does not belong either to testator or to legatee.

(*u*) *Howells v. Jenkins*, 1 D. J. & S. 617.

(*v*) *Re Hancock*, [1905] 1 Ch. 16.

(*w*) [1906] 2 Ch. 321.

(*x*) 31 Ch. D. 466. Compare the cases where a married woman is restrained from anticipation, *post*, p. 553.

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under which they were to go with the possession of a house of which the testator was tenant for life, with remainder to A. as tenant for life; the testator bequeathed these heirlooms upon trust for sale for the benefit of B. and C., and gave his residue to A. It was held by Chitty, J., that no case of election arose, because A. could not give up the heirlooms. The learned judge distinguished the case before him from the case of *Williams v. Mayne* (y), in which a testator bequeathed a legacy to a married woman, and purported to dispose of a fund in which she had a reversionary interest under her marriage settlement, and it was held that the legacy must be impounded until the reversionary interest fell into possession. *Williams v. Mayne* seems to have been decided in accordance with the views held by the Court of Appeal in *Robinson v. Wheelwright* (z).

Doctrine applies to contingent and reversionary interests.

The doctrine of election clearly applies as well to contingent as to vested rights (a); and to reversionary and remote as well as to immediate interests (b). "Lord Hardwicke, indeed," as Mr. Jarman points out (c), "at one time seems to have thought that it did not extend to a remainder expectant on an estate tail (d); but the notion stands upon no intelligible principle, and is inconsistent with his Lordship's own decision in *Graves v. Forman* (e), in which he would not allow an heir at law to whom an estate for life in remainder after an estate tail was devised, to take it without giving up a copyhold disposed of to another, but upon which the will could not (in the then state of the law) operate, for want of a previous surrender. The heir it seems (strangely enough) elected to take the estate for life in remainder, and eventually got nothing; the tenant in tail having acquired the fee-simple by suffering a common recovery."

Immaterial whether testator is acquainted with his want of title.

Mr. Jarman continues (f): "It is immaterial in regard to the doctrine of election, whether the testator, in disposing of that which is not his own, is aware of his want of title, or proceeds on the erroneous supposition that he is exercising a power of disposition which belongs to him; in either case, whoever claims in opposition to the will, must relinquish what the will gives him (g). This seems to

(y) Ir. R., 1 Eq. 519.

(z) 6 D. M. & G. 535, disapproving *Wall v. Wall*, 15 Sim. 513.

(a) Per Lord Loughborough, 2 Ves. jun. 696, 697.

(b) *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *Wilson v. Lord John Townshend*, 2 Ves. jun. 697.

(c) First ed. p. 386.

(d) *Bor v. Bor*, 3 Br. P. C. Toml. 178, n.

(e) Cited 3 Ves 67; see *Mahon v. Morgan*, 6 Ir. Jur. 173.

(f) First ed. p. 387.

(g) *Whistler v. Webster*, 2 Ves. jun. 370; *Thellusson v. Woodford*, 13 ib. 221; *Welby v. Welby*, 2 V. & B. 199, overruling *Cull v. Showell*, Amb. 727, unless decided on the ground of the great lapse of time, which seems probable. *Re Brooksbank*, 34 Ch. D. 160.

result from the impossibility of knowing with certainty that the testator would not have made the disposition, had he been accurately acquainted with the title; and (as a great judge has observed), 'nothing can be more dangerous than to speculate upon what he would have done, if he had known one thing or another' (*h*).

"A question which has been much discussed is, whether the principle governing cases of election under a will is forfeiture or compensation; or, to speak more explicitly, whether a person claiming against a will is bound to relinquish the benefit thereby given to him in toto, or only to the extent of indemnifying the persons disappointed by his election. The strong current of the authorities, particularly those of a recent date, is in favour of the principle of compensation (*j*); interrupted, certainly, by some dicta (*k*), which seem to favour the doctrine of forfeiture (*l*). In the case of *Green v. Green* (*m*), Lord Eldon is generally supposed to have used expressions indicating a similar opinion. His Lordship, however, expressly admits the cases to have decided that the party electing against a will was not bound to give up more than was enough to make satisfaction for that which was intended for another; and when his Lordship states the contrary doctrine, it is with reference to the case before him, which arose upon a deed, 'in which,' he observed, 'as it is a contract, it is very difficult to say that compensation only is to be made' (*n*). The doctrine of compensation was also subsequently recognized by the same high authority in the House of Lords, in *Ker v. Wauchope* (*o*), as well as in the earlier and much-discussed case of *Lord Rancliffe v. Parkyns* (*p*); and were it not that the contrary doctrine has received the support of a gentleman of great ability and eminence (*q*), the writer would not

Principle of doctrine is compensation, not forfeiture.

(*h*) See Sir R. P. Arden's judgment in *Whistler v. Webster*, 2 Ves. jun. 370.

(*j*) *Webster v. Mitford*, 2 Eq. Ca. Ab. 363, stated from Reg. Lib. 1 Sw. 449; *Bor v. Bor*, 3 Br. P. C. Toml. 167; *Ardesoife v. Bennet*, 2 Dick. 463; *Lewis v. King*, 2 Br. C. C. 600; *Freke v. Lord Barrington*, 3 Br. C. C. 284; *Blake v. Bunbury*, 1 Ves. jun. 523; *Whistler v. Webster*, 2 Ves. jun. 372; *Lady Cavan v. Pulteney*, 2 Ves. jun. 560; *Ward v. Baugh*, 4 Ves. 627; *Dashwood v. Peyton*, 18 Ves. 49; *Welby v. Welby*, 2 V. & B. 190. (See these cases stated in Mr. Swanston's note to *Gretton v. Haward*. 1 Sw. 433); *Tibbits v. Tibbits*, Jac. 317.

(*k*) *Cowper v. Scott*, 3 P. W. 119; *Cookes v. Hellier*, 1 Ves. sen. 235; *Morris v. Burroughs*, 1 Atk. 404; *Vil-*

lareal v. Lord Galway, 1 Br. C. C. 292, n.; *Wilson v. Townshend*, 2 Ves. jun. 697; *Wilson v. Mount*, 3 Ves. 194; *Broome v. Monck*, 10 Ves. 609; *Thellusson v. Woodford*, 13 Ves. 220.

(*l*) And by an express decision of Lord Langdale to that effect: *Greenwood v. Penny*, 12 Beav. 406.

(*m*) 2 Mer. 86.

(*n*) 19 Ves. 668.

(*o*) 1 Bli. 1.

(*p*) 6 Dow, 149.

(*q*) 1 Roper's Husband and Wife, by Jacob, 556, n.; "The writer understands that other eminent equity lawyers concur in Mr. Jacob's views." (Note by Mr. Jarman.) See also Sug. Pow. p. 575, 8th ed., where the doctrine of forfeiture is preferred.

CHAPTER XVI.

No compensation where legatee takes under will.

Personal competency to express intention requisite.

As to infants and femes covertes.

have thought the point open to discussion." It is now generally accepted as the settled doctrine of the Court (*r*).

If the person who is put to his election elects to take under the will, no question of compensation arises (*s*).

Mr. Jarman continues (*t*): "In order to raise a case of election, there must be a *personal* competency on the part of the author of the attempted disposition, as the doctrine is founded on intention (*u*), which supposes such competency. Thus, under the old law, where personalty was, and real estate was not, disposable by the will of a person under age, the heir of the infant testator was allowed to take his real estate in opposition to the will, without relinquishing a legacy bequeathed to him by the same will (*v*). And though the disability of coverture is, in some respects, distinguishable from and less absolute than that of infancy, (a feme covert having, it is said, a disposing mind, but not a disposing power, while an infant has neither the one nor the other,) yet the principle seems, according to the authorities, to apply to the attempted dispositions of married women. If, therefore, a feme covert, having a testamentary power, makes an appointment by will in favour of her husband, and by the same will professes to bequeath to another personal estate to which her power does not extend, the husband may take the benefit appointed to him, and also defeat the intended bequest of the other property, by the assertion of his marital right" (*w*).

So if a married woman, subject to the old law, makes a valid testamentary disposition in favour of her heir, and attempts to devise real estate, not settled to her separate use, to a stranger, the heir is not put to his election (*x*). Or if she makes a valid appointment of personalty in favour of her next of kin, and an invalid appointment of another fund to strangers, the next of kin are not put to their election (*y*).

But if a married woman attempts to dispose by will of property which belongs to her husband otherwise than *jure mariti*, and

(*r*) *Schroder v. Schroder*, Kay, 578; *Howells v. Jenkins*, 1 D. J. & S. 617; *Cooper v. Cooper*, L. R., 6 Ch. 15, 7 H. L. 53; *Re Vardon's Trusts*, 28 Ch. D. 124; 31 Ch. D. 275. Compare *Griffith Boscawen v. Scott*, 26 Ch. D. 358.

(*s*) *Re Lord Chesham*, 31 Ch. D. 466, and cases there cited.

(*t*) First ed. p. 388.

(*u*) That is, a disposing intention, not an intention to put the owner to his election; see per Lord Cairns, *Cooper*

v. Cooper, L. R., 7 H. L. 67.

(*v*) *Hearle v. Greenbank*, 1 Ves. sen. 298. See *Re Anderson*, [1905] 2 Ch. 70.

(*w*) *Rich v. Cockell*, 9 Ves. 370. The passage above quoted was referred to by Kay, J., in *Re De Burgh Lawson*, 55 L. J. Ch. 46, as a correct statement of the law.

(*x*) *Re De Burgh Lawson*, 55 L. J. Ch. 46.

(*y*) *Blakelock v. Grindle*, L. R., 7 Eq. 215.

makes a valid disposition of other property in his favour, he is bound to elect (z). CHAPTER XVI.

In *Rich v. Cockell* (cited by Mr. Jarman, *supra*) the will was wholly inoperative, except as to the testatrix's separate estate; it had not been proved, and could not be proved without the husband's assent. Since the Married Women's Property Acts, the will of a married woman is entitled to probate (*ante*, p. 45), and it is submitted that this alteration in the law has rendered obsolete the doctrine stated above by Mr. Jarman. *Re Harris (a)* seems to have been partly decided on this ground. In that case a testatrix gave her husband an annuity of 100*l.*, and bequeathed to C. a gold watch which had formerly belonged to her, but became her husband's property, *jure mariti*, on her marriage in 1873: it was held by Parker, J., that the husband was put to his election.

Effect of
M. W. P.
Acts.

Where under the old law, a testator, by a will sufficient in point of execution to pass personal estate, but not adequately attested for the devise of freehold estate, devised such estate away from the heir, to whom, by the same will, he bequeathed a legacy, no case of election arose against the heir (*b*), unless the legacy to him was bequeathed upon the express condition that he should confirm the devise (*c*). Of course this question cannot now arise under wills made or republished since the year 1837, which, if sufficiently executed for the bequest of a personal legacy, will also be effectual to dispose of freehold estate. Nor is this the only instance in which the Wills Act has tended to narrow the practical range of the doctrine under consideration; for now that the devising power extends to after-acquired real estate, it can no longer be a question (as formerly (*d*)), whether the testator has, by attempting to dispose

As to heir.

Effect of
1 Vict. c. 26,
on doctrine.

(z) *Coutts v. Acworth*, L. R., 9 Eq. 519.

(a) [1909] 2 Ch. 206. In his judgment Parker, J., seems to doubt whether Mr. Jarman's statement of the law was justified, even in 1844, by the decision in *Rich v. Cockell*.

(b) *Hearle v. Greenbank*, 1 Ves. 298, 3 Atk. 697, 716; *Cary v. Askew*, 1 Cox, 241; *Sheddon v. Goodrich*, 8 Ves. 481; *Brodie v. Barry*, 2 V. & B. 127; *Gardiner v. Fell*, 1 J. & W. 22. *Wilson v. Wilson*, 1 De G. & S. 152, seems *contra*. But see as to that case *Middlebrook v. Bromley*, 9 Jur. N.S. 614; and per Lord Alvanley, *Buckridge v. Ingram*, 2 Ves. jun. 665, cited by Lord Eldon, 8 Ves. 500. So where a devise was revoked by an alteration of the estate of the testator, *Jacob v. Jacob*, 82 L. T. 270; *ante*, p. 161.

(c) *Boughton v. Boughton*, 2 Ves. 12.

(d) See *Churchman v. Ireland*, 4 Sim. 520, 1 R. & My. 250 (questioning *Back v. Kett*, Jac. 534); *Tennant v. Tennant*, 2 Ll. & G. t. Plunket, 516; *Schroder v. Schroder*, Kay, 578; *Hance v. Trauwitt*, 2 J. & H. 216. In *Schroder v. Schroder* the testator (who died before the Act 3 & 4 Will. 4, c. 106, s. 3, came into operation), after making his will, which purported to devise his after-acquired real estates, contracted to buy a certain estate, and then made a codicil directing his trustees to complete the purchase, and hold the estate on the trusts of the will, which were partly in favour of the heir; afterwards the codicil was revoked by a conveyance to uses to bar dower in the testator's favour (*vide ante*, p. 161), and it was held that the heir must elect. But

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In what cases
a Scotch heir
is put to
election by
English will.

of the real estate to which he may be entitled at his decease, raised a case of election against the heir in respect of such property. Even before the act, the heir was held not to be put to his election in cases of revocation by alteration of estate (a).

Nearly allied to the cases last noticed, are those where a testator entitled to heritable property in Scotland, affects by will in the English form, ineffectual to pass the Scotch property, to devise it away from the Scotch heir, at the same time giving him property in England. It seems now well settled that in such cases, if the English will purports to give the Scotch property either by name or under the general denomination of property in Scotland (b), or of property "in any part of the United Kingdom" (c), the Scotch heir is put to his election, while, on the other hand, a devise in general terms of all the testator's property whatsoever and where-soever is held to refer only to such property as he has power to give by the will, and the Scotch heir may claim both by descent and under the will (d); the first proposition also seems to apply where the disposition is in the Scotch form, but not sufficient to pass lands in England away from the English heir (e), and it is presumed the latter proposition would be held to apply also, as the doctrine of approbate and reprobate in Scotland, and of election in England, seem to be identical (f).

In *Douglas-Menzies v. Umphelby* (g), a testator domiciled in Scotland made two wills, under each of which he gave benefits to his wife; one will was to take effect according to the law of New South Wales, the other according to the law of Scotland; the wife took

if a testator before 1838 devised estate A., which he had contracted to buy, to one person, and estate B., with all other estates which he might subsequently acquire, to another, and gave benefits to his heir, and afterwards took a conveyance of estate A. to uses to bar dower in his own favour, and acquired other estates, it was questioned by the V.-C. whether the heir was bound to elect; for there was no intention to give estate A. to the devisee of B., and the whole doctrine of election proceeded so entirely on the ground of intention, that perhaps the heir might be entitled to retain the estate against both devisees, neither of whom would have a better right against him than the other.

(a) *Plowden v. Hyde*, 2 Sim. (N.S.) 171; *Tennant v. Tennant*, 2 Ll. & Go. 516; Sugd. Pow. 577, 8th ed.

(b) *Brodie v. Barry*, 2 V. & B. 127; *Reynolds v. Torin*, 1 Russ. 129; *M'Call v. M'Call*, Dru. t. Sug. 283.

(c) *Orrell v. Orrell*, L. R., 6 Ch. 302.

(d) *Johnson v. Telford*, 1 R. & My. 244; *Allen v. Anderson*, 5 Hare, 163; *Maxwell v. Maxwell*, 16 Beav. 106, 2 D. M. & G. 705; *Maxwell v. Hyslop*, L. R., 4 Eq. 407. As to land in France, see *Baring v. Ashburton*, 54 L. T. 463.

(e) *Dundas v. Dundas*, 2 D. & Cl. 349. The Scotch Courts, therefore, unlike the English Courts, will read against the English heir an instrument imperfectly executed according to the Statute of Frauds, so as to put him to an election; and in like manner the English Courts (treating the Scotch heir differently from the English heir, *Dewar v. Maitland*, L. R., 2 Eq. 834) will read against the Scotch heir an instrument insufficient according to the law of Scotland to disinherit him.

(f) 2 D. & Cl. 352; 16 Beav. 107; *Ker v. Wauchope*, 1 Bli. 1; *Codrington v. Codrington*, L. R., 7 H. L. at p. 866,

(g) [1908] A. C. 224.

proceedings in Scotland in which she successfully asserted a claim to share in the testator's property contrary to the terms of the will, and it was held that under the doctrine of approbate and reprobate she could not take any benefit under the Australian will.

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In *Haynes v. Foster* (h), a testator devised land in Turkey, which by the law of that country he had no power to dispose of by will, and it was held that his son, being one of his heirs by Turkish law, was put to his election.

Land in Turkey.

The application of the doctrine of election to appointments under powers is discussed elsewhere (i).

Powers of appointment.

The doctrine of election has been held not to apply to creditors; and, therefore, where a testator appropriated to the payment of debts property which was not liable thereto, and by the same will disposed of, in favour of other persons, property which was by law assets for the payment of debts, it was held that the creditors might take the latter in subversion of the testator's devise, without abandoning their claim to the former (j). And where a testator devised for payment of debts certain lands, (including some which were not his own, but belonged to his son,) the son was allowed to participate as a creditor in the provision for debts, out of the other property, without relinquishing his own estate to the creditors (k). But now real estates of every description are assets for the payment of debts (l).

Not applicable to creditors.

II. Parol Evidence inadmissible to raise Election.—"At one period," says Mr. Jarman (m), "it was doubted whether evidence dehors the instrument was admissible for the purpose of shewing that a testator considered that to be his own which did not actually belong to him, or was not under his disposing power. In the well-known case of *Pulteney v. Darlington* (n), rent-rolls and steward's accounts were admitted to prove that the testator dealt as absolute owner with lands of which he was only tenant in tail, and, consequently, that he must have intended them to pass under a general devise of his real estate, so as to impose election on the heir in tail,

Whether parol evidence is admissible.

(h) [1901] 1 Ch. 361.

(i) Chap. XXIII.

(j) *Kidney v. Coussmaker*, 12 Ves. 136; see also *Clark v. Guise*, 2 Ves. 617.(k) *Deg v. Deg*, 2 P. W. 412. See further as to the position of creditors with reference to the doctrine of elec-tion, per Lord Cairns in *Cooper v. Cooper*, L. R., 7 H. L. p. 66.

(l) Chaps. LIII, LIV.

(m) First ed. p. 391.

(n) (*Lady Cavan v. Pulteney*; *Darlington v. Pulteney*); 2 Ves. jun. 544, and 3 Ves. 384.

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“ Lord Commissioner Eyre, however, in *Blake v. Bunbury* (p), laid it down, that ‘ the intent of the testator to dispose of that which was not his, ought to appear on the will.’ The admissibility of extrinsic evidence, too, was strongly denied by Lord Loughborough, in *Stratton v. Best* (q); and the same Judge expressed his disapprobation of *Pulteney v. Lord Darlington*, in *Rutter v. Maclean* (r); as did Lord Eldon in *Pole v. Lord Somers* (s), and *Druce v. Dennison* (t). In the latter case, however, his Lordship admitted a statement of property written by the testator, and books of account, as evidence that he considered himself to be owner, and, as such, intended to dispose of certain messuages and leases, the property of his wife, part of which the testator had made his own by alienation; but Lord Eldon seems to have regarded the papers themselves as testamentary, and to have thought that he must either admit the testator’s explanatory statement as extrinsic evidence, or give the parties an opportunity of propounding it as part of the will in the Ecclesiastical Court. This case, however, does not contain so decided an expression of his Lordship’s opinion on the subject, as we find in a subsequent case in the House of Lords (u) in which he observed that he thought the rules as to election had been settled: ‘ It must appear on the face of the will, that the testator proposes that there should be an election, and as to what subjects.’ And his Lordship referred to *Druce v. Dennison* as standing, to some extent at least, on the special ground which has been noticed. Lord Eldon also adverted to a case of *Andrews v. Lemon*, where a testator bequeathed all his personal property (he having personal property of his own, and also personal property not so strictly his own, but which he had power to dispose of by deed or will), for purposes for which his own was insufficient; Sir L. Kenyon, M.R., sent it to the Master to inquire whether by personal property he meant his own strictly, or intended to include both: but when the evidence was taken, he was so much struck with his own decision, that he said, ‘ Though the evidence has been taken, I shall not now admit one word of it, it being necessary, for the general interests of mankind, that persons should in their wills state clearly what they mean.’

(o) See also *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516; *Rutter v. Maclean*, 4 Ves. 531; *Pole v. Lord Somers*, 6 Ves. 309; and *Druce v. Denison*, *ibid.* 385; and see *Finch v. Finch*, 4 Br. C. C. 38, 1 Ves. jun. 534.

(p) 1 Ves. jun. 523.

(q) 1 Ves. jun. 285.

(r) 4 Ves. 537.

(s) 6 Ves. 322.

(t) *Ibid.* 402.

(u) *Doe v. Chichester*, 4 Dow, 76, 89, 90.

“The doctrine thus earnestly advocated by these eminent Judges has prevailed in subsequent cases. As in *Clementson v. Gandy* (v), where parol evidence was tendered for the purpose of shewing that the testatrix had supposed herself to be absolute owner of, and intended to include in the residuary bequest in her will, certain settled property, in which she had only a life interest, in order to raise a case of election against a legatee under the will, who also took an interest in such property under the settlement; but the evidence was rejected, Sir J. Leach, M.R. (w), observing that the intention to dispose must in all cases appear by the will itself; that there was no ambiguity in the expressions the testatrix had employed; and extrinsic evidence for the purpose of contradicting the intention was inadmissible.”

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Parol
evidence
rejected.

III.—What Dispositions are sufficient to raise Election.—With respect to the intention, as manifested by the will itself, it is to be observed, that, in order to raise a case of election, it must be clear and decisive; for if the testator's expressions will admit of being restricted to property belonging to or disposable by him, the inference will be, that he did not mean them to apply to that over which he had no disposing power (x). Thus, in *Dummer v. Pitcher* (y), where the testator having, before making his will, transferred certain 4 per cent. and 5 per cent. stock (then forming the whole of his funded property) into the joint names of himself and his wife, bequeathed the rents of his leasehold houses, and the interest of all his funded property or estate, of whatsoever kind, to trustees, upon trust for his wife for life, and after her decease upon trust to pay divers legacies of 4 per cent. stock, the aggregate amount of which fell short by 50*l.* only of the amount of stock of that description so formerly transferred by him: he afterwards made some further purchases of 5 per cent. stock, taking the transfers in the joint names of himself and his wife. The testator at his death left no funded property, except the 4 per cents. and 5 per cents. before mentioned, exclusive of which his assets were greatly inadequate to pay his legacies. It was held, first, that all

Expressions
must be clear
in order to
raise a case of
election.

(v) 1 Kee. 309; see also *Dixon v. Samson*, 2 Y. & C. 566. The exploded doctrine of *Darlington v. Pulteney* was treated obiter as law by Jessel, M.R., in *Pickersgill v. Rodger*, 5 Ch. D. 171; but the subsequent cases were not cited.

(w) The judge was Lord Langdale.

(x) See *Dashwood v. Peyton*, 18 Ves. 41; *Rancliffe v. Parkyns*, 6 Dow, 149;

Minchin v. Gabbett, [1896] 1 Ir. R. 1, and the other cases cited *infra*, p. 546.

(y) 5 Sim. 35; 2 My. & K. 262; see also *Crabb v. Crabb*, 1 My. & K. 511; *Blommart v. Player*, 2 S. & St. 597; *Parker v. Carter*, 4 Hare, 411; *Smith v. Lyne*, 2 Y. & C. C. 345; *Seaman v. Woods*, 24 Beav. 381; *Jervoise v. Jervoise*, 17 Beav. 566.

CHAPTER XVI. the sums of stock then standing in the joint names of the husband and wife, and whether transferred before or after the date of his will, became, by survivorship, the absolute property of the wife; secondly, that the will did not purport to dispose of the stock in terms sufficiently distinct and explicit to put the wife to her election (z).

But if the will is so expressed as to shew that the testator had in mind some specific property, the case is different (a).

General devise restricted to property of testator.

A general devise of the testator's real estate has always been held to shew an intention to give what strictly and properly belonged to him, and nothing more, even if the testator had no real estate of his own upon which the devise could operate. The same principle was held, in *Timewell v. Perkins* (b), to apply to a devise of a specified kind of property, as "ground-rents"; in regard to which however, it is to be observed, that the bequest, even under the old law, would have included, and, therefore, might have been designed to include, leasehold ground-rents purchased by the testator after the making of the will; so that no inference that he had not his own property in contemplation arose from the circumstance of his not having any such when he made his will.

Devise of "ground-rents."

General clause of revocation.

On the same principle, a clause in general terms revoking all settlements theretofore made by the testator, is not sufficient evidence of an intention to put the beneficiaries to their election (c).

Devise of lands answering to certain locality.

With respect to wills subject to the old law, Mr. Jarman observes (d), that, though a general devise was construed as comprising property belonging to the testator and that only, even when there was nothing properly and strictly his own on which it could operate, "yet a devise of lands answering to a particular locality seems to stand upon a different footing. It is hardly to be supposed that a testator would make such a devise without having a particular property in view" (e).

How affected by 1 Vict. c. 26.

Such a question, however, will present itself under a different aspect in regard to wills made since the year 1837, which (we have seen (f)) speak, in reference to the property comprised in

testator and his wife.

(z) See also *Henry v. Henry*, Ir. R., 6 Eq. 286; *Minchin v. Gabbett*, [1896] 1 Ir. R. 1.

(b) 2 Atk. 102.

(c) *Re Booker*, 34 W. R. 346.

(d) First ed. p. 394.

(a) *Att.-Gen. v. Fletcher*, 5 L. J. (N.S.), Ch. 75; *Shuttleworth v. Greaves*, 4 My. & Cr. 38; *Coates v. Stevens*, 1 Y. & C. 66; *Grosvenor v. Durston*, 25 Bea. 97; *Re Harris*, [1909] 2 Ch. 206. In *Poole v. Odling*, 31 L. J. Ch. 439, a bequest of 800l. consols was held to be general, and therefore not to refer to a like sum standing in the name of the

(e) See, however, *Read v. Crop*, 1 Br. C. C. 492; s. c. Cox's MS.; 1 Sw. 402, n., "where" as Mr. Jarman remarks "Lord Thurlow's remarks, it is conceived, must be taken in connection with the special circumstances of the case."

(f) Ante, Chap. XII.

them, from the death; though even with regard to such wills, devising lands in a particular locality, it is difficult to say that no inference that the testator had some specific property in view arises from the fact of his having none of his own to satisfy the devise at the date of its execution; for it is a whimsical intention to impute to a testator, when he affects to dispose of all property of a particular character, of which he has now, or may hereafter have power to dispose, that he makes that disposition without the least suspicion that he has then any property of that description, and solely with the notion that he may thereafter buy some such property (g). Where the devise is specific in the sense of being a gift of a particular estate, as "my R. property," the wife alone and not the devisor being entitled to that property, she must undoubtedly elect (h). And where (i) a testator was seised of freeholds in fee simple and of copyholds in tail, and himself occupied parts of each, and had let other parts of each to tenants at entire rents, and then by will, dated in 1859, devised his "real estate" upon trust as to the "lands occupied by him" for his wife, and confirmed his tenants "in their present occupations at their present rents" for twenty-one years, it was held that the heir in tail of the copyholds (to whom an annuity was bequeathed) must elect.

IV.—Where the Testator has only a Partial Interest.—But the most numerous as well as the most difficult class of cases with which the Courts have had to deal, consists of those in which the testator and the person against whom the election is sought to be raised, have each an undivided share, or some partial or limited interest, in the property; and in which, therefore, the question is not, as in the cases before discussed, simply whether the testator referred to particular tenements, but whether he intended the devise to comprise such property, inclusive of the interest of his co-owner. Thus, in *Padbury v. Clark* (j), the testator being entitled to a moiety of a freehold house, devised "all that my freehold messuage, &c., now on lease to A. and in his occupation," giving the person entitled to the remaining moiety benefits under his will; he was also entitled to a moiety of some other property, which he devised by the description of "all that my moiety," &c. Lord Cottenham observed that he found no ground for a doubt as to the intention to give the entirety; that the words were ample, complete and

Question whether testator intends to include interest of co-proprietor.

Padbury v. Clark.

(g) Per Wood, V.-C., *Usticke v. Peters*, 4 K. & J. 455.

(will in 1857).

(i) *Honywood v. Forster*, 30 Beav. 14.

(h) *Whitley v. Whitley*, 31 Beav. 173

(j) 2 Mac. & G. 298.

CHAPTER XVI. correct for that purpose, but wholly inapplicable to the supposed gift of a moiety only : and that if this were matter of any doubt, this construction would be strongly corroborated by the other devise, which shewed how the testator described a moiety when his intention was to give only a moiety. The L.C. therefore held that the owner of the other moiety must elect. A direction to repair the specifically described property would likewise corroborate this construction (*k*) ; but it would appear from Lord Cottenham's judgment, and from subsequent authorities (*l*), that a specific devise as of the entire subject will generally suffice, without such assistance, to put the co-owner to his election.

Swan v. Holmes.

So, in *Swan v. Holmes* (*m*), where a sum of 10,000*l.* consols stood settled in trust for two sisters for life, and after their deaths, two-thirds of the capital in trust for their brother, and one-third in trust for their sisters ; and the brother bequeathed the whole of his property to trustees, as to part on certain trusts for his sisters ; and he afterwards bequeathed the property, " including the 10,000*l.* trust money," to other persons : it was held that the sisters must elect between the benefits given them by the will, and their interest in the 10,000*l.* consols.

Question, whether testator, having reversion only, intends to include the immediate interest.

So, where the testator has a reversion only in the lands devised, it frequently becomes a question whether he intended to confine the will to that estate, or to include in it the immediate and absolute interest. *Primâ facie*, the testator must, of course, be understood to refer only to what he had power to dispose of. But the context of the will must be examined, to see whether an intention to include also what he had no such power to dispose of, be indicated ; and for this purpose, notwithstanding some strong expressions tending to shew the difficulty of applying the doctrine of election to such cases (*n*), the ordinary rules for collecting the testator's intention must be observed, the question being simply, what does the testator mean ? If he has subjected the lands in question to limitations which, if the devise be limited to the reversion, cannot, or probably will not, ever take effect, or has conferred powers on the devisees which, on the same hypothesis, they can never exercise, the intention to include the immediate interest will be sufficiently established (*o*). But these indications of intention

(*k*) *Howells v. Jenkins*, 2 J. & H. 706. There was no such direction in *Padbury v. Clark*.

(*l*) *Wilkinson v. Dent*, L. R. 6 Ch. 339 ; *Fitzsimons v. Fitzsimons*, 28 Beav. 417 ; *Miller v. Thurgood*, 33 Beav. 496.

(*m*) 19 Beav. 471.

(*n*) See per Lord Eldon, in *Rancliffe v. Parkyns*, 6 Dow. 149 ; *Minchin v. Gabbett*, [1896] 1 Ir. R. 1.

(*o*) *Welby v. Welby*, 2 V. & B. 187 ; *Wintour v. Clifton*, 21 Beav. 447, 8 D. M. & G. 641 ; *Ustick v. Peters*, 4 K. & J. 437.

will not prevail against an express and unreserved confirmation of the settlement creating the estates which precede the testator's reversion. Express declaration overrides conjecture, however probable (*p*).

On the same principle, if a testatrix devises "all my estate and interest to the lands of H.," in which she has only a life interest, this does not put the remainder-man to his election (*q*). And if a testator has a charge on land at L. and no other property there, and disposes of all his property at L., he has a sufficient interest to satisfy the words of the will (*r*).

Again, if a testator, having an estate subject to an incumbrance, simply devises the estate without saying more, he is to be taken to mean the estate in its actual condition; and the incumbrancer, to whom other benefits are given by the will, is not, in such a case, put to his election; still less, if the beneficiary be entitled only to participate in the incumbrances with others to whom no benefit is given by the will (*s*). But the provisions of the will may shew an intention that the incumbrancer shall give up his charge (*t*).

Similar question where testator is entitled subject to incumbrances.

V.—Claims by Widow of Testator.—A similar question, and one which was formerly much agitated, was (*u*) whether the widow of a testator, married before 1834, was precluded, by a benefit given to her by his will, from claiming dower out of lands devised by that will. It is clear that, under the old law, a mere devise in general terms of the testator's real estate afforded no indication of an intention to dispose of the dower (*v*).

Dowress when put to her election.

General devise does not put dowress to her election.

And the addition of the word "all" would not enlarge the

(*p*) *Rancliffe v. Parkyns*, 6 Dow, 149. But confirmation of a portion of the settlement leaves the remaining portion unconfirmed, *Blake v. Bunbury*, 1 Ves. jun. 514.

(*q*) *Galvin v. Devereux*, [1903] 1 Ir. R. 185.

(*r*) *Maddison v. Chapman*, 1 J. & H. 470.

(*s*) *Stephens v. Stephens*, 3 Drew. 697, 1 De G. & J. 62; *Sadlier v. Butler*, Ir. R., 1 Eq. 415; *Henry v. Henry*, *ibid.* 286.

(*t*) *Blake v. Bunbury*, 1 Ves. jun. 514. See *Sadlier v. Butler*, *supra*, where the circumstances were very special.

(*u*) As this question can seldom be of any practical importance at the present time, the remarks of the learned writer and of former editors as to election by a dowress have been much abbreviated. For a fuller discussion of the cases referred to on this subject, see the fourth

edition of this work, Vol. I. p. 458 et seq.

(*v*) *Lawrence v. Lawrence*, 2 Vern. 365, 1 Eq. Ca. Ab. 218 pl. 2, 1 Freem. Ch. Ca. 234, 3 B. P. C. Toml. 484, 8 Vin. Abr. Devise, 361, pl. 22; see also *Lemon v. Lemon*, 8 Vin. Abr. Devise, 366, pl. 45, 2 Eq. Ca. Ab. 355, pl. 13; *Hitchin v. Hitchin*, Pre. Ch. 133, 2 Vern. 403; *Brown v. Parry*, 2 Dick. 685; *Incleidon v. Northcote*, 3 Atk. 430; *Strahan v. Sutton*, 3 Ves. 249; *Lord Dorchester v. Earl of Effingham*, Coop. t. Eldon, 319; see also *Ayres v. Willis*, 1 Ves. 230; *Waller v. Fuller*, 8 Vin. Abr. Devise, 244, pl. 19. So a bequest to the widow on condition that she make no claim on "the residue of my property," was held not to exclude her from dower. *Wetherell v. Wetherell*, 4 Gif. 51.

CHAPTER XVI. operation or vary the construction of the devise, which is still but a gift of "all" the testator's own estate (*w*).

According to the authorities, as well as upon principle, it seems to have been immaterial whether the lands devised to the widow were or were not part of those out of which her dower arose; nor, it should seem, would her dower have been excluded even in respect of the lands so devised, except in cases where the testator had introduced into the devise some special provision irreconcilable with the widow's claim of dower.

What provisions are inconsistent with claim of dower;

Thus, in *Birmingham v. Kirwan* (*x*), where a testator devised his house and demesne to trustees, upon trust to permit his wife to enjoy the same for life, she paying 13s. yearly for every acre, to keep the house in repair, and not to let, except to the person who should be in possession of the remainder; and the residue of his lands, subject to debts and legacies, to A. for life, remainder to B. in fee. The question was as to the wife's right of dower; first, in the part devised to her; secondly, in the residue. Lord Redesdale was of opinion that the directions that the widow should keep the house and demesne in repair, that she should not alien, except to the person in remainder (*y*), which directions applied to the whole of the house and demesne, could not be considered obligations on a person claiming title by dower. On the other question, however, his Lordship held, that the devise of the beneficial interest in the house and demesne was not a bar to the widow's right of dower in the rest of the estate.

—to use, occupy, and enjoy;

So, in *Miall v. Brain* (*z*), Sir J. Leach, V.-C., held, that the claim of dower was inconsistent with a trust to permit another to use, occupy, and enjoy the estate for her life; his Honor thinking that the testator contemplated the personal use, occupation and enjoyment. And, in *Butcher v. Kemp* (*a*), the same learned Judge considered that a direction to trustees, to whom a farm was devised during the minority of the tenant for life, who was the testator's daughter, "to carry on the business thereof, or to let the same upon lease for her benefit," was inconsistent with the claim of dower.

—to carry on business and let.

A power to lease put the widow to her election.

Again, in *Hall v. Hill* (*b*), there was a general devise of the testator's estates to a trustee, upon trust to pay his wife an annuity,

(*w*) *Thompson v. Nelson*, 1 Cox, 447; see also *Dowson v. Bell*, 1 Kee. 761; *Harrison v. Harrison*, ib. 765.

(*x*) 2 Sch. & Lef. 444.

(*y*) But Sir R. P. Arden, M.R., in *Strahan v. Sutton*, 3 Ves. 249, held that a restriction on letting did not render

the devise inconsistent with the dowress's claim.

(*z*) 4 Mad. 119.

(*a*) 5 Mad. 61; see also *Roadley v. Dixon*, 3 Russ. 192.

(*b*) 1 D. & War. 94, 1 Con. & L. 120.

and to permit her to enjoy part of the property for her life, and the residue was otherwise disposed of. By a codicil a power to lease was given to the trustee. Sir E. Sugden, C., decided that the widow must elect between her dower and the benefits under the will (c).

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However fine the distinction, yet it is clearly settled, in accordance with an opinion of Lord Redesdale (d), that a general devise of all the testator's estates upon trust for sale did not put the widow to her election; because the sale might have been made subject to her right of dower (e).

Power of sale did not put the widow to her election.

Another point formerly much discussed was as to the effect of the property being devised to the dowress and others in equal shares. In *Chalmers v. Storil* (f), the devise was in these words: "I give to my dear wife A. and my two children [naming them] all my estates whatsoever, to be equally divided amongst them, whether real or personal." One of the questions was, whether the wife, taking a share under this devise, was bound to relinquish her dower. Sir W. Grant considered the claim of dower to be directly inconsistent with the disposition of the will. The principle upon which *Chalmers v. Storil* stands seems to have been adopted in several subsequent cases (g).

As to devise to dowress and another in equal shares.

Another question, which was formerly much litigated between the dowress and devisees, was, whether she was put to her election by a rent-charge, or an annuity charged on the property out of which the dower arose. Lord Hardwicke, in *Pitts v. Snowden* (h), decided that she was not, and although this has not been uniformly followed (i), it seems to have been treated as clear in all the later cases (j).

Barred by mere annuity out of property.

(c) This decision as to the effect of a power of leasing was followed in *O'Hara v. Chaine*, 1 J. & Lat. 662; *Grayson v. Deakin*, 3 De G. & S. 298; *Parker v. Sowerby*, 1 Drew. 488, 4 D. M. & G. 321; *Linley v. Taylor*, 1 Gif. 67. See also *Reynard v. Spence*, 4 Beav. 103; *Lowe v. Lowe*, 5 Hare, 501; *Pepper v. Dixon*, 17 Sim. 200; *Thompson v. Burra*, L. R., 16 Eq. 592.

(d) *Birmingham v. Kirwan*, 2 Sch. & Lef. 444.

(e) *Ellis v. Lewis*, 3 Hare, 313; *Gibson v. Gibson*, 1 Drew. 42; *Bending v. Bending*, 3 K. & J. 257. But see *Parker v. Downing*, 4 L. J. (N. S.) Ch. 198, where the devise was of a particular house on trust for sale, Shadwell, V.-C., held that the widow must elect. As to the implication of election as to the whole property from powers relating only to part, see *Miall v. Brain*, 4 Mad.

119; *Roadley v. Dixon*, 3 Russ. 204; *O'Hara v. Chaine*, 1 J. & Lat. 665.

(f) 2 V. & B. 222.

(g) *Dickson v. Robinson*, 1 Jac. 503; *Roberts v. Smith*, 1 S. & St. 513. See also *French v. Davies*, 2 Ves. jun. 577; *Ellis v. Lewis*, 3 Hare, 314; *Gibson v. Gibson*, 1 Drew. 58; *Bending v. Bending*, 3 K. & J. 257; *Reynolds v. Torin*, 1 Russ. 129; *Goodfellow v. Goodfellow*, 18 Beav. 356.

(h) 1 Br. C. C. 292, n.

(i) *Arnold v. Kempstead*, Amb. 466, 2 Ed. 236; *Villa Real v. Lord Galway*, Amb. 682, more fully reported 1 Br. C. C. 292, n.; *Jones v. Collier*, Amb. 730; *Wake v. Wake*, 3 Br. C. C. 255, 1 Ves. jun. 335.

(j) *Pearson v. Pearson*, 1 Br. C. C. 292; *Foster v. Cook*, 3 Br. C. C. 347; *Miall v. Brain*, 4 Mad. 119; *Dowson v. Bell*, 1 Kee. 761; *Holdich v. Holdich*, 2 Y. &

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To whom the bar of dower enures.

Widow, when excluded from share of personalty.

Effect of failure of disposition of dower-lands, where a benefit is given in lieu of dower.

And here it may be observed, that where a widow was barred of her dower in lands devised by the will, by a benefit given to her in satisfaction of such claim, the exclusion was considered as made, not in favour of the devisee personally, but of the estate; and, consequently, it enured to the benefit of the heir, in case of the devolution of the land upon him by the failure of the devise (*k*).

But a gift to the widow in satisfaction of all her claims on the testator's estate, does not preclude her from claiming her share of the personalty under the Statutes of Distribution, in the event of the failure of a bequest of that property (*l*). And an annuity given to the widow "in lieu and satisfaction of all dower and thirds or other claims and demands which she could or might have had or been entitled to" out of the testator's estate, will not bar her right as customary heir to her husband in respect of copyholds not disposed of by his will (*m*).

Mr. Jarman points out (*n*) that "The difference between such a case and that of dower seems to be this: Where a testator gives a benefit in lieu of dower, he purchases an interest in the estate for the benefit of any and every person claiming that estate under him, whether as heir or devisee; and the exclusion of the dower arises, not from the disposition of the property (which, it has been shewn, will not per se exclude the dower), but from the provision for the widow being given expressly in satisfaction of it, and, consequently, is not affected by the failure of the disposition. Whereas, in the case under discussion, though the gift is expressed to be in satisfaction of the widow's claim on the testator's estate, yet, in fact, the efficient part of the exclusion consists in the disposition, which gives the property to some other person: that disposition therefore failing, the widow's claim under the Statute of Distributions is revived; and such claim is not inconsistent with any disposition in

C. C. C. 18; *Lowes v. Lowes*, 5 Hare, 501; *Hall v. Hill*, 1 D. & War. 103. See also per Wickens, V.-C., *Thompson v. Burra*, L. R., 16 Eq. 602. As to annuities charged on mixed funds of realty and personalty, see *French v. Davies*, 2 Ves. jun. 572; *Greatorex v. Cary*, 6 Ves. 615.

(*k*) See *Pickering v. Lord Stamford*, 3 Ves. 337.

(*l*) *Pickering v. Lord Stamford*, 2 Ves. jun. 272, 581, 3 Ves. 332, 492; *Tavernor v. Grindley*, 32 L. T. 424; see also *Sympson v. Hutton*, 11 Vin. Ab. Executors, 185, 2 Eq. Ca. Ab. 439, but more correctly stated 3 Ves. 335; *Naismith v. Boyes*, [1899] A. C. 495.

But a declaration to this effect in a settlement will, of course, effectually bar the widow, *Gurly v. Gurly*, 8 Cl. & Fin. 743; *Druce v. Denison*, 6 Ves. 395; the former case appears to overrule *Slatter v. Slatter*, 1 Y. & C. 28. See also *Coyne v. Duigan*, [1894] 1 Ir. R. 138.

(*m*) *Norcott v. Gordon*, 14 Sim. 258. A provision made by settlement for a jointure and in lieu of dower and thirds at common law was held only to exclude the widow from further claim against the testator's lands: *Colleton v. Garth*, 6 Sim. 19. Compare *Gurly v. Gurly*, supra; *Thompson v. Watts*, 2 J. & H. 291.

(*n*) First ed. p. 407.

the will. It would seem to follow, from this view of the subject, that where the exclusion of the dower by means of election arises merely from the terms and mode in which the estate subject to the dower is devised, there is strong ground for holding that the failure of the devise lets in the claim of dower. The question, of course, is always a question of intention to be collected from the whole will."

With regard to the widow's claim to her share of the personalty, it is said to be different if, on the face of the will, there is an original intestacy as to a part of the personal estate, on the ground that the exclusion cannot then be represented as auxiliary to any disposition of that portion of the personalty; it must have an independent effect; and the only effect it can possibly have is to exclude the widow from participation in the undisposed part of the personalty (o).

Distinction in case of personalty where widow is in terms excluded but part of the personalty is left undisposed of.

There appears to be a distinction between those cases in which a testator makes a gift to his widow in satisfaction of all her claims on the testator's estate, and those in which he expressly excludes her from taking any share or interest in his estate, for such a direction may, if clearly expressed, amount to a gift by implication to the other persons entitled under an intestacy. It appears that Shadwell, V.-C., decided the contrary in *Johnson v. Johnson* (p), but if so it is submitted that the decision is erroneous (q).

Provision excluding widow.

The words "in lieu of dower or thirds at common law or otherwise," have been held to extend to the wife's right of freebench in copyholds (r).

The question whether a dowress is put to her election by the contents of her husband's will less frequently arises in regard to widows whose marriage was since the 1st of January, 1834; as such persons may, under the act of 3 & 4 Will. 4, c. 105, be excluded from dower by various acts of the husband, including a disposition of the property by deed or will (for which a general devise had been held sufficient (s), or a mere declaration therein, or a rent-charge, or other interest devised to her out of any lands subject to dower; but a mere gift of personal estate, or of an interest in lands not liable to dower, will not defeat the widow's claim. Moreover, all partial estates and interests, and charges created by the disposition or will of the husband, and all debts and

Effect of 3 & 4 Will. 4, c. 105, upon points discussed in this chapter.

(o) *Lett v. Randall*, 3 Sm. & G. 83: not appealed on this point: 2 D. F. & J. 388. The doctrine so laid down is probably bad law.

(p) 4 Bea. 318.

(q) The cases are discussed, post, Chap. XIX, p. 679.

(r) *Nottley v. Palmer*, 2 Drew. 93.

(s) *Lacey v. Hill*, L. R., 19 Eq. 346.

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As to copyholds.

liabilities affecting his land, will oust the widow's right to dower; and the right is subject to any conditions, restrictions, or directions declared by the husband's will. This act does not affect copyholds (*t*); but it must be remembered that the Wills Act, 1 Vict. c. 26, has been held (*u*) to render a devise of copyholds as effectual as a surrender to bar the widow of freebench.

Gift in lieu of a specified thing does not exclude from another gift.

VI.—When Election is excluded.—The ordinary doctrine of election may, doubtless, be excluded either wholly or partially, if the testator so desires. “The rule in *Noys v. Mordaunt*,” said Lord Hardwicke (*v*), “of not claiming by one part of a will in contradiction to another, is a true rule, but has its exceptions. . . . Several cases have been, and several more may be, in which a man shall give a child or other person a legacy or portion in lieu or satisfaction of particular things expressed, which shall not exclude him from another benefit, though it may happen to be contrary to the will; for the Court will not construe it as meant in lieu of everything else, when he has said a particular thing.”

The case put by Lord Hardwicke occurred in *Brown v. Parry* (*w*), where a testator gave his wife an annuity “to be accepted by her in lieu of her dower,” and also bequeathed other benefits to her (without adding in lieu of her dower); the widow elected not to take the annuity, but to keep her dower; and it was held by Lord Thurlow that she was nevertheless entitled to take the rest of the testator's bounty, and that the case was too clear for argument. In truth, this is not properly a case of election at all; which arises only when something is taken against the will. There is here a legacy upon an express condition which is submitted to, and another legacy without express condition. Why should a condition be annexed by implication to the latter bequest, when by taking it the legatee disappoints no part of the will?

But if the words of the will are sufficiently wide, the legatee may be put to election (*x*).

And the case is different where a gift is made in lieu of a particular thing expressed, and there is then a question—not whether the legatee, while rejecting the proposed exchange, can take another

(*t*) *Powdrell v. Jones*, 2 Sm. & Gif. 407; *Smith v. Adams*, 5 D. M. & G. 712.

(*u*) *Lacey v. Hill*, L. R., 19 Eq. 346, ante, p. 71. But see *Thompson v. Burra*, L. R., 16 Eq. 592, where the widow was put to her election between an annuity given by the will, and there-

by charged on part of the testator's freeholds and copyholds, and her right to freebench out of devised copyholds.

(*v*) *East v. Cook*, 2 Ves. sen. 33. See also *Bor v. Bor*, 3 Br. P. C. Toml. 167.

(*w*) Romilly's No. Cas. 85, also reported, but imperfectly, 2 Dick. 685.

(*x*) *Nottley v. Palmer*, 2 Dr. 93.

gift under the will unconditionally, but—whether, while accepting the exchange, he can insist on his right to another property against the will. Thus, in *Wilkinson v. Dent* (y), where a testatrix gave to her brother T. 10,000*l.* in satisfaction of any sums in which she then was or might at her death be indebted to him, and to her brother W. 3,000*l.* in lieu and satisfaction of any rent-charge out of a certain part of her real estate, and specifically disposed of the entirety of another estate, in which both brothers had interests: it was held that the brothers taking their legacies must bring these latter interests into account as well as the debts and the rent-charge. Sir W. M. James, L.J., said, “The question is, whether there is testamentary bounty to a person whose estate and right are, under another part of the will, interfered with. It appears to me clear that this question must be answered in the affirmative, though before the amount of the bounty can be ascertained, the amount of the claims which the legatees had against the testatrix must be ascertained.”

Where a testator attempts to dispose of property in favour of A., and gives his own property to B., a married woman, with a restraint on anticipation, this shews that he intends to exclude the doctrine of election, so that if the property attempted to be given to A. devolves on B., she is not bound to make compensation to A. out of the property given to her by the testator's will. The doctrine of election does not apply, because the property, which if the doctrine applied would have to be sequestered, in order to compensate the disappointed legatee, has by the terms of the will itself been made inalienable (z). Where the restraint on anticipation, or inalienability, is created independently of the will, a different principle seems to apply (a).

Restraint on anticipation.

In *Box v. Barrett* (b), a testator by his will recited that his two daughters, A. and B., were entitled to certain property under a settlement, and stated that for this reason he had not given them so large a share of his own property as he would otherwise have done; he then devised to A. and B. certain estates, and to his two other daughters, C. and D., other estates, of much greater value; in fact his four daughters were entitled under the settlement; it was held that this mistake did not put C. and D. to their election.

Mistake.

(y) L. R., 6 Ch. 339.

(z) *Re Wheatley*, 27 Ch. D. 606; *Re Vardon's Trusts*, 31 Ch. D. 275; *Haynes v. Foster*, [1901] 1 Ch. 361. *Smith v. Lucas*, 18 Ch. D. 531, and *Hamilton v. Hamilton*, [1892] 1 Ch. 396, were cases

of settlement by deed.

(a) Ante, p. 535 (*Re Lord Chesham*).

(b) L. R., 3 Eq. 244, where *Dashwood v. Peyton*, 18 Ves. 27, and *Langslow v. Langslow*, 21 Bea. 552 were cited. See also *Lewis v. Lewis*, Ir. R., 11 Eq. 340.

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Infant.

Lunatic.

Married woman.

VII.—Election by Persons under Disability.—An infant cannot elect, and in those cases in which an infant, if adult, would have to elect, the ordinary practice is to direct an inquiry whether it is to his advantage to take under or against the will (*c*). But in some cases the infant has been allowed to postpone his election until he comes of age (*d*).

The Court has power, in certain cases, to elect on behalf of a person of unsound mind not so found by inquisition (*e*).

On the question whether a married woman subject to the old law can elect, the authorities are not consistent, but the weight of authority seems to be against her having capacity to do so (*f*). It was decided in *Ardesoife v. Bennet* (*g*), that a married woman could elect to take under a will; and the same principle seems to be laid down in *Griggs v. Gibson* (*h*). But the dicta in *Wilson v. Townshend* (*i*) and *Davis v. Page* (*j*) lead to a contrary conclusion, and in *Cooper v. Cooper* (*k*), where it was decided that two persons (one of whom was a married woman) were put to their election, it was also held that the married woman could not herself elect, and that the Court must ascertain by inquiry whether it was for her benefit to take under or against the will. It is possible that the decision in *Ardesoife v. Bennet* may be explained on the principle

(*c*) *Gretton v. Haward*, 1 Sw. 413 and note; *Brown v. Brown*, L. R., 2 Eq. 481; *Re Montagu*, [1896] 1 Ch. 549; *Re Barnett*, [1900] W. N. 81; *Cooper v. Cooper*, L. R., 7 H. L. 53. As to the practice where the infant is tenant in tail, see *Re Montagu*, [1896] 1 Ch. 549.

(*d*) *Boughton v. Boughton*, 2 Ves. sen. 12; *Streatfield v. Streatfield*, Ca. t. Talb. 176.

(*e*) *Re Marriott*, 2 Moll. 516; *Wilder v. Pigott*, 22 Ch. D. 263. The question in that case was as to the confirmation of a settlement made during infancy, but the principle seems to be the same. See *Re Earl of Sefton*, [1898] 2 Ch. 378.

(*f*) As to the position of a married woman in this respect, see *Nicholl v. Jones*, L. R., 3 Eq. 696; *Cahill v. Cahill*, 8 A. C. 420.

(*g*) 2 Dick. 463; see *Barrow v. Barrow*, 4 K. & J. 409.

(*h*) L. R., 1 Eq. 685. It is clear from the cases of *Barrow v. Barrow*, 4 K. & J. 409; *Willoughby v. Middleton*, 2 J. & H. 344; *Campbell v. Ingilby*, 21 Bea. 567; *Anderson v. Abbott*, 23 Bea. 457; *Smith v. Lucas*, 18 Ch. D. 531; *Wilder v. Pigott*, 22 Ch. D. 263, and *Viditz v. O'Hagan*, [1900] 2 Ch. 87, that a married woman can

elect to confirm or repudiate a settlement executed by her while an infant; but the principle on which this rule is based is quite different from that applicable to the question discussed in the text. Whether the rule applies where the interest of the married woman in personal property is reversionary, see *Greenhill v. North British Co.*, [1893] 3 Ch. 474; *Harle v. Jarman*, [1895] 2 Ch. 419. The case of *Williams v. Mayne* (Ir. R., 1 Eq. 519) has been already referred to (*supra*, p. 536).

(*i*) 2 Ves. jun. 693. The same rule was acted on in the suit brought by Lord Darlington, as stated in *Cavan v. Pulteney*, 2 Ves. jun. at pp. 552–53. See also *Frank v. Frank*, 3 Myl. & C. 171.

(*j*) 9 Ves. 350. Some of the old cases seem to shew that where the Court held that a married woman was put to her election the original practice was to require her to signify her election before an officer of the Court, and only to direct an inquiry in the event of her failing to do so; see the cases cited in *Gretton v. Haward*, 1 Sw. 413, n., and compare *Standerling v. Hall*, 11 Ch. D. 652.

(*k*) L. R., 7 H. L. 53.

that as it was obviously to the benefit of the married woman to elect in a particular way, the Court would (if she had been living) have elected for her without an inquiry (*l*), and she being dead, the Court treated her, retrospectively, as having so elected.

It seems clear on principle, though the point has not been decided, that a married woman can elect in respect of her separate estate (*m*). Separate estate.

VIII.—Time and Mode of Election.—It seems that a person does not lose his right to elect by mere lapse of time, unless it can be shewn that injury would result to third persons by the delay (*n*).

In some of the older cases, infants have been allowed to postpone their election until after attaining majority (*nn*), and in the case of *Williams v. Mayne* (*o*), it was held that a married woman could not elect until a reversionary interest, settled on her marriage, fell into possession. Postpone-
ment of elec-
tion by per-
son under
disability.

A person is not bound to elect until all the circumstances which may influence his election are known to him (*p*), and an election made in ignorance of material facts is not binding (*q*). Full
knowledge
required.

Where there is no express election, it may be implied or inferred from acts. But to raise an inference of election, it should appear that the person knew of his right to elect, and not merely of the instrument giving it (*r*). Even the receipt of income for sixteen years in ignorance of a right to elect will not operate as an election (*s*), though an election may be presumed from possession or receipt of income where there is full knowledge (*t*). Implied
election.

Election is a question of intention, and in general may be inferred from a series of unequivocal acts (*u*). Receiving the income of, or dealing with, a fund or property is in general an election to take that fund or property, if the person was fully cognisant of his rights (*v*).

(*l*) *Wilson v. Townsend*, 2 Ves. jun. 693.

(*m*) See *Re Davidson*, 11 Ch. D. 341.

(*n*) *Brice v. Brice*, 2 Moll. 21; *Spread v. Morgan*, 11 H. L. C. 588.

(*nn*) *Supra*, p. 554.

(*o*) *Ir. R.*, 1 Eq. 519, referred to above, p. 536.

(*p*) *Wake v. Wake*, 1 Ves. jun. 335; *Boynton v. Boynton*, 1 Br. C. C. 445; *Chalmers v. Storil*, 2 V. & B. 222; *Dillon v. Parker*, 1 Sw. 359; *Jac.* 505; 1 Cl. & F. 303; *Douglas v. Douglas*, L. R., 12 Eq. 617.

(*q*) *Kidney v. Coussmaker*, 12 Ves. 136; *Pusey v. Desbouvrie*, 3 P. W. 315; *Dillon v. Parker*, *supra*.

(*r*) *Morgan v. Edwards*, 1 Bli. N. S. 401; *Wake v. Wake*, 3 Br. C. C. 254;

Reynard v. Spence, 4 Bea. 103; *Wintour v. Clifton*, 21 Bea. 447; *Watson's Comp. Eq.* 184 seq.; *Wilson v. Thornbury*, L. R., 10 Ch. 239; *Sweetman v. Sweetman*, *Ir. R.*, 2 Eq. 141.

(*s*) *Sopwith v. Maughan*, 30 Bea. 235.

(*t*) *Butricke v. Broadhurst*, 1 Ves. jun. 171; *Worthington v. Wiginton*, 20 Bea. 67; *Stratford v. Powell*, 1 Ba. & B. 1.

(*u*) *Spread v. Morgan*, 11 H. L. C. 588; *Dillon v. Parker*, *supra*.

(*v*) *Ardesoife v. Bennet*, 2 Dick. 463; *Giddings v. Giddings*, 3 Russ. 241; *Briscoe v. Briscoe*, 1 Jo. & Lat. 334; *Dewar v. Maitland*, L. R., 2 Eq. 834; and the cases cited above, notes (*r*), (*s*), and (*t*).

CHAPTER XVI.

Possession
of both
properties.
When com-
pensation
ascertained.

Election to
accept.

Inferred from
conduct.

Two gifts
under same
will—one
may be taken,
the other
rejected ;

The mere fact that a person enters into the receipt of the rents and profits of two properties, as it affords no proof of preference, cannot be held an election to take one and reject the other (*w*).

The amount of the compensation to be made to the disappointed legatees, where the party elects to take against the will, is ascertained as at the date of the testator's death (*x*).

IX.—Onerous Property—A gift of property by will is supposed, *primâ facie*, to be beneficial to the devisee or legatee, and consequently it is also supposed, until the contrary is proved, that the gift is accepted by him. But he is at liberty to refuse or disclaim it, for the law will not compel a man to take property against his will (*y*). Disclaimer may be express or implied (*z*), but there can be no effectual disclaimer after the party has once elected to accept the gift (*a*). And election, like disclaimer, may be inferred from the conduct of the party. Thus if a devisee retains possession for some years of property subject to charges which exceed its value, he may be deemed to have elected to accept the devise (*b*). This, however, does not make him personally liable for the charges (*c*).

Where by the same will two properties are given to the same person, one beneficial and the other burdensome, he is generally at liberty to accept the former and reject the latter (*d*), although by so doing he throws a burden on the testator's general estate, which, if he accepted both, must be borne by himself ; as where the repudiated gift comprises shares in a company which, after the testator's death, fails and is wound up, the shareholders being called on to contribute (*e*), or where the subject is leasehold property, in respect of which the testator was liable at his death under his covenant to repair (*f*). So where a testator devised a house, which was mortgaged beyond its value, upon trust to permit his two sisters to have

(*w*) *Padbury v. Clark*, 2 Mac. & G. 306; *Spread v. Morgan*, 11 H. L. C. 588; *Brice v. Brice*, 2 Moll. 21; but see *Worthington v. Wiginton*, 20 Beav. 67; and generally, as to what acts constitute election, see note to *Dillon v. Parker*, 1 Sw. 382; *Giddings v. Giddings*, 3 Russ. 241; *Briscoe v. Briscoe*, 1 J. & Lat. 334; *Mahon v. Morgan*, 6 Ir. Jur. 173; *Ruttledge v. Ruttledge*, 1 Dow. & Cl. 331; *Fytche v. Fytche*, 19 L. T. 343. As to how far the gain or loss to the person called on to elect is to weigh in presuming election, see *Harris v. Watkins*, 2 K. & J. 473.

(*x*) *Re Hancock*, [1905] 1 Ch. 16.

(*y*) *Shepp. Touch*. 284–85; see David-

son Conv. 5, part 2, p. 661, n., where the law of disclaimer is explained.

(*z*) *Stacey v. Elph*, 1 Myl. & K. 195 (disclaimer of trust); *Re Birchall*, 40 Ch. D. 436.

(*a*) *Bence v. Gilpin*, L. R., 3 Exch. 76.

(*b*) *Re Cowley*, 53 L. T. 494.

(*c*) *Ibid*.

(*d*) *Andrew v. Trinity Hall*, 9 Ves. 525.

(*e*) *Moffett v. Bates*, 3 Sm. & Gif. 468; *Aston v. Wood*, 43 L. J. Ch. 715. Putting a distringas on shares does not prevent a subsequent disclaimer: *Hobbs v. Wayet*, 36 Ch. D. 256.

(*f*) *Warren v. Rudall*, 1 J. & H. 1.

the use and occupation of it and the furniture in it: the furniture was sold and the proceeds invested, and it was held that the sisters were entitled to receive the income of the investments without keeping down the interest on the mortgage debt (*g*). But the question is one of intention, and, therefore, where a testator bequeathed an annuity to A., and also a leasehold house held at a rack-rent beyond its value, Sir J. Leach, M.R., thinking that the plain intention of the testator was that his estate should no longer be subject to the rent of the leasehold house, held that the legatee must take both bequests or neither (*h*). The cases are not easy to reconcile, but the test seems to be whether or not the gifts are separate and distinct. If onerous property and beneficial property are included in the same gift, as an aggregate, then, unless a contrary intention appears by the will, the donee cannot disclaim the onerous property and accept that which is beneficial; he must take the whole gift or nothing (*i*). But if two distinct gifts are made by the same will, one of them being onerous and the other beneficial, the donee may reject the former and take the latter (*j*).

—unless a
contrary
intention
appears.

ESTOPPEL.

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I.—By Possession under Devise.—The general principle that a person who takes possession of land under an instrument is estopped from denying its validity, applies to wills (*k*); consequently if a testator devises Blackacre, which really belongs to X., to A. for life with remainder to B., and A. enters and retains possession until X.'s title is extinguished by the Statute of Limitations, A. acquires only an estate for life with remainder to B (*l*). The fact that the testator devises the legal estate to trustees,

Possession
under title.

(*g*) *Syer v. Gladstone*, 30 Ch. D. 614, explained in *Re Kensington*, *infra*.

(*h*) *Talbot v. Earl of Radnor*, 3 My. & K. 254; *Fairtlough v. Johnstone*, 16 Ir. Ch. 442.

(*i*) *Green v. Britten*, 42 L. J. Ch. 187; *Guthrie v. Walrond*, 22 Ch. D. 573; *Frewen v. Law Life Assurance Society*, [1896] 2 Ch. 511; *Parnell v. Boyd*, [1896] 2 Ir. R. 571; *Re Kensington*, [1902] 1 Ch. 203; *Honywood v. Honywood*, [1902] 1 Ch. 347.

(*j*) *Re Hotchkys*, 32 Ch. D. 408.

(*k*) *Dalton v. Fitzgerald*, [1897] 1 Ch.

440; 2 Ch. 86. It is said in the old books that an heir is estopped from denying the will of his ancestor: Br. Abr. Estoppel, pl. 193; but that if A. and B. are named executors by a will, it is no estoppel for them to say that they were not made executors: *ibid*, pl. 185. As to the old rule that the heir is not presumed to have notice of his ancestor's will, see *Doe d. Kenrick v. Beaucherk*, 11 East, 667, cited post, Chap. XXXIX.

(*l*) *Board v. Board*, L. R., 9 Q. B. 48.

CHAPTER XVI. and that adverse possession is taken by one of the beneficiaries, does not make any difference (*m*).

The same principle applies where a devisee takes possession of land which really belonged to the testator, the devisee being under the erroneous belief that it passed by the will. Thus if a testator, being entitled to land in the parishes of X. and Y., devises the land in X. to A. for life, with remainder over, and A. takes possession of the land both in X. and Y., under the belief that the land in Y. passed by the devise, and retains possession for the statutory period, he cannot, it seems, claim to be entitled to the land in Y. for his own benefit: "My impression is (if it were necessary to decide the point), that the Statute of Limitations can never be so construed that a person claiming a life estate under a will shall enter, and then say that such possession was unlawful, so as to give his heir a right against the remainder-man. I think that no Court would so construe it" (*n*).

Accordingly, in *Kernaghan v. M'Nally* (*o*), where the testator devised lands to trustees, and the cestui que trusts took possession of certain land which did not pass by the devise, and held it as if they had been beneficially entitled to it under the devise, it was held that the title thus acquired under the Statute of Limitations vested the legal estate in the trustees and not in the beneficiaries.

The decision in *Paine v. Jones* (*p*) appears to be inconsistent with this principle. In that case a testator, by will made in 1824, devised all his real estate to A. and B. upon trust to pay the rents to A. for life, with remainders over. Part of the testator's real estate was purchased after the date of the will, and therefore did not pass by it; A. entered into possession of the after-acquired land, believing that it passed by the will, and continued in possession for more than twenty years: it was held by Malins, V.-C., that she had acquired a title to the fee against the remainder-man. In *Dalton v. Fitzgerald* (*q*), Lindley, L.J., thought this decision was intelligible having regard to the facts of the case, but he doubted the soundness of the distinction drawn by the V.-C. "between cases of persons having no title under a will, because it does not purport to include the lands they claim, although they believe that it does, and persons claiming under a will which purports to deal with land to which the testator had no title, although they thought he had."

(*m*) *Hawksbee v. Hawksbee*, 11 Ha. 230, and *Kernaghan v. M'Nally*, 12 Ir. Ch. Rep. 89. The question of estoppel did not arise in *Scott v. Nixon*, 3 Dr. & W. 388.

(*n*) Per Martin, B. in *Anstee v. Nelms*, 1 H. & N. at p. 232, quoted

with approval by Blackburn, J., in *Board v. Board*, supra, and by Lindley, L.J., in *Dalton v. Fitzgerald*, supra.

(*o*) 12 Ir. Ch. R. 89.

(*p*) L. R., 18 Eq. 320.

(*q*) Supra.

But if the devise of the remainder is invalid because it transgresses some rule of law—such as the Rule against Perpetuities, or the rules governing charitable gifts—then the entry of the tenant for life under the will does not, it seems, affirm the invalid devise to the remainderman, whether the devise to the tenant for life himself is valid or invalid (*r*).

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Where devise is illegal.

In *Re Anderson* (*s*) it was held that the same principle applies where the devise is invalid by reason of the personal disability of the testator. In that case the testatrix was married, and acquired the property before 1883.

Where testator under disability.

II.—By Erroneous Statement in Will.—Somewhat analogous to the doctrine of estoppel is the rule that in certain cases a person claiming under a will is bound by an erroneous statement of fact contained in it. Thus in *Re Wood* (*t*), a testator gave his property upon trust for his children in equal shares, and after reciting that he had advanced certain sums (specifying the amounts) to four of his sons on account of their respective shares, he directed that “the respective sums hereinbefore recited to have been advanced” should be brought into hotch-pot; it was held that the sons were bound by the statement, and could not adduce evidence to shew that it was erroneous.

Legatee bound by erroneous statement in will,

Conversely, if the amount of the advance is understated, the legatee is entitled to the benefit of the error (*u*).

But the limits of the doctrine are not satisfactorily settled, and it seems that it will only be applied where the statement of the testator is unequivocal. Thus in *Re Taylor's Estate* (*v*), a testator bequeathed a legacy of 7,000*l.* in trust for his daughter, the wife of J. T., and her children; he then, after reciting (in effect) that he had paid upwards of 5,000*l.* for J. T., directed that if J. T. should not before his death have repaid him 5,000*l.* at least, the sum of 5,000*l.* should be taken in part payment of the 7,000*l.* Taken literally, the effect of this direction would have been that if J. T. only repaid 4,999*l.* the legacy of the daughter would be reduced by 5,000*l.*; it was held that this could not have been the intention, and that what the testator meant was that whatever was owing to him by J. T., up to 5,000*l.*, should be satisfied out of the legacy.

unless result would defeat intention.

(*r*) Per Jessel, M.R., in *Re Stringer's Estate*, 6 Ch. D. 1; the decision of the M.R. that the remainder was void was reversed by the C. A., and it became unnecessary to consider the point above stated.

(*s*) [1905] 2 Ch. 70.

(*t*) 32 Ch. D. 517, following *Re Aird's*

Estate, 12 Ch. D. 291. The case of *Quikhampton v. Going*, 24 W. R. 917, ante, p. 138, seems to have been decided on the same principle.

(*u*) *Burrowes v. Clonbrock*, 27 L. R. Ir. 538.

(*v*) 22 Ch. D. 495.

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So in *Re Kelsey* (*w*), a testator after reciting that a legatee of a share of residue owed him 5,000*l.*, forgave him 2,000*l.*, and directed the balance of 3,000*l.* or so much thereof as should remain unpaid at the time of distribution, to be brought into hotchpot; it was held that the legatee was not bound by the statement as to the debt of 5,000*l.*, which was erroneous, and that he was only chargeable with actual advances. Swinfen Eady, J., distinguished between the case of a testator erroneously reciting that a particular sum has been advanced and directing it to be brought into hotchpot, and the case of a testator erroneously reciting that a particular sum has been advanced and directing it "or so much thereof as shall remain unpaid" to be brought into hotchpot; in the former case the legatee is bound by the recital, in the latter case he is not.

Non-disclosure by executor-legatee.

III.—By Conduct.—In *Re Lewis* (*x*), a testatrix bequeathed a leasehold house to a son then abroad, and directed that "in case he should not return and claim the said house," the same should accrue to another son, whom she appointed executor of the will. The executor informed the legatee of the bequest to him of the house, but did not inform him that in the event of his not returning and claiming it the house would go to the executor; the legatee died abroad without having returned to claim the house; it was held that the executor was not estopped from claiming under the gift over.

Estoppel by litigation.

A person who is cognizant of litigation relating to a will, and stands by and takes the benefit of a decision on its construction under which a particular fund is distributed, is estopped from re-opening the question by instituting fresh litigation relating to another fund under the same will (*y*).

A person who is cognizant of proceedings in a Court of Probate in which the validity of a will is questioned, is bound by the result, if he had a right to intervene (*z*).

Heir-at-law.

Where the heir-at-law of a testator is made defendant, as one of the testator's next-of-kin, in a probate action to establish the will, and appears and contests its validity, which is established in the action, he cannot afterwards dispute its validity in respect of real estate affected by it, notwithstanding that he was not cited to appear in the action as heir-at-law (*a*).

(*w*) [1905] 2 Ch. 465.

(*x*) [1904] 2 Ch. 656. See *Re Mackay*, [1906] 1 Ch. 25.

(*y*) *Re Lart*, [1896] 2 Ch. 788.

(*z*) *Wytherley v. Andrews*, L. R., 2 P.

& D. 327, and other cases cited in *Young v. Holloway*, [1895] P. 87.

(*a*) *Beardsley v. Beardsley*, [1899] 1 Q. B. 746.

CHAPTER XVII.

EFFECT OF REPUGNANCY OR CONTRADICTION IN WILLS, AND AS
TO REJECTING WORDS.

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I.—Provisions wholly Void for Repugnancy.—Before dealing with the question of ascertaining the intention of a testator where the dispositions of the will appear to be contradictory, it should be premised that a provision in a will may be void for repugnancy, apart from the question of intention. Thus where property is given to an adult person absolutely, coupled with a direction that the income shall be applied for his benefit in a certain way, or accumulated, this direction is generally void, being inconsistent with the right of enjoyment which follows from ownership (*a*). So, where a testator bequeathed the residue of his personal estate to his son absolutely, with a direction that it should not be delivered to him till the completion of his twenty-fifth year, it was held that the son was entitled to payment on attaining twenty-one, the direction being rejected as repugnant to the enjoyment of a vested interest (*b*). And where an absolute vested interest is given to a person, an attempt to create a protected interest in the income by directing it

Provisions
inconsistent
with owner-
ship.

(*a*) *Gurney v. Goggs*, 25 Bea. 334; *Saunders v. Vautier*, Cr. & Ph. 240; *Gosling v. Gosling*, John. 265; *Re Thompson*, 44 W. R. 582; *Re Johnston*, [1894] 3 Ch. 204. In *Harbin v. Masterman*, [1894] 2 Ch. 184 (s. c., s. n. *Wharton v. Masterman*, [1895] A. C. 186), it was held that the principle applies where the legatee is a charity. As to *Billing v. Billing*, 5 Sim. 232, see Chap. XXXIII.

(*b*) *Rocke v. Rocke*, 9 Bea. 66. See *Re Young's Settlement*, 18 Bea. 199; *Re Jacob's Will*, 29 Bea. 402; *Gosling v.*

Gosling, Johns. 265; *Re Couturier*, [1907] 1 Ch. 470. Compare the cases on the question whether a trust is created by directions as to the application of property given to a person absolutely: Chap. XXIV.

Where property is given to a class of persons with a trust for maintenance until the youngest attains a specified age, this is effectual to postpone distribution: see *Hodson v. Micklethwaite*, 2 Dr. 294; *Berry v. Briant*, 2 Dr. & S. 1; *Hughes v. Hughes*, 3 Br. C. C. 434, and other cases cited post, Chap. XLII.

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to be paid to him by weekly instalments until he attains the age of thirty-five, is nugatory (*c*).

In many cases the desired result may be attained by giving the property to trustees subject to a discretionary trust or gift over under which other persons have an interest in the property (*d*).

Restraint on alienation.

On the same principle, a person to whom the ownership of property is given cannot, as a general rule (*e*), be restrained from alienating it, either by express direction (*f*), or by condition (*g*), or by gift over to take effect in the event of his disposing, or attempting to dispose, of it; in such a case the gift over is void, and the beneficiary takes absolutely (*h*). So if property is given to a person absolutely, followed by a gift over to take effect on involuntary alienation, such as bankruptcy, the gift over is void (*i*).

And a restriction forbidding a particular mode of alienation, such as a mortgage or a charge by way of annuity, is void (*j*).

It seems now settled that a restraint on alienation is bad even if it is limited in point of time (*k*).

Limits of the doctrine invalidating restraints on alienation.

But a restraint on alienation may be good if it only prohibits alienation to a limited number or class of persons (*l*). Again, a gift over to take effect on the alienation of an interest in property, before it is absolutely vested, may be good (*m*). And a life interest may be made determinable on alienation (*n*). And a married woman may be restrained from anticipation (*o*).

Absolute interests cannot be given to persons in succession.

On the same principle, where there is an absolute gift of property to a person, followed by a gift over in the event of his dying intestate, or not disposing of it, the gift over is, as a general rule, repugnant and void (*p*). And a gift over in the event of the

(*c*) *Re Williams*, [1907] 1 Ch. 180.

(*d*) See cases cited in the preceding notes, and post, Chap. XXIV.; *Gott v. Nairne*, 3 Ch. D. 278.

(*e*) As to married women, see Chap. XXXIX.

(*f*) *Hood v. Oglander*, 34 Bea. 513.

(*g*) See Chap. XXXIX.

(*h*) *Bradley v. Peizoto*, 3 Ves. 324; *Shaw v. Ford*, 7 Ch. D. 669; *Re Dugdale*, 38 Ch. D. 176; *Corbett v. Corbett*, 14 P. D. 7; *Re Jones's Will*, 23 L. T. 211; *Re Wolstenholme*, 43 L. T. 752; *Re Bourke's Trusts*, 27 L. R. Ir. 573.

(*i*) *Re Machu*, 21 Ch. D. 838; *Metcalfe v. Metcalfe*, 43 Ch. D. 633.

(*j*) *Ware v. Cann*, 10 B. & Cr. 433; *Willis v. Hiscox*, 4 My. & Cr. 197.

(*k*) This question is discussed in Chap. XXXIX.

(*l*) See Chap. XXXIX.

(*m*) *Re Porter*, [1892] 3 Ch. 481.

(*n*) Chap. XXXIX. The interest must be really a life interest, and not part of a series of limitations which in effect give the legatee an absolute interest: *Re Wolstenholme*, 43 L. T. 752.

(*o*) See Chap. XXXIX.

(*p*) *Lightburne v. Gill*, 3 Br. P. C. 250; *Ross v. Ross*, 1 Jac. & W. 154; *Green v. Harvey*, 1 Hare, 428; *Re Yalden*, 1 D. M. & G. 53; *Re Mortlock's Trust*, 3 K. & J. 456; *Bowes v. Goslett*, 27 L. J. Ch. 249; *Henderson v. Cross*, 29 Bea. 216; *Gulliver v. Vaux*, 8 D. M. & G. 167, n.; *Holmes v. Godson*, ib. 152; *Barton v. Barton*, 3 K. & J. 512; *Perry v. Merritt*, L. R., 18 Eq. 152; *Re Wilcocks' Settlement*, 1 Ch. D. 229; *Re Percy*, 24 Ch. D. 616; *Re Jenkins' Trusts*, 23 L. R. Ir. 162; *Stretton v. Fitzgerald*, ib. 310, 466; *Parnell v. Boyd*, [1896] 2 Ir. R. 571; *Re Walker*

devisee or legatee dying intestate is void, even if the interest given to him is contingent (*q*). CHAPTER XVII.

In some cases effect has been given to a gift over of "what shall remain," or the like, following the gift of a life interest (*r*). Life interest.

On the same principle, where a life annuity was given payable by trustees half-yearly, with a gift over, on the death of the annuitant, of so much "as should remain unapplied as aforesaid," the gift over was held void (*s*). Annuity.

So a condition or provision requiring a person, to whom property is given, to use it, or not to use it, in a particular way, is invalid if it is inconsistent with "those rights of enjoyment which are inseparably incident to the absolute ownership" (*t*). Provision as to user of property may be void for repugnancy.

It may indeed be stated as a general principle that any limitation or gift over, which is not in accordance with the rules governing the devolution and disposition of property, is void. Thus personal property cannot be given to persons in succession, in such a way as to prevent the absolute interest from vesting in accordance with the rules of law (*u*). And if a testator gives personal property to A. in tail, with remainder to B. in tail, and A. survives the testator, he takes absolutely, and the remainder to B. is void. But the death of A. in the testator's lifetime may have the effect of making the gift to B. valid (*v*). Gift over contrary to law.

A gift over on breach of a condition may be void if it does not fit in with the terms of the condition, or is inconsistent with the original gift (*w*).

Where a testator devised real estate to his son and his heirs, and declared that in case his son should die without leaving lawful issue, then the estate should go over to the son's heir-at-law to whom he gave and devised the same accordingly: it was held by

(*Lloyd v. Tveddy*), [1898] 1 Ir. R. 5; *Re Dixon*, [1903] 2 Ch. 458; *Comiskey v. Bowring-Hanbury* (*Re Hanbury*), [1905] A. C. 84. Some of these cases are referred to ante, p. 463, in connection with the doctrine of uncertainty. As to *Doe v. Glover*, 1 C. B. 448; and *Watkins v. Williams*, 3 Mac. & G. 622, see *Shaw v. Ford*, 7 Ch. D. 669.

(*q*) *Barton v. Barton*, 3 K. & J. 512.

(*r*) See ante, p. 464.

(*s*) *Re Sanderson*, 3 Jur. N. S. 809. The annuitant was in fact non compos mentis, although the fact was not referred to in the will; the trustees did not apply the whole annuity for his maintenance; it was held that the surplus formed part of his estate.

(*t*) See the principle stated in Chap. XXXIX., where the cases of *Att.-Gen. v. Catherine Hall*, Jac. 395, and *Att.-Gen. v. Greenhill*, 33 Bea. 193, are referred to.

(*u*) *Byng v. Lord Strafford*, 5 Bea. 558.

(*v*) *Re Lowman*, [1895] 2 Ch. 348, infra, p. 565. So in *Carte v. Carte*, 3 Atk. 180, it was held that if land is devised to a person in fee, a gift over in the event of his committing treason, is void.

(*w*) *Bird v. Johnson*, 18 Jur. 976 (stated in Chap. XXXIX. in connection with another doctrine); *Re Call's Trusts*, 2 H. & M. 46; *Musgrave v. Brooke*, 26 Ch. D. 792.

CHAPTER XVII. the Court of Appeal that the gift over was repugnant and void, and that the son took an absolute estate in fee simple (x).

Restriction on right of owner to sell. In *Re Rosher* (xx) it was held that a condition annexed to a devise in fee requiring the devisee, in the event of his selling the property, to offer it to A. at a certain price, was repugnant and void. Again, in *Re Elliot* (y) a testator gave all his property, including his tea plantations, to A., and provided as follows: "On any sale of the said tea plantations I direct her [A.] to pay to B. 1000*l.* out of the proceeds of such sale": it was held that this direction was repugnant and void. So if an absolute gift to a person is followed by a clause cutting it down in the event of his embracing a religious life, this proviso is repugnant and void (z).

Estate tail. Conditions and gifts over intended to restrict alienation by a tenant in tail are, as a general rule, repugnant and void, as explained elsewhere (a).

Examples of valid gift over. In *Re Sax* (b) a testator bequeathed his business together with a leasehold messuage to his sons, subject to a proviso that if the sons ceased to carry on the business, the leasehold messuage should fall into residue: North, J., held that the proviso was not repugnant to the gift, and that it took effect on the conversion of the business into a private company.

A gift over in the event of the original gift being held void at law or in equity, is valid (c).

Where gift over becomes valid ex post-facto. It was held by Romilly, M.R., that where there is an absolute gift to A., with a gift over to B. in the event of A. dying without having disposed of the property, and A. dies in the testator's lifetime, so that the gift to him lapses, the gift over nevertheless fails (d). This view was dissented from by James, L.J. (e), on the ground that there can be no repugnance where the original gift never takes effect at all. And having regard to the present disposition of the Courts to pay more attention to the wishes of testators than to technical doctrines, it seems clear that the decisions of Romilly, M.R., would not now be followed. The general principle is that "where there are successive limitations of personal estate in favour of several persons absolutely, the first of them who survives

(x) *Re Parry and Daggs*, 31 Ch. D. 130. The principle is a very old one: *Tilbury v. Barbut*, 3 Atk. 617. Compare *Gulliver v. Vaux*, 8 D. M. & G. 167, n. and the cases there cited.

(xx) 26 Ch. D. 801.

(y) [1896] 2 Ch. 353.

(z) *Re Thompson*, 44 W. R. 582.

(a) Chap. XXXIX.

(b) 62 L. J. Ch. 688.

(c) *De Themmines v. De Bonneval*, 5 Russ. 288 (deed). Compare *Re Crawshaw*, 43 Ch. D. 615, cited in Chap. XXIII.

(d) *Hughes v. Ellis*, 20 Bea. 193: *Greated v. Greated*, 26 Bea. 621.

(e) *Re Stringer's Estate*, 6 Ch. D. 15.

the testator takes absolutely, although he would take nothing if any other legatee had survived and taken. . . . The doctrine of repugnance has no application to gifts which fail. . . . This is entirely in accordance with the opinion expressed by James, L.J., in *Re Stringer's Estate*, already referred to, and is good sense" (f). Whether this principle applies to devises of real estate does not seem to have been decided, but the dictum of James, L.J., in *Re Stringer's Estate* expressly includes such cases.

II.—Construction of Contradictory Provisions.—Mr. Jarman states the general rule thus (g): "Doubt is sometimes cast upon the intention of a testator by the repugnancy or contradiction between the several parts of his will, though each part, taken separately, is sufficiently definite and intelligible. In such cases the context (which is so often successfully resorted to for the purpose of throwing light on a doubtful passage) becomes itself the source of obscurity; and, unless some principle of construction can be found authorising the adoption of one, and the rejection of the other of the contrariant parts, both are necessarily void, each having the effect of neutralising and frustrating the other. With a view to prevent this most undesirable result, it has become an established rule in the construction of wills, that where two clauses or gifts are irreconcilable, so that they cannot possibly stand together, the clause or gift which is posterior in local position shall prevail, the subsequent words being considered to denote a subsequent intention: Cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est (h). Hence it is obvious that a will can seldom be rendered absolutely void by mere repugnancy: for instance, if a testator in one part of his will gives

Rule in case of contradiction or repugnancy.

(f) Per Lindley, L.J., in *Re Lowman*, [1895] 2 Ch. 357, ante, p. 563. In *Andrew v. Andrew* (1 Coll. 690) a testator bequeathed consumable articles to his sister for her life, or so long as she should remain unmarried, "in either event then to go over to" A. The sister married in the testator's lifetime. It was held by Sir J. K. Bruce, V.-C., that the gift over was void. There was no express reference, he observed, to the happening of any event in the testator's lifetime; the testator meant death or marriage whensoever happening, not death or marriage happening only in his lifetime. "The words were intended to operate by way of remainder. It is a gift to her so long as she shall be living unmarried, and then over. Now the

gift of consumable articles to a woman so long as she shall be living unmarried is the gift of an absolute interest. The gift over, therefore is void, nor rendered valid by the circumstance of the legatee having survived the testator and married in his lifetime." This decision also would probably not be followed at the present day.

(g) First ed. p. 411.

(h) Co. Litt. 112, b; *Ulrich v. Litchfield*, 2 Atk. 372; *Sims v. Doughly*, 5 Ves. 243; *Constantine v. Constantine*, 6 Ves. 100; *Doe d. Leicester v. Biggs*, 2 Taunt. 109; see also *Chandless v. Price*, 3 Ves. 99; *Wykham v. Wykham*, 18 Ves. 421; *Marks v. Solomon*, 18 L. J. Ch. 234, 19 L. J. Ch. 555.

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to a person an estate of inheritance in lands, or an absolute interest in personalty, and in subsequent passages unequivocally shews that he means the devisee or legatee to take a life interest only, the prior gift is restricted accordingly (i).

Clear gift not cut down by doubtful expressions.

It must be borne in mind, however, that the rule only applies where the later gift shews with reasonable certainty that the testator did not mean the prior gift to take effect according to its terms (j).

Absolute gift cut down to limited interest.

The simplest example of the general rule is where a gift to A., apparently absolute, is cut down to a life estate by a subsequent direction that on A.'s death the property is to go to B. There are numerous authorities to this effect (k). But the subsequent direction must be unambiguous (l).

And where there is an absolute gift of property to A., with a gift over to B. in the event of A. dying without having disposed of it, or a gift to B. of "what remains" at A.'s death, the question of the effect of these words is often a difficult one, and the authorities, as might be expected, are not wholly consistent (m).

Gift over not "fitting" condition.

Where there is gift upon condition, followed by a clause of forfeiture or gift over, which does not "fit" the condition, the effect may be that the latter clause is ineffectual and the gift absolute (n).

Whether absolute interest cut down in any event.

Where property is given to a person without limitation or qualification, followed by a direction that at his death it is to be divided among his children, the question arises whether he takes nothing more than a life interest in any case, or whether the subsequent direction is only to take effect in the event of his leaving children, so that if he leaves none the absolute gift remains in force. Thus in *Joslin v. Hammond* (o) a testator gave to his wife A., whom he appointed executrix, the whole of his property, on condition of her paying to his mother 130*l.* per annum during her life, and added, "at the death of my dear wife A., the whole of the property to be equally

(i) It will be remembered that Mr. Jarman is here dealing only with those cases where the two repugnant gifts are contained in the same testamentary instrument; if one of them is contained in a will and the other in a codicil, the question is one of revocation: see Chap. VII.

(j) Post, p. 574.

(k) The general rule is recognised in *Constable v. Bull*, 3 De G. & S. 411; *Bibbens v. Potter*, 10 Ch. D. 733; and was applied in *Re Russell*, 52 L. T. 559, and *Re Houghton*, 53 L. J. Ch. 1018. See also Chap. XXXVI. As to the difference between "at the death" and

"after the death," see *Re Hutchinson's Trusts*, 21 Ch. D. 811.

(l) *Re Jones*, [1898] 1 Ch. 438, distinguishing *Re Pounder*, 56 L. J. Ch. 113; *Re Percy*, post, p. 575; *Re Bourke's Trusts*, 27 L. R. Ir. 574.

(m) Ante, p. 462 seq.; post, Chap. XXXIV.

(n) See *Re Catt's Trusts*, 2 H. & M. 46, and *Musgrave v. Brooke*, 26 Ch. D. 792, both cited ante, p. 563.

(o) 3 My. & K. 110. See *Lassence v. Tierney*, 1 Mac. & G. 551; *Waters v. Waters*, 26 L. J. Ch. 624, and the other cases discussed in Chap. XXXVIII.

divided amongst those of my children who may survive her ” ; and should his wife marry again, the testator directed that each of his children at the age of twenty-four be paid 400*l.* ; should she not marry, he left them implicitly to her kind and indulgent care. No child of the testator survived the widow. It was contended, therefore, that the widow was absolutely entitled, on the ground that the absolute interest which she would have taken under the first words of the will, was cut down to a life interest only in a certain event which had not happened ; but Leach, M.R., considered that, upon the whole context of the will, it was the intention of the testator that in no event the wife should have other than a life estate. “ If,” said his Honor, “ at her death, a child or children survived her, they were to take the property between them ; but he has not provided for the case of all the children dying during the life of his wife, and that event having happened, he has so far died intestate. It is not a probable intention to be imputed to the testator, that, if his children died in the lifetime of his wife, leaving families, his widow, on her second marriage, should enjoy the whole property.” His Honor did not advert to the annuity to the mother.

On the other hand, in *Crozier v. Crozier* (*p*), a testator gave all his property to his wife, “ and after her death to be equally divided to the children, should there be any ” : the testator had only one child, who was born after the date of the will and predeceased the testator : it was held by James, L.J., that the gift to the wife was absolute, and only to be cut down in the event of there being children : there being none, she took absolutely. The learned judge remarked that the testator clearly did not mean to die intestate, which would be the effect of giving the wife only a life interest (*q*).

The question whether the original gift is an absolute gift, with a subsequent gift in derogation, or whether it is a mere life interest with subsequent limitations, may be affected by the interposition of trustees (*r*).

In *Re Hutchinson's Trusts* (*s*) property was given to A. and B. share and share alike, and after their decease to their children share and share alike, and to their heirs for ever ; A. died without issue and B. died leaving issue : it was held by Kay, J., that as the absolute gift to each was only cut down in favour of his children,

(*p*) L. R., 15 Eq. 282. See *Bell v. Jackson*, 1 Sim. N. S. 547 ; *Salmon v. Salmon*, 29 Bea. 27.

(*r*) Ibid. . *Scawin v. Watson*, 10 Bea. 200.

(*q*) See also *Monck v. Croker*, [1900] 1 Ir. R. 56, post, Chap. XXXVII.

(*s*) 21 Ch. D. 811 ; see *Re Rubbins*, 78 L. T. 218 ; 79 L. T. 313.

CHAPTER XVII. the property was, in the events which had happened, divisible in moieties between the representatives of A. and the children of B.

The general rule stated by Mr. Jarman applies even where the apparently absolute nature of the prior gift is emphasised by the use of words of limitation.

Posterior of
two inconsis-
tent clauses
preferred ;

As in *Crone v. Odell* (t), where a testator devised the residue of his real and personal property to his children, A., B., and C., and all their younger children, their heirs, executors, administrators and assigns, for ever ; so far it was a clear joint devise ; but he went on to declare, that, nevertheless, his intentions were, that A. should receive the entire interest or yearly produce of such part of his real or personal fortune as he (testator) intended for his (A.'s) younger children during his life. The testator then made a similar direction as to B. and C. ; and he provided, that, in case any of his said three children should die, the share of such should go to the younger children of such children ; if no younger children, to the survivors ; and he gave the parents a power of distribution among their younger children. Lord Manners determined that the parents took life interests only, with a power of distribution among their younger children ; which decree was affirmed in D. P.

So, in *Sherratt v. Bentley* (u), where a testator, after bequeathing several legacies, devised unto his wife a certain messuage and all other his real estates, and his household goods and all other his personal estate, to hold to his said wife, her heirs, executors, administrators and assigns, for ever. The testator then directed that none of the legatees should be entitled until twelve months after his wife's decease ; and, in case his wife should happen to die in his lifetime, and the before-mentioned devises and bequest to her should thereby lapse, the testator gave the estate and effects, as well real as personal, comprised therein, to S., his heirs, executors, administrators and assigns, to the use of such persons as his wife should, in her lifetime, by writing under her hand appoint. The testator then gave some pecuniary legacies, and proceeded to devise and bequeath to W. A. and his (the testator's) brother-in-law's children the residue of his real and personal estates, to be equally divided amongst them, share and share alike, at the

(t) 1 Ba. & Be. 449, (*Odell v. Crone*)
3 Dow, 61 ; see also *Roe d. James v.*
Avis, 4 T. R. 605.

(u) 2 My. & K. 149. See also *Re*

Brooks' Will, 2 Dr. & Sm. 362 ; *Gravenor v. Watkins*, L. R., 6 C. P. 500,
post, Chap. XLV. ; *Estate of Lupton*,
[1905] P. 321.

decease of his said wife. The heir-at-law contended, that the will was void for uncertainty, on account of the repugnance between the gift to the wife, her heirs, executors, administrators and assigns, and the subsequent gift of the residue to others, to be divided at her decease. The person claiming under the wife contended that the pecuniary legacies and the gift of the residue were only to take effect in the event of her decease in the testator's lifetime; but Sir J. Leach, M.R., was of opinion that the Court was not warranted in putting such a construction upon the will, for that the testator's general intention, as collected from the concluding passages in his will, was to give the wife the full enjoyment during her life only, and to give it over to the persons named afterwards; and that the words "heirs, executors, administrators and assigns," were to be rejected; and his Honor referred, as one of the grounds of his decision, to the rule, that the latter part of a will shall prevail against inconsistent expressions in the prior part of it. On appeal, Lord Brougham affirmed the decree, observing that either the testator had changed his intention and was minded to give his wife a life estate instead of the fee, or he was ignorant of the force of the words he had originally used, and those words must be rejected as having been used by mistake. The former alternative was the one to which the rule, sanctioned by the authorities (which he stated in detail), led. The latter was the inference drawn, not unfairly, from the whole instrument taken together.

In *Hare v. Westropp* (v) the testator gave all his property to his wife, and then gave all the rest residue and remainder of his estate and effects to trustees upon trust for his wife for life, with remainder to his children: it was held that the wife took a life interest in the whole of the testator's property.

"But in these cases," as Mr. Jarman points out (w), "it is a settled and invariable rule not to disturb the prior devise farther than is absolutely necessary for the purpose of giving effect to the posterior qualifying disposition."

—but prior
devise not
unnecessarily
disturbed.

As in *Doe d. Amlot v. Davies* (x), where a testator devised all his messuage and garden in the occupation of D., and also all that his messuage and garden wherein he then resided, both situate in P., to trustees and their heirs, upon trust to pay the rents to

(v) 9 W. R. 689. But where there are two residuary gifts to different persons, the prior gift, if clear and distinct, will prevail unless the testator shews with reasonable certainty that he means the later gift to take effect: see post,

Chap. XXIX.

(w) First ed. p. 414.

(x) 4 M. & Wels. 599. See also *Crossman v. Bevan*, 27 Beav. 502; *Spence v. Handford*, 4 Jur. N. S. 987, 27 L. J. Ch. 767.

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his wife during widowhood, and after the determination of that estate, to the use of his children by his said wife, equally to be divided between them and the lawful issue of their or his bodies or body, and, in default of such issue, to his nephew D. The testator immediately afterwards gave to his daughter F. a pecuniary legacy when she attained the age of twenty-one years, and the house where she then lived, after the decease of her mother or the day of intermarriage; and the testator gave to his daughter R. a legacy in like manner, and the house then in the occupation of D., after the decease of her mother or the day of her intermarriage. The two houses last referred to were those comprised in the previous devise. It was admitted that, under the first devise, the daughters would have been tenants in common in tail of the two houses, but, as the second devise clearly indicated an intention to give one of the houses to each daughter, the whole was in some degree reconciled by holding each to take an estate for life in severalty in her own house under the latter devise (which contained no words of inheritance), leaving the prior devise still to operate on the inheritance in remainder, of which it made the two daughters tenants in common in tail expectant on the estate for life of each in the respective houses.

Devise annulled by subsequent inconsistent devise in same will;

“The doctrine in question,” says Mr. Jarman (*y*), “has been sometimes unsparingly applied, even where the effect of the posterior devise is not merely (as in the two last cases) to restrict and qualify the interest conferred by the prior devise, but wholly to defeat and frustrate such prior devise. Thus in *Ulrich v. Litchfield* (*z*), where a testatrix bequeathed her real *and personal estate* to A. and B. equally for life, and, upon the death of A., she gave the whole estate to B. in tail, with remainder over, with a few pecuniary legacies, and charged her real estate with the payment of the legacies, if the personalty should be insufficient. The testatrix then gave *all the residue of her personal estate* to her uncle C.’s three daughters. Lord Hardwicke held the daughters to be entitled to the residue of the personal estate, considering that the testatrix must be presumed to have altered the intention expressed in the prior part of her will.

—the whole to be reconciled, if possible.

“But the rule which sacrifices the former of several contradictory clauses is never applied but on the failure of every attempt to give to the whole such a construction as will render every part of it effective (*a*). In the attainment of this object the local order of

(*y*) First ed. p. 415.
(*z*) 2 Atk. 372.

(*a*) *Langham v. Sanford*, 19 Ves. 649; *Shipperdson v. Tower*, 1 Y. & C.

the limitations is disregarded, if it be possible, by the transposition of them, to deduce a consistent disposition from the entire will. Thus, if a man, in the first instance, devise lands to A. in fee, and in a subsequent clause give the same lands to B. for life, both parts of the will shall stand; and, in the construction of law, the devise to B. shall be first (*b*), the will being read as if the lands had been devised to B. for life, with remainder to A. in fee.

“So where (*c*) a testator, after devising the whole of his estate to A., devises Blackacre to B., the latter devise will be read as an exception out of the first, as if he had said, ‘I give Blackacre to B., and subject thereto, all my estate, or the residue of my estate, to A.’

“By parity of reason, where (*d*) a testator gives to B. a specific fund or property at the death of A., and in a subsequent clause disposes of the whole of his property to A., the combined effect of the several clauses, as to such fund or property, is to vest it in A. for life, and, after his decease, in B.

Devise qualified by subsequent disposition.

“Again (*e*), where a testator gave his real and personal estate to A., his heirs, executors and administrators, and in a subsequent part of his will gave all his property to A. and B., upon trust for sale, and to pay the interest of the proceeds to A. for life, and at her decease, upon trust to pay certain legacies, leaving the residue undisposed of, A. was held to be entitled, under the first devise, to the beneficial interest in reversion, not exhausted by the trust for the payment of legacies created by the second (*f*).

“Sometimes it happens that the testator has, in several parts of his will, given the same lands to different persons *in fee*. At first sight this seems to be a case of incurable repugnancy, and, as such, calling for the application of the rule, which sacrifices the prior of two irreconcilable clauses, as the only mode of escaping from the conclusion that both are void. Even here, however, a reconciling construction has been devised, the rule being in such cases, according to the better opinion, that the devisees take concurrently (*g*). The contrary, indeed, is laid

Effect of separate contrariant devises, each in fee.

Both take concurrently.

C. C. 459; *Briggs v. Penny*, 3 De G. & S. 539; *Jackson v. Forbes*, Taml. 88; *Brocklebank v. Johnson*, 20 Beav. 205.

(*b*) Per *Anderson, Anon.*, Cro. El. 9; see also *Ridout v. Dowding*, 1 Atk. 419; *Plenty v. West*, 6 C. B. 201; *Usticke v. Peters*, 4 K. & J. 437.

(*c*) *Cuthbert v. Lempriere*, 3 M. & Sel. 158; see also *Anon.*, Dalison, 63; *Adams v. Clerke*, 9 Mod. 154; *Allum v. Fryer*, 3 Q. B. 442; *Roe d. Snape v. Nevill*, 11 Q. B. 466.

(*d*) *Blamire v. Geldart*, 16 Ves. 314.

(*e*) *Brine v. Ferrier*, 7 Sim. 549.

(*f*) In point of fact, in this case the inconsistent gifts were contained in several papers supposed to be written at different times; but as the Ecclesiastical Court had allowed them to be proved as one will, they were, of course, to be so construed.

(*g*) 3 Leon. 11, pl. 27; 8 Vin. Abr. Devise, 152, pl. 3; arg. in *Coke v. Bullock*, Cro. Jac. 49, and in *Fane v. Fane*, 1 Vern. 30.

CHAPTER XVII. down by Lord Coke (*h*) and other early writers (*i*), who say that the last devise shall take effect; and a similar opinion seems to have been entertained by Lord Hardwicke, though he admitted that, latterly, a different construction had prevailed (*j*). The point underwent much discussion in *Sherratt v. Bentley* (*k*), already stated; and Lord Brougham, after reviewing the authorities, and fully recognising the general doctrine, which upholds the latter part of a will by the sacrifice of the former to which it was repugnant, considered that, consistently with this rule, it might be held, that, where there are two devisees in fee of the same property, the devisees take concurrently. 'If, in one part of a will,' he said, 'an estate is given to A., and afterwards the same testator gives the same estate to B., adding words of exclusion, as "not to A.", the repugnance would be complete, and the rule would apply. But if the same thing be given, first to A., and then to B., unless it be some indivisible chattel, as in the case which Lord Hardwicke puts in *Ulrich v. Litchfield*, the two legatees may take together without any violence to the construction. It seems, therefore, by no means inconsistent with the rule as laid down by Lord Coke, and recognised by the authorities, that a subsequent gift, entirely and irreconcilably repugnant to a former gift of the same thing, shall abrogate and revoke it, if it be also held that, where the same thing is given to two different persons in different parts of the same instrument, each may take a moiety; though, had the second gift been in a subsequent will, it would, I apprehend, work a revocation.' "

Whether as joint tenants or tenants in common.

It is laid down by Lord Hardwicke in *Ulrich v. Litchfield* (*l*), that the two devisees, if they take concurrently, are joint tenants; this is supported by several old authorities (*m*), and appears to have been assumed by Lord Brougham, who speaks of their joint estate (*n*). When he speaks (as above) of each taking a "moiety," it is only as opposed to either taking the whole to the exclusion of the other. In *Ridout v. Pain* (*o*), Lord Hardwicke says, that "latterly such a devise has been construed either a joint tenancy or tenancy in common, according to the limitation"; and this it is said must be presumed to mean, "that if the two estates given by the will have the unity or sameness of interest in point of quantity essential to a joint tenancy, the devisees shall be joint

(*h*) Co. Litt. 112.

(*i*) Plow. 541.

(*j*) See *Ulrich v. Litchfield*, 2 Atk. 374.

(*k*) 2 My. & K. 165, ante, p. 568.

(*l*) 2 Atk. 372.

(*m*) 14 Vin. Ab. 485, pl. 2; *Anon.*, Cro. El. 9; *Wallop v. Darby*, Yelv. 210; Co. Litt. 21 a, n. (4).

(*n*) 2 My. & K. 166.

(*o*) 3 Atk. 493.

tenants, but otherwise shall be tenants in common" (*p*). Now, as both devisees are supposed to have vested estates in fee, this interpretation points to their being joint tenants. Independently of authority this seems the preferable construction, as less violence is thereby done to the testator's language than by making them tenants in common, as the creation of a tenancy in common requires positive intention.

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It is observable that both Lord Hardwicke and Lord Brougham considered that the doctrine in question did not apply to a single indivisible chattel; but such an exclusion, as Mr. Jarman points out (*q*), is attended with difficulty, "for though, certainly, it may seem rather absurd that a testator should give a horse or a watch to several persons concurrently, yet it is impossible to say that there may not be such an intention; and where is the line to be drawn? Is it to depend upon the greater or less convenience attending a joint or concurrent enjoyment of the subject of gift?"

Whether doctrine applies to an indivisible chattel.

Sometimes where an estate in fee is followed by apparently inconsistent limitations, the whole has been reconciled by reading the latter disposition as applying exclusively to the event of the prior devisee in fee dying in the testator's lifetime, the intention being, it is considered, to provide a substituted devisee in the case of lapse (*r*); or by understanding the latter devise to be dependent on a certain contingency mentioned in the will, though such contingency may not clearly appear to be attached to it (*s*).

Apparent inconsistency reconciled by reference to lapse.

The anxiety of the Courts to adopt such a construction as will reconcile and give effect to all parts of a will, is further exemplified by *Holdfast* d. *Hitchcock* v. *Pardoe* (*t*), where a testator devised to A. a farm in the occupation of C., and to B. lands in L. Marsh; and it appeared that part of the farm in the occupation of C. consisted of lands in L. Marsh; but there was another estate, not in his occupation, consisting entirely of marsh lands in L.; and it was held, that the subsequent devise was not, as contended, a revocation of the preceding devise, but that A. took the farm, and B. the marsh lands not included in that farm.

Instances of devises reconciled.

So, where (*u*) a testator devised to A. "her heirs, executors and administrators," a house in T. Street (describing it), and in distinct clauses gave her several other houses, "the whole of which premises were in the borough of Plymouth, during her natural life,"

(*p*) Co. Litt. 112 b, n. (1), by Harg.

(*q*) First ed. p. 418.

(*r*) *Clayton* v. *Lowe*, 5 B. & Ald. 636;

but see remarks on this case post, Chap. LVII.

(*s*) *Ley* v. *Ley*, 2 M. & Gr. 780.

(*t*) 2 W. Bl. 975; see also *Woolcomb*

v. *Woolcomb*, 3 P. W. 111.

(*u*) *Doe* d. *Bailey* v. *Sloggett*, 5 Exch. 107.

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but should A. have children, "the before-mentioned houses" to descend to them; but if she should die without issue (which happened), then the "said premises" to become the joint property of the children of X. The house included in the first devise being, as well as all the rest, in the borough of Plymouth, it was contended that it went with them to the children of X. But it was held, that although the words were not perfectly accurate, yet they could not intend that the testator meant by the subsequent words to cut down the estate in fee first given.

Mr. Jarman also cites the case of *Bettison v. Richards (v)* as being "perhaps, the strongest authority of this kind."

Clear gift not cut down by doubtful expressions.

These cases also exemplify a rule which is certainly not of less frequent application than that enunciated at the beginning of this section, viz., that where there is a clear gift in a will it cannot be cut down by subsequent words which are not clear and decisive (*w*). They need not (as sometimes stated (*x*)) be equally clear with the gift. "You are not to institute a comparison between the two clauses as to lucidity" (*y*). But the clearly expressed gift naturally requires something unequivocal to shew that it does not mean what it says. Thus if a testator gives all his property to A. and in a later part of the will appoints B. his residuary legatee, the general rule is that this does not affect the gift to A. (*z*), and lapsed legacies go to A., not to B. (*a*). So where a testator made a careful and elaborate disposition of the residue of his property in favour of his sons and daughters and a grandchild in unequal shares with clauses of accruer, and then made a gift of his residue to the same persons in equal shares, it was held by Fry, J., that the first gift prevailed (*b*). Again, in *Re Spencer (c)*, where the testator filled up the first blank in a printed form by giving all his real and personal property to certain persons, after which came a full printed form of

(*v*) 7 Taunt. 105.

(*w*) *Thornhill v. Hall*, 2 Cl. & F. 22; *Re Segelcke*, [1906] 2 Ch. 301.

(*x*) For example, by Knight Bruce, L.J., in *Kiver v. Oldfield*, 4 De G. & J. 30.

(*y*) Per Lord Campbell, *Randfield v. Randfield*, 8 H. L. Ca. 225, where the rule was held inapplicable. For further instances of the application of the rule, see *Clavering v. Ellison*, 3 Drew. 451; *Re Larkin*, 2 Jur. N. S. 229; *Walmsley v. Foxhall*, 1 D. J. & S. 605; *Kerr v. Clinton*, L. R., 8 Eq. 462; *Crozier v. Crozier*, L. R., 15 Eq. 282; *Re Bywater*, 18 Ch. D. 17; *Re Viscount*

Exmouth, 23 Ch. D. 158. And see this rule further discussed, post, pp. 579 et seq.

(*z*) *Davis v. Bennet*, 30 Bea. 226; *Kilvington v. Parker*, 21 W. R. 121; *Re Jessop*, 11 Ir. Ch. R. 424.

(*a*) *Johns v. Wilson*, [1900] 1 Ir. R. 342; *Re Isaac*, [1905] 1 Ch. 427. See the cases referred to in detail in Chap. XXIX.

(*b*) *Bristow v. Masfield*, 52 L. J. Ch. 27. *Fitzpatrick v. Knaresborough*, 13 Ir. Eq. R. 338, seems to have been the converse of this case.

(*c*) 54 L. T. 597.

residuary gift in which he inserted the names of four other persons : CHAPTER XVII.
it was held that there was nothing on which the residuary clause could operate, and that the prior gift must prevail (*d*).

In *Hoare v. Byng* (*e*) a testator left all his personal estate and all his landed estates to his wife for life, and "afterwards" all his personal and landed estates to his sister for her life, and "then" to the eldest son of B. and "afterwards" to B.'s second, third, or any later sons, and "then" to the eldest and other sons successively of C. : it was contended that the words "then" and "afterwards" shewed an intention to give B.'s eldest and other sons nothing more than life interests, but it was held that the eldest son of B. took the personal estate absolutely. All the judges laid stress on the fact that where the testator intended to give estates for life, estates for life were in terms given. This element was absent in the case of *Re Percy* (*f*), where a testator, by an extremely short and concise will, bequeathed to his wife 10,000*l*. "afterwards to go to the understated residuary legatee E." : it was held by Bacon, V.-C., that the gift to the wife was absolute, and not cut down to a life interest by the "inept words" which followed it. But it is not very easy to see why the word "afterwards" should be considered more inept than the words "at her death," following an absolute gift (*g*).

Absolute gift not cut down to estate for life by vague words.

III.—Rejection of Words.—"It is clear," says Mr. Jarman (*h*), "that words and passages in a will, which are irreconcilable with the general context, may be rejected, whatever may be the local position which they happen to occupy ; for the rule which gives effect to the posterior of several inconsistent clauses must not be so applied as in any degree to clash or interfere with the doctrine which teaches us to look for the intention of a testator in the general tenor of the instrument, and to sacrifice to the scheme of disposition so disclosed, any incongruous words and phrases which have found a place therein.

Rule as to the rejection of words.

"Thus, in *Boon v. Cornforth* (*i*), where a testator bequeathed

(*d*) As to the construction of a will written on a printed form, see *Re Harrison*, 30 Ch. D. at p. 394.

(*e*) 5 Bea. 558 (*Byng v. Stafford*) ; 10 Cl. & F. 508.

(*f*) 24 Ch. D. 616. This case is also referred to *supra*, p. 463.

(*g*) Ante, p. 566.

(*h*) First ed. p. 420. It will be remembered that where words have been inserted in a will by mistake, they are sometimes omitted from the pro-

bate; ante, p. 30.

(*i*) 2 Ves. sen. 277; *Robinson v. Waddelow*, 8 Sim. 134; *Jones v. Price*, 11 Sim. 557; *Aspinall v. Audus*, 7 M. & Gr. 912; *Hanbury v. Tyrell*, 21 Beav. 322; *Campbell v. Bouskell*, 27 Beav. 325 ("aforesaid nephews," "aforesaid" rejected); *Smith v. Crabtree*, 6 Ch. D. 591 ("living at the death or second marriage of my wife" rejected).

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the interest of 6,000*l.* stock to his daughter for life, and after her decease, upon trust to dispose of the principal and interest to and between her husband and his (testator's) daughter's child and children, viz. her husband should have and enjoy one-half of the interest thereof for and during his natural life, if there should be *no child or children* (the words in italics were interlined (j)), and the child or children the other half ; on his death his half should go to the child or children, but till the child or children attained twenty-one the husband should have the whole interest, and on the death of their father, they should have the remaining 3,000*l.* ; but if no such child or children at the time of her death, or they

- should die before twenty-one, then to go on further trust as he should thereafter mention—Lord Hardwicke rejected the interlined words, as inconsistent and repugnant with the whole disposition, his Lordship being of opinion that he had no alternative but that of rejecting either these or the entire provision.

Passage at variance with context rejected.

“ So, in the case of *Coryton v. Helyar* (k), where a testator devised lands to the use of his son *for ninety-nine years*, and, after the determination of that estate, to the use of trustees during the life of the son, to preserve contingent remainders ; and, after the decease of the son, to the use of his first and other sons in tail male—Lord Hardwicke held that the term was, with reference to the true construction of the several parts of the will, to be construed, not as an absolute term, but as determinable with the decease of the son.

Ambiguous words inconsistent with prior devise rejected.

“ In several instances inconsistent words engrafted on a prior clear and express devise have been rejected.

“ Thus, where (l) the devise was to A. and her heirs, *for their lives*, Lord Ellenborough rejected the latter words ; which, he said, were merely the expression of a man ignorant of the manner of describing how the parties whom he meant to benefit would enjoy the property ; for whatever estate of inheritance the heirs might take, they could in fact only enjoy the benefit of it for their own lives.” And where (m) a testator gave to his wife, her heirs and

(j) *Lunn v. Osborne*, 7 Sim. 56, affords another instance of the rejection of words which had been interlined by a testator, and were at variance with the general context.

(k) 2 Cox, 340. See, for other examples of powers or interests reduced within a limited period by force of the context, *Waltington v. Waldron*, 4 D. M.

& G. 259 ; *Chapman v. Gilbert*, ib. 366.

(l) *Doe d. Cotton v. Stenlake*, 12 East, 515. See also *Towns v. Wentworth*, 11 Moo. P. C. C. 545 ; *Hugo v. Williams*, L. R., 14 Eq. 224.

(m) *Doe d. Herbert v. Thomas*, 3 Ad. & Ell. 123, 4 Nev. & M. 696. See also *Brocklebank v. Johnson*, 20 Beav. 205 ; *Pasmore v. Huggins*, 21 Beav. 103.

assigns for ever, his house and other property, with the intention that she might enjoy the same during her life, and by her will dispose of the same as she thought proper; it was contended that the wife took only a life interest with a testamentary power of appointment; but the Court held, that the latter part of the clause did not cut down the clear gift of a fee-simple contained in the former part, and that the testator merely meant to mention all the incidents of a fee which occurred to him at the time (*n*).

So, where (*o*) a testatrix bequeathed an annuity, to be equally divided between M. B., C. S., and C. A., "to them and their heirs, or the survivor of them, in the order they are now mentioned," Sir W. Grant rejected the latter words as repugnant.

The embarrassment often caused by cases of this description is exemplified by *Morrall v. Sutton* (*p*), where a testator limited life interests in his leasehold property charged with certain annuities, with remainder to S. C., "her executors, administrators and assigns, subject to the said annuities charged thereon during her natural life." The general rules above mentioned were acknowledged on all hands; but there was a difference of opinion upon the question, whether or not sufficient evidence of the testator's intention could be collected from the context to authorise the rejection of the words "during her natural life," so as to give S. C. the absolute interest; for, in the absence of such evidence, those words being placed last must, according to the general rule, overrule the preceding words "executors, &c.," thereby limiting S. C.'s interest to a life-estate. The case was ultimately compromised.

Where there is a gift to a limited class of children or issue, with a gift over in default of "such children," or "such issue," it may appear that the word "such" was not used in its proper sense, and it may be rejected or modified accordingly (*q*).

Where inappropriate words have apparently been inserted by mistake in a will shewing signs of having been carefully and skilfully prepared, the Court sometimes assumes that they were

The "blundering attorney's clerk."

(*n*) If there had been a gift over in the event of the wife not disposing of the property the construction would have been different: see *Re Stringer's Estate*, 6 Ch. D. 1, and the other cases cited in Chap. XXIII.

(*o*) *Smith v. Pybus*, 9 Ves. 566; see also *Jesson v. Wright*, 2 Bligh, 1, and other cases of the same class discussed, Chap. XLIX.; and *Reece v. Steel*, 2 Sim. 233; *Townley v. Bolton*, 1 My. & K.

148; *Harvey v. Harvey*, 5 Beav. 134; *Re Bywater*, 18 Ch. D. 17.

(*p*) 4 Beav. 478, 1 Phil. 533. Compare *Bunbury v. Doran*, Ir. R., 9 C. L. 284, where a testator devised to P. and M. a certain property "until I am able to live there and enjoy it myself": these words were rejected, as being inconsistent with the normal operation of a testamentary disposition.

(*q*) Chaps. XX., LII.

CHAPTER XVII. inserted by some "blundering attorney's clerk," and rejects them (g).

Words not to be expunged, unless inconsistent.

"But words are not to be expunged," says Mr. Jarman (r), "upon mere conjecture, nor unless actually irreconcilable with the context of the will, though the retention of them may produce rather an absurd consequence (s).

"Thus, where (t) a testator after bequeathing certain property to Thomas Brailsford, son of his nephew Samuel Brailsford, devised his real estates 'to the use of *the said* Thomas Brailsford and his assigns, for and during the term of his natural life, and after his decease, to the use of *the said Thomas Brailsford, son of my nephew, Samuel Brailsford*, his heirs and assigns, for ever.' The only Thomas Brailsford mentioned in the will was the son of Samuel, but the testator had another nephew of that name, (who was uncle of the legatee,) to whom, therefore, it was contended, that the devise to '*the said* Thomas Brailsford' applied, though he was not before named, according to the case in Hawkins (u), that father and son having the same name, the son, not the father, is distinguished by an addition (v). The words '*the said*,' it was observed, might be considered surplusage; and that the devise was either void for uncertainty, or, there must be an inquiry. But Sir William Grant said, that it was impossible to contend that there was, *primâ facie*, any ambiguity in the description; by the words, '*the same Thomas Brailsford*,' the Thomas Brailsford who had been before mentioned was sufficiently described. 'The argument on the other side,' said his Honor, 'rests chiefly on the inconsistency of giving to the same person, in the same sentence, an estate for life and also an estate in fee; there is certainly a particularity in that; *but the devise as it stands is not so insensible or contradictory as to drive the Court to the necessity of expunging or adding words to give it a meaning*;' and this decree was affirmed by Lord Eldon on appeal (w).

Devise not controlled by reason assigned.

"And though *repugnant* expressions will yield to an intention and purpose expressed, or apparent upon the general context,

(g) *Re Dayrell*, [1904] 2 Ch. 496. The expression was first used by Bacon, V.-C., in *Re Redfern*, 6 Ch. D. 133, post, p. 590, n. (f).

(r) First ed. p. 423.

(s) See *Mellish v. Mellish*, 4 Ves. 45, where the inference that a name had been inserted by mistake, was very strong.

(t) *Chambers v. Brailsford*, 18 Ves. 368.

(u) 2 Hawk. P. C. 271, s. 106.

(v) See also *Goodright d. Hall v. Hall*, 1 Wils. 148.

(w) 19 Ves. 652, 2 Mer. 25; see also *Roe v. Foster*, 9 East, 405; *Ridgeway v. Munkittrick*, 1 D. & War. 90, 91; *Ridout v. Pain*, 3 Atk. 493; *Langley v. Thomas*, 6 D. M. & G. 645.

yet it does not appear that a bequest actually made, or a power given, can be controlled merely by the reason assigned. The assigned reason may aid the construction of doubtful words, but cannot warrant the rejection of words that are clear (x). Thus, where (y) a testator expressed his conviction of the honour and justice of his trustees, and made that conviction the ground of his reposing in them the trust of distributing his property among his relations, authorising them to fix both the objects and the proportions, but afterwards gave the power in express terms, to them, *and the heirs, executors and administrators of the survivor of them*—Sir W. Grant, M.R., observed: ‘Though it seems very incongruous and inconsequential to extend to unknown and unascertained persons the power which personal knowledge and confidence had induced the testator to confide to his original trustees and executors, yet I am not authorised to strike these words out of the will, upon the supposition, though not improbable, that they were introduced in this part by inadvertence or mistake.’ ”

IV.—Distinct Gift not controlled by Ambiguous Context.—

Again, it is a general rule, that a devise in general terms shall not, even though the result may be to render it inoperative, be held to control another devise made in distinct terms. Thus, in *Borrell v. Haigh* (z), where a testatrix devised all her messuages, cottages, closes, lands and hereditaments at H. to A., and afterwards gave all her copyhold estates and hereditaments at N. and T. “and elsewhere”; and it appeared that the only place besides N. and T., in which the testatrix had copyholds, was H.: Lord Langdale, M.R., held, nevertheless, that the prior devise, which per se clearly carried the copyholds at H., was not defeated by the vague expression which followed. *Greenwood v. Sutcliffe* (a) was decided on the same principle. In *Mann v. Fuller* (b) there was a bequest of 2,000*l.* to A. and his children, followed by legacies to other persons, and then a bequest of 1,000*l.* to A., “in addition to one thousand before mentioned”: it was held that this did not cut down the former legacy to 1,000*l.*

Distinct gift not cut down by vague words.

“It is to be observed, too,” says Mr. Jarman (c), “that a devise of lands, in clear and technical terms, will not be controlled by

Clear devise not controlled by subsequent inaccurate words of reference.

(x) Per Sir W. Grant, 16 Ves. 46; and see 4 Ves. 808; *Thompson v. White-lock*, 5 Jur. N. S. 991.

(y) *Cole v. Wade*, 16 Ves. 27. The general principle laid down by the M.R. as to the transmission of powers involving personal confidence, was dis-

sented from by Farwell, J., in *Re Smith*, [1904] 1 Ch. 139; see Chap. XXIV.

(z) 2 Jur. 229. See also *Sidebotham v. Watson*, 11 Hare, 170 (4th question).

(a) 14 C. B. 226.

(b) Kay, 624.

(c) First ed. p. 425.

CHAPTER XVII. expressions in a subsequent part of the will, inaccurately referring to the devise, in terms which, had they been used in the devise itself, would have conferred a different estate, if the discordancy appear to have sprung merely from a negligent want of adherence to the language of the preceding devise.

“Thus, where (*d*) a testatrix devised lands to her eldest daughter A. S., *and the heirs of her body* for ever, with remainder over, charged with a sum of money to be raised out of the yearly profits; and the testatrix declared it to be her will that her executors (thereinafter named) should stand seised of the lands until they should have raised the said sum, or until the same should be discharged by A. S. *and her heirs*; and after the raising or payment thereof by the said A. S. *or her heirs*, then that A. S. *and her heirs* should enjoy the said lands for ever (*e*). It was held that the word ‘heirs’ of A. S. thrice repeated, referred to the special designation of heirs to whom the estate was devised in the beginning of the will, and were not intended to introduce a new and more general denomination of heirs, and to revoke the express estate tail given in the beginning of the will.

“So, where (*f*) the devise was to A. and the heirs *male* of his body, and, in case he should die *without issue*, then over, the words ‘without issue’ were held to mean without issue *male*.

“Both the preceding cases exhibit deficiency, rather than repugnancy of expression, and will serve, therefore, not inaptly to conduct to the commencing subject of the next chapter.”

(*d*) *Doe d. Hanson v. Fyldes*, Cowp. 833.

(*e*) The words “for ever” were not strictly repugnant, as an estate tail is capable of perpetuity of duration.

(*f*) *Tuck v. Frencham*, Moore, 13 pl. 50 (*Buck v. Frencham*), 1 And. 8; see also *Ellicombe v. Gompertz*, 3 My. & Cr. 127; *Hillersdon v. Lowe*, 2 Hare, 355; *Mortimer v. Hartley*, 3 De G. & S. 332.

CHAPTER XVIII.

AS TO SUPPLYING, TRANSPOSING, AND CHANGING WORDS.

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I.—As to supplying Words.—The question whether parol evidence is admissible to supply blanks left in a will has been already considered (a). Supplying blanks.

Where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied (b) in order to effectuate the intention, as collected from the context (c). Words may be supplied, when.

Of this we have a very simple example in an early case, where a devise to A. and the heirs of [his body, and, if he should die, then over, was read “and if he should die without issue” (d). So, where (e) a man having three sons, John, Thomas, and William, devised lands to John, his eldest son, and the heirs of his body, after the death of Alice, the devisor’s wife; and declared that if John died, living Alice, William should be his heir. [And the testator devised other lands to Thomas, and the heirs of his body, and, if he died without issue, then that John should be his heir; and he devised other lands to William and the heirs of his body, and, if all his sons should die without heirs of their bodies, then that his lands should be to the children of his brother. John

(a) Ante, Chap. XV.

(b) This is generally done by the Court of Construction and not by the Court of Probate: but if the missing words bear on the question of probate, they may be supplied: *In bonis Morony*, 1 L. R. Ir. 483.

(c) See *Towns v. Wentworth*, 11 Moo. P. C. 526; *Hope v. Potter*, 3 K. & J. 206; per K. Bruce, L.J., 3 De G. & J. 266, 267; *Mellor v. Daintree*, 33 Ch. D. 198. The general principle laid

down by Knight-Bruce, L.J., in *Key v. Key*, 4 D. M. & G. at p. 84, was approved by Swinfen Eady, J., in *Phillips v. Rail*, 54 W. R. 517.

(d) *Anon.*, 1 And. 33; see also *Atkins v. Atkins*, Cro. El. 248. The cases of *Coryton v. Helyar*, *Doe v. Fyldes*, and *Tuck v. Frencham*, cited in the last chapter (ante, pp. 576, 580), illustrate the same principle.

(e) *Spalding v. Spalding*, Cro. Car. 185.

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died in the lifetime of Alice, leaving a son ; and the Court held, that, upon the whole context of the will, the construction should be " if John died without issue, living Alice " ; and that this was the intent appeared, it was said, by other parts of the will, the other sons having other lands to them and the heirs of their bodies ; and that if they all died without issue, it should be to his brother's children, not meaning to disinherit any of his children. And it was declared not to be a contingent remainder or limitation to abridge the former express limitation.

" Without issue " read " without leaving issue."

And in several instances where a testator, in a will made before the year 1838, had used the phrase " without leaving issue " and " without issue " indifferently, in bequests of personalty, in regard to which alone (as hereafter shown) the difference of expression is material, the word " leaving " has been supplied, in order to produce uniformity, which, it was considered, must have been intended (*f*).

Words " under twenty-one " supplied.

Again, in *Kirkpatrick v. Kilpatrick* (*g*), where a sum of money was bequeathed to J. and S. to be equally divided ; but in the event of the death of either of them before he attained the age of twenty-one years, and without issue, his share to go to the survivor ; but in the event of both dying without issue, then over ; Lord Erskine, on the authority of *Sheppard v. Lessingham* (*h*), supplied the words " under twenty-one," in the ulterior bequest.

" On marriage " read " at twenty-one or marriage."

The case of *Lang v. Pugh* (*i*) was of the same kind. A testator gave a sum of money, in trust for his son T. for life, and after his death for his lawful issue if then of age or married, equally if more than one, if only one the whole to go to such only child ; or in case such child or children of his son should be under age at the death of the son, then " to be divided or paid to him, her, or them, in manner aforesaid, on their attaining their respective age or ages of twenty-one years, if sons, or if daughters, on their marriage

(*f*) *Sheppard v. Lessingham*, Amb. 122. See also *Radford v. Radford*, 1 Kee. 486, where freeholds and leaseholds were combined in the same devise. And see *Greenway v. Greenway*, 1 Gif. 131, 2 D. F. & J. 128. Cf. *Pye v. Limwood*, 6 Jur. 618, post, Chap. LII. As regards wills made since 1837 it is provided by sect. 29 of the Wills Act that words in a devise or bequest importing failure of issue are to mean issue living at the death unless a contrary intention appears by the will. See further on this point, post, Chap. LII.

(*g*) 13 Ves. 476 ; see also *Wheable v.*

Withers, 16 Sim. 505. But see *Else v. Else*, L. R., 13 Eq. 196. In *Radley v. Lees*, 3 M. & Gr. 327, the codicil shewed that the testator's intention would be defeated by supplying the words there proposed to be inserted in the will.

(*h*) Supra.

(*i*) 1 Y. & C. C. C. 718 ; see also *King v. Cullen*, 2 De G. & S. 252 ; *Woodburne v. Woodburne*, 3 ib. 643. So, in *Re Dear*, 61 L. T. 432, where there was a gift to the testator's widow so long as she should remain unmarried, with a gift over on her death, Kay, J., held that the words " or marriage " must be supplied.

respectively." Sir K. Bruce, V.-C., read the will as if it had been written, "or, in the case of daughters marrying earlier, upon marriage"; he thought it improbable that the testator could "have meant a daughter of T. surviving her father, and having attained majority in her father's lifetime, to take the fund or a portion of it absolutely, though never married, but that he meant altogether to exclude any daughter, a minor at her father's death, if not then married, unless she should at some period of her life marry."

Again, in the leading case of *Abbott v. Middleton* (j), a testator gave an annuity of 2,000*l.* to his wife for life, and directed funds to be set apart for securing it, "and on her decease the sums provided and set apart for such payment to become the property of my son A. so far as he the said A. my son shall receive the interest on such sum during his life, and on his demise the principal sum to become the property of any child or children he may leave, and in such sums as my said son shall will and direct; but in case of my son dying before his mother, then and in that case the principal sum to be divided between the children of my daughters" B., C., and D. The son A. having died before his mother but leaving a child, the question was, whether the words "without leaving any child" could be supplied after the word "dying" in the final gift over, so as to leave the child of A. in possession of the property, and it was held by Romilly, M.R., that those words must be supplied. Referring to *Spalding v. Spalding* (k), he said the principal ground of the decision there seemed to him to be the expression of the testator's intention that the heirs of the body of the first son should take, and it was to be observed that they could take only by descent through the father, whereas in the present case they took vested interests direct from the testator. The judgment of the M.R. was affirmed in the House of Lords, principally on the same ground (l). A clear gift was not to be divested but by an unmistakable provision to that effect (m).

"Dying" read "dying without leaving a child."

In the foregoing cases the testator had used expressions that

(j) 21 Beav. 143, 7 H. L. Ca. 68. And see *Brotherton v. Burry*, 18 Beav. 65.

(k) Ante, p. 581.

(l) By Lords Chelmsford and St. Leonards; Lords Cranworth and Wensleydale diss. Whether the words were supplied or not the will remained incomplete. If they were not supplied, the testator's bounty to his grandchildren would depend on their father's surviving his mother, which appeared

unreasonable. If they were supplied, and the son survived his mother and died leaving no child, the fund would not go to the children of the daughters but would fall into the residue.

It should be noted that the general canon of construction laid down by Lord Cranworth in this case has often been cited with approval: see *Gordon v. Gordon*, L. R., 5 H. L. 254.

(m) See *Hope v. Potter*, 3 K. & J. 206.

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Elliptical expression supplied; but an event not contemplated will not be provided for.

were, or were considered to be, plainly elliptical. Some contingency or state of circumstances that was present to his mind was imperfectly described. But the Court cannot provide for an event which appears to have been absent from the testator's mind, however strange the omission may be. Thus in *Eastwood v. Lockwood* (n), where a testator disposed of all his property on trusts for the maintenance of his children until Hannah, the youngest, attained twenty-one; and as soon as she attained that age he disposed of his personal estate among certain of his children; and as to a specified part of his real estate, he devised it to his son A. in tail male, subject to a certain charge; and as to other specified parts, he devised one to each of his other sons in tail male, with a gift over "in case of any of his said sons should die during the minority of Hannah, or in the event of any of them dying without such lawful issue as aforesaid, and either before or after their or his share should be divisible according to the provisions of the will" (i.e., before Hannah attained twenty-one); A. died before that time leaving issue, and it was argued, on the authority of *Spalding v. Spalding* (o), that his estate was not cut down. Sir W. P. Wood, V.-C., agreed that the words "in case of any son dying during the minority of Hannah" standing alone would have brought the case within that authority: but the words that followed made it different. The testator had put two classes of events together. He had said, "I point to a dying in the one case simpliciter during a given epoch. I point to a dying without issue in the other case generally, either before or after Hannah attains twenty-one." It was true that in one sense the second alternative might be included in the first, yet still it was emphatic; and although it seemed strange to suppose that he meant it in this sense, yet if he did, he could hardly have expressed himself more clearly. Notwithstanding the existence of issue, therefore, the estate of A. was divested and went over.

The principle of supplying omitted words has been applied in numerous other cases, from which the following have been selected, as affording apt examples of its application.

Thus, where (p) a testator having two sisters, A. H. and M. J., and also two cousins, F. and G., devised his estate at A. to his sister A. H. for life, remainder to his sister M. J. for life, remainder to another person for life, remainder to F. in tail, remainder

Words supplied to provide for an alternative event, obvious, though not expressed.

(n) L. R., 3 Eq. 487.

(o) Ante, p. 581.

(p) *Doe d. Leach v. Micklem*, 6 East, 486; see also *Webb v. Hearing*, Cro.

Jac. 415; *Anon.*, 2 Vent. 363; *Pearsall v. Simpson*, 15 Ves. 29; Lord Eldon's judgment in *Doe d. Planner v. Scudamore*, 2 B. & P. 296.

to G. in tail, with remainders over; and then devised another estate to B. "to his sister M. J. for life, or if she should survive his wife and sister A. H., so that she should come into possession of the estate at A.," then to L. J. for life, towards the support of his cousins F. and G., remainder to the said G. in fee. M. J. survived the testator's widow, but not his sister A. H., and it was therefore contended that the remainder to L. J. and G. failed; but the Court decided, that, as the word "or" so placed was unintelligible, being referrible to no other alternative; and as it was apparent from the whole context that the testator had in contemplation another alternative, namely, the death of his sister M. J., and that he meant to make a provision after the death of his sisters for his cousin G. as well as his cousin F., which was not satisfied by only giving G. a remainder in tail after a remainder in tail to his brother F.; in order to render the sentence complete and sensible, and to give effect to the apparent intent of the testator, the necessary words might be supplied to make the devise read as a gift to his sister M. J. for life, and after her death, or if she should survive his wife (g) and sister A. H., so that she should come into possession of the estate at A., then over to L. J., who consequently took a vested remainder, and was entitled in the events that had happened.

"But no case, probably," says Mr. Jarman (r), "has gone further in supplying words in compliance with the intention appearing by the context, than *Doe d. Wickham v. Turner* (s), where the testator's deficiency of expression left the devise without an object. The will was in these words: 'I give unto H. W. a messuage or tenement now in the possession of W. *Item*, I give further unto my nephew H. W. half part of my garden, and 100*l.* stock in the 4 *per cent.* Bank annuities. *I give, further, my yard, stables, cowhouse, and all other outhouses in the said yard*, my sister M. W. to have the interest and profits during her life.' The question was, whether the nephew was entitled to the yard under this devise. The Court (Best, J., diss.) decided in the affirmative: for as the testator had used the word 'further' in the preceding part of his will, when he made an additional gift to the same devisee, and as the clause would otherwise have been senseless and inoperative,

Object
supplied by
reference to
preceding
devise.

(g) It does not distinctly appear why the death of the wife is introduced; but probably she had a life estate in the property at A.; or, perhaps, it was because the wife had a life annuity of 50*l.* out of estate A.; and that, there-

fore, M. J. was not intended to lose estate B. till after the cesser of that charge upon her interest in estate A.

(r) First ed. p. 431.

(s) 2 D. & Ry. 398.

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the words 'to him' might be supplied, and then it was a devise to M. W. for life, remainder to her son H. W. *in fee*" (t).

A stricter construction was followed in *Driver v. Driver* (u): there the testator gave all his property to his executor upon trust for the purposes of his will, and gave 300*l.* to his daughter, and 5*s.* a week to his son J. D.; he then gave other property to his son R. D., and his daughter in equal shares, and proceeded as follows: "I further order that after paying the before mentioned 300*l.* to my daughter, and the aforesaid legacy to my son J. D., I give and bequeath the remainder of my property, of what nature or kind soever it may be [specifying various descriptions of property] and other property of which I may die possessed, and I nominate and appoint my son R. D. sole executor of this my last will and testament." Bacon, V.-C., refused to insert the word "to" after the words "of which I may die possessed" and held that there was an intestacy as to the residue.

Words supplied to preserve others.

Words are often supplied if, without them, other words would be inoperative. Thus, "if a man by his last will devise lands or tenements to a man and to his heirs male, this by construction of law is an estate tail, the law supplying these words (of his bodie)" (v).

Limitation to second and every other son to be begotten held to include eldest son.

In *Langston v. Pole* (w), where a testator, passing over the first son of A. (his son and devisee for life), proceeded to limit the estate to the "second, third, fourth, fifth, and all and every other the son and sons of the body, sons of A. lawfully to be begotten severally and successively in remainder in seniority of age and priority of birth" in tail male, and then to the first and other daughters of A. in like manner; on a case from Chancery the Court of C. B. supplied the vacancy in the series of limitations, by holding the first son to take an estate tail immediately expectant on his father's decease. It appears that the Court of B. R. had come to an opposite conclusion upon the same will. Neither Court gave reasons. The decision of the Court of C. B. was affirmed in D. P. Lord Brougham relied on the trusts of a term, which were, in case there should be only one son and one daughter, to raise a portion for the daughter; an absurd provision, if the daughter herself took the estate, as she would, under the circumstances, unless the son

(t) "There must be a mistake in this, as the will was destitute of any ground for raising a fee in the devisees, and it was not necessary for the Court to determine the quantity of the devisee's interest." (Note by Mr. Jarman.)

(u) 43 L. J. Ch. 279.

(v) Co. Litt. 27a. See Chap. XLVII.

(w) 2 M. & Pay. 490, 5 Bing. 228, Tam. 119, and in D. P. nom. *Langston v. Langston*, 8 Bli. N. S. 167, 2 Cl. & Fin. 194, Sugd. Law of Prop. 370. See also *Newburgh v. Newburgh*, Sug. Law of Prop. 367; *Re Blake*, 19 W. R. 765.

did. However, he was of opinion that the phrase "other sons" included the first son, and therefore the decision of the Court below was right, without supplying any words (x).

But although the general rule of construction as regards wills is to extend the words "to be begotten" to issue begotten before the date of the will (y), yet the rule is not so absolute but that it will give way upon indication of a contrary intention appearing from other parts of the will. Thus, in *Locke v. Dunlop* (z), where a testator devised real estate to the use of his second son F. for life, with remainder to the use of his first and other sons in tail

Same expression held on context of will to exclude eldest son.

(x) See also *Clements v. Paske*, 3 Dougl. 384, cit. 1 M. & Sel. 130, 2 Cl. & Fin. 230, n. The devise was to trustees during the life of J. C., upon trust for J. C. for life, and after his decease, to the eldest son of J. C., and for default of such issue, then likewise to the second, third, and every other son of J. C. successively, according to seniority, and the several and respective heirs male of the body and bodies of such (omitting the first son) second, third, or other son or sons, the *eldest of such sons* and the heirs male of his body being always preferred to and take before any of the younger sons and the heirs male of his body, and, in case of such issue male failing by J. C., then over. It was held in B. R. that the eldest son of J. C. took an estate tail, and not an estate for life. Lord Mansfield seems to have chiefly relied on the word "likewise," as indicating an intention that the first son should have the same estate as the younger sons, and not on the word "other" as (according to Lord Brougham's judgment in *Langston v. Langston*) he might have done. In *Owen v. Smyth*, 2 H. Bl. 594, Eyre, C.J., doubted whether words such as those which afterwards occurred in *Langston v. Langston*, could in a deed be considered to give an estate tail to the eldest son. In *Barnacle v. Nightingale*, 14 Sim. 456, there was a devise to A. for life, and, after his decease, to his first son, and, for default of such issue, to the second, third, &c., and all and every other son and sons of A., and the heirs of his or their bodies lawfully issuing, the elder always to be preferred and to take before the younger of such sons and the heirs of his body: Shadwell, V.-C., decided that the limitation to the heirs of the body of the first son had been omitted, and could not be supplied, and that such son took only an estate for

life. The Court of B. R. decided the direct contrary on the same will, *Doe d. Harris v. Taylor*, 10 Q. B. 718; and with the latter decision agrees *Galley v. Barrington*, 2 Bing. 387, in which, upon a settlement expressed in very similar words, the Court of C. B. held that the limitation "to the heirs of the body" included the heirs of the body of the first as well as of the second and younger sons; and *Owen v. Smyth*, 2 H. Bl. 594, where the limitations in a deed were to the use of N. for life, remainder to the use of the first son of N., and for default of such issue to the use of the second, third, and all and every other son and sons of N. successively, and of the several heirs male of the body and bodies of *all and every such son and sons*, so that the elder of such sons and the heirs male of his and their bodies should always take before the younger of the same sons and the heirs male of his and their body and bodies; and it was held that the words in italics included the first son as well as the others and gave him an estate tail. It must be observed that the authority of *Doe v. Taylor* is impaired by the reasons given for the decision, viz. that the words "for default of such issue" did not, as is the universal rule, mean for default of such issue as took under the previous limitation, that is, "for default of such first son," but meant "for default of issue of such first son," and that the first son, therefore, took an estate tail by implication. See post, Chap. LII. and *Re Arnold's Estate*, 33 Beav. 163.

(y) Co. Lit. 20 b.; *Hebblethwaite v. Cartwright*, Cas. t. Talb. 31; *Hewet v. Ireland*, 1 P. Wms. 426; *Doe v. Hallett*, 1 M. & S. 124; *Early v. Benbow*, 2 Coll. 342; *Almack v. Horn*, 1 H. & M. 630.

(z) 39 Ch. D. 387, affirming the decision of Stirling, J., *ibid*.

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male, with remainder to the use of the testator's third son J. for life, with remainder to the use of his first and other sons in tail male, with remainder in the following words: "And for default of such issue to the use of my fourth, fifth, and all and every other son and sons of my body on the body of my said wife to be begotten, born, or en ventre sa mère at the time of my decease, severally, successively, and in remainder one after another, as they and every of them shall be in seniority of age and priority of birth," in tail male, with remainder to the use of the testator's daughters "begotten or to be begotten, born, or en ventre sa mère at the time of my decease," equally as tenants in common in tail; all the testator's sons except the eldest having died without issue male, it was held by the Court of Appeal, that, having regard to the various limitations of the will, the words "to be begotten," &c., must be construed strictly, and that the eldest son was excluded from taking.

It may, indeed, be stated as a general rule, that mere conjecture or inference is not a sufficient ground for adding words to a will (a).

Words supplied to make limitations consistent with context.

It is clear, however, that words and even clauses, may be supplied in a set or series of limitations or trusts, from which they have been omitted without apparent design, where those limitations or trusts as they stand are inconsistent with the context, and the context shews what must be added to remove the inconsistency. Thus in *Parker v. Tootal* (b), where the testator devised land to A. for life, with remainder to the first son of A. severally and successively in tail male, the words "and other sons" were introduced, in order to prevent the words "severally and successively" from being in effect struck out of the will. So in *Greenwood v. Greenwood* (c), where a testator gave his real and personal estate to trustees on trust to sell and invest the sale moneys, and "pay the moneys and the investment for the time being representing the same to my wife during her life upon trust for all my children or any child who, being sons, shall attain twenty-one, or being daughters, shall attain that age or marry, in equal shares"; with power for the trustees, "after the death of my wife, or previously thereto if she shall so direct, to raise any part not exceeding one half of the then expectant presumptive or vested share of any child under the trusts hereinbefore declared" for the advancement of the child; and "after the death of my wife"

(a) See *Jennings v. Newman*, 10 Sim. 219; *Eastwood v. Lockwood*, L. R., 3 Eq. 487: ante, p. 584.

(b) 11 H. L. C. 143.
(c) 5 Ch. D. 954.

to apply the whole or a part " of the income of the share to which any child shall for the time being be entitled in expectancy under the trusts hereinbefore declared " for maintenance of the child : and, in default of children, " then from and after the death of my said wife and such default of children," over. The question was whether the wife had a beneficial interest for her life in the fund, and it was held by the L.JJ. that she had. Sir W. James observed that if the will had ended with the gift to the children in equal shares, it would have been difficult to alter the natural meaning of the words, which imported a gift to the wife during her life in trust for the children, giving the latter an estate *pur autre vie* only. But when they read the powers of advancement and maintenance, which were powers dealing after the death of the wife with what the testator treated as already given to the children, it was evident that the natural meaning of the previous words could not be the true one, these powers being utterly inconsistent with the view that the previous trust for children was one determining with the wife's life ; they were driven therefore to separate the words in the gift to the children from the gift to the wife for life, the words " after her death " being implied after the gift of her life estate.

Re Daniel's Trusts (d), which was the case of a postnuptial settlement, was decided on the same principle.

Again, in *Sweeting v. Prideaux* (e), where a testator bequeathed 16,000*l.* in trust to pay the income of one moiety to his daughter A. for life for her separate use, and after her death to divide that moiety among her children, or failing children among her statutory next of kin ; and to pay the income of the other moiety to his daughter B. for life " in the same manner in every respect, and subject to the same control as he had before directed as to A., it being his intention that his said daughters' fortunes should not be subject to the control of their husbands." He then gave 6,000*l.* in trust for his son C. for life, and after his death for his children, and failing children to form part of his estate ; and he empowered the trustees to apply the income of the 16,000*l.* and 6,000*l.* for the maintenance of his said daughters' or son's children as they might think proper. B. died leaving children, and it was held by Hall, V.-C., that they were by implication entitled to the moiety given to B. for life. He said : " The daughters

(d) 1 Ch. D. 375. The remarks on this case by Mr. Vincent in the 4th and 5th editions of the present work have been omitted, as the case is not rele-

vant to the law of wills.

(e) 2 Ch. D. 413 ; see also *Re Smith*, 45 L. T. 246. And as to interests created by reference, see Chap. XX.

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were treated collectively, it being his intention that their 'fortunes' should be alike, and the income was not only given to them but there was a provision for maintenance of his 'said daughters' and son's children.' There was a separate provision for the heads of the three families."

Acting on the principle laid down in the cases cited above, Bacon, V.-C., in *Re Redfern* (f), held that a trust for the children of one of the five daughters of the testator must be implied. North, J., in *Mellor v. Daintree* (g), held that an absolute gift of a moiety of the testator's estate to the testator's nephew must be implied; in *Re Hunt* (h) the words "shall attain the age of twenty-one years" were interpolated in a limitation to daughters, who would otherwise have taken vested interests only in the event of their marrying under that age; in *Re Patterson* (i), words giving a life interest to the widow of a tenant for life were interpolated; in *Re Wroe* (j) the residuary gift was construed as if the word "child" was inserted in it; and in *Phillips v. Rail* (k) limitations in strict settlement were supplied from a corresponding devise of other realty in the same will.

"Respective."
"Respectively."

There are several cases in which the word "respective" or "respectively" has been added in order to carry out the testator's intention (l).

Other cases illustrative of the general principle will be found in a later chapter (m).

Words of limitation used in one devise, not to be applied to a distinct devise.

"But," as Mr. Jarman points out (n), "it is not to be inferred from the preceding cases, that words may be inserted upon mere conjecture, in order to equalise estates created by several distinct and independent devises, in favour of persons with respect to whom the testator has expressed no uniformity of purpose, though it may reasonably be conjectured that he had the same intention as to all."

As illustrations of this principle Mr. Jarman cites numerous cases in which it had been decided, under the old law, that where a testator gave some of his lands to A. with words of limitation carrying the fee, and other lands to A. or B. without words of

(f) 6 Ch. D. 133. It was in this case that the V.-C. made his well-known allusion to "blundering attorney's clerks and law-stationers," as persons who are often responsible for obscure wills. Ante, p. 578, n. (q).

(g) 33 Ch. D. 198.

(h) 62 L. T. 753.

(i) [1899] 1 Ir. R. 324.

(j) 74 L. T. 302.

(k) 54 W. R. 517. Compare *Munro v. Henderson*, [1908] 1 Ir. R. 260.

(l) *Wills v. Wills*, L.R., 20 Eq. 342; *Re Hutchinson's Trusts*, 21 Ch. D. 811. But see *Swabey v. Goldie*, 1 Ch. D. 380.

(m) Chap. XIX.

(n) First ed. p. 432.

limitation, it could not be inferred that he meant the latter devise to carry the fee (o). And Mr. Jarman quotes from the case of *Right d. Compton v. Compton* (p) the following remarks of Lord Ellenborough: "That the exposition of every will must be founded on the whole instrument and made ex antecedentibus et consequentibus, is one of the most prominent canons of testamentary construction; yet, where between the parts there is no connexion by grammatical construction, or by some reference, express or implied, and where there is nothing in the will declarative of some common purpose, from which it may be inferred that the testator meant a similar disposition by such different parts, though he may have varied his phrase or expressed himself imperfectly, the Court cannot go into one part of the will to determine the meaning of another *perfect in itself*, and *without ambiguity*, and not militating with any other provision respecting the same subject-matter, notwithstanding that a more probable disposition for the testator to have made may be collected from such assisted construction. . . . From a testator having given persons in a certain degree of relationship to him a fee-simple in [part of] a certain farm, no conclusion, which can be relied upon, can be drawn, that his intention was to give to other persons, standing in the same rank of proximity, the same interest in another part of the same farm. Where the words of the two devises are different, the more natural conclusion is, that, as his expressions are varied, they were altered because his intention in both cases was not the same" (q).

Words not supplied in order to render uniform several devises of different parts of one farm, to persons in same relationship.

A question involving the principle now under discussion arose in *Walker v. Tipping* (r), where, among several legacies of 300*l.* each to the testator's grand-nephews, some of which were directed to be paid at particular ages, and others to be sunk in annuities for the lives of the respective legatees, there occurred two bequests as follows: "J. W., 300*l.* annuity for life." "Martha—, 300*l.*, an annuity for life." Sir G. Turner, V.-C., held, that he could not read these bequests as if they were gifts of sums of 300*l.* to be sunk

Gift of annuity not restricted by context.

(o) *Spirit v. Bence*, Cro. Car. 368; *Right d. Mitchell v. Sidebotham*, Dougl. 759; *Paice v. Archbp. of Canterbury*, 14 Ves. 366; *Doe d. Child v. Wright*, 8 T. R. 64; see also 1 B. & P. N. R. 335; where the same construction was adopted by three of the judges, with the reluctant concurrence of Sir James Mansfield. To these may be added *Hay v. Earl of Coventry*, 3 T. R. 83; *Doe d. Crutchfield v. Pearce*, 1 Pri. 353.

(p) 9 East, 267. See also *Morris v.*

Lloyd, 3 H. & C. 141. *Anon.*, Moo. 52. But it is said a devise thus, "I give Blackacre to C. and his heirs, and also Whiteacre" (not repeating the devisee's name and the verb of gift), gives C. the fee in Whiteacre: per Levinz, J., 1 Mod. 130.

(q) The principle here laid down was applied in *Re Patterson*, [1899] 1 Ir. R. 324.

(r) 9 Hare, 800. But it is difficult to overcome the impression that the bequests in question were elliptical.

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Name of
legatee not
supplied by
conjecture.

in annuities for the lives of the legatees, but must understand them in their plain and obvious sense as giving annuities of 300%.

The same principle is applicable to the objects of a devise. Thus, in *Clarke v. Clemmans* (s), where a testator bequeathed legacies to "my brother A.," "my sister B.," "the widow of my late brother C.," and "the eight children of D.," and gave the residue of his estate to X. for life, and after her death, "in trust for the said A., B., and C., and the eight children of the said D.," it was held by Sir R. Malins, V.-C., that the testator never intended to give a share of the residue to C., for he had already referred to him as dead at the date of the will; it was clear, therefore, that he had made some mistake, and it was highly probable that he intended to have given the share to C.'s widow, but as this intention was not certain, the Court could not make the addition needed to effectuate it (t).

Still less can the words of a devise contained in a will be extended to modify the effect of an independent devise contained in a codicil (u).

Revoked
words
cannot be
restored.

Mr. Jarman says (v): "It is to be collected from the case of *Holder v. Howell* (w) that where a testator in a codicil recites that an inconvenient consequence may result from a devise in his will, as that in a particular event the devisee or legatee would be unprovided for contrary to his intention, and then, instead of confining himself to simply effecting the declared purpose of the codicil, he proceeds to revoke the whole devise, giving the land again to the same trustees upon certain trusts which he particularizes, and which are the same as the former trusts, with the exception of the matter expressly intended for correction, and of one other of the trusts, which he wholly omits; this omission, though probably undesigned, cannot be supplied. The principle of this case seems to be inconsistent with, and it may, therefore, be considered as overruling, the earlier case of *Mathews v. Bowman* (x), where a testator, having devised the residue of his estate to his

(s) 36 L. J. Ch. 171. See also *Driver v. Driver*, 43 L. J. Ch. 279, ante, p. 586.

(t) Note, however, that the words "the said" confined the choice to those previously mentioned, that C. was confessedly out of the question, that all the others were correctly re-named except C.'s widow and X. (on whose death the disposition was to take effect), and that between these two there could scarcely exist a judicial doubt.

(u) *Biss v. Smith*, 2 H. & N. 105; *Grimson v. Downing*, 4 Drew. 132.

(v) First ed. p. 164.

(w) 8 Ves. 97; and see *Dashwood v. Peyton*, 18 Ves. 46; *Viscount Holmesdale v. West*, L. R., 3 Eq. 486, on app. (but this point not touched), L. R., 4 H. L. 543. See same case L. R., 12 Eq. 280.

(x) 3 Anst. 727, a reporter of very doubtful authority, and see *In bonis Lewis*, 14 Jur. 514, 7 No. Cas. 436.

daughters as tenants in common, by a codicil made for a particular purpose re-devised it to them, omitting the words of severance, it was held, that the legatees were tenants in common."

Conversely, a codicil may have the effect of removing an ambiguity which appears on the face of the will (*y*).

This seems to be a convenient place to consider those cases in which the question has arisen whether words at the beginning or end of a clause apply to the whole clause or only to the part which immediately follows or precedes them. Thus in *Doe d. Ellam v. Westley* (*z*), a testator gave several pecuniary legacies, prefacing each bequest with the word "Item," and made a specific devise, also commencing with the word "Item." He then proceeded as follows: "Item, I give and bequeath unto M. W. all that my messuage or dwelling-house wherein I now dwell, with the garden and all the appurtenances thereunto belonging; and I also give to the said M. W. all my household goods and chattels, and implements of household within doors and without, *all for her own disposing, free will, and pleasure*, immediately after my decease"; it was held, that the words in italics were confined to the last section of the clause, and consequently that the devisee took only an estate for life in the messuage. Again, in *Gower v. Towers* (*a*), a testator made two bequests to the same person in successive sentences, and in the latter added the words "for life"; it was held that they applied only to the second bequest. And in *De Windt v. De Windt* (*b*), where a testator devised his estates in N. to his nephew A. for life, and after his death to his sons in tail lawfully begotten; and in the event of his or their death without sons lawfully begotten, the testator left the said estates to his cousin B., and after his death to his sons lawfully begotten, *beginning with the elder*. It was held that these four words applied to the latter limitation only, and not to the limitation to the sons of A., who consequently took as tenants in common.

How far operation of words enlarging or modifying gifts extends.

But it may appear from the grammatical construction of the clause that the concluding words were intended to apply to the whole of it: as in *Child v. Elsworth* (*c*). And a similar result may follow from a consideration of the scheme of the whole will; as in *Gordon v. Gordon* (*d*) where the testator in effect devised his

Where whole disposition is affected.

(*y*) *Re Venn*, [1904] 2 Ch. 52.

(*z*) 4 B. & Cr. 667.

(*a*) 26 Beav. 81.

(*b*) L. R., 1 H. L. 87.

(*c*) 2 D. M. & G. 679.

(*d*) L. R., 5 H. L. 254.

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estates Blackacre and Whitacre, as to Blackacre in trust for his son R. and his issue, then for his son J. and his issue; and as to Whitacre in trust for J. and his issue, then for R. and his issue; and in default of issue of R. and J. in trust for the testator's daughter: it was held that the devise over included Blackacre as well as Whitacre, notwithstanding that each devise began with the words "as to" (e).

Effect, where clauses of will are numerically arranged.

And where a testator divides his will into sections, numerically arranged, and in some instances places the words of limitation at the end of each section, it seems that they will be considered as applicable to the several devises contained in that section, and not be confined to those in immediate juxtaposition. As, in *Fenny d. Collings v. Ewestace* (f), where a testator devised, "first," to his wife, all his household goods, &c., to her and her heirs for ever; also, he gave to his wife three cow commons, to her and her heirs for ever. "2ndly," To his two nephews, J. and T. C., all that piece of land called P.; also, he gave to his nephews, J. and T. C., all that piece of land called L., to be equally divided between them as tenants in common, and to their several heirs and assigns for ever. "3rdly," as follows: "I give unto my nephew J. D. all that my house and premises at P., in the occupation of R.; I also give unto my nephew J. D. all that my land in the parishes of P. and A., in the occupation of J. T. to him my said nephew J. D., his heirs and assigns for ever." The question was, whether the words of limitation in the last devise applied to the lands in the occupation of R., or were confined to those immediately preceding, i.e., in the occupation of J. T.; and it was held that they applied to both. Lord Ellenborough said, "If it had not been for the numerical arrangement, there might have been some difficulty, but that removes it. It seems clear, from the context, that both in the second and third clause, the testator, by reserving to the close of the entire sentence the words of limitation, meant to accumulate and comprehend within those words all that he had disposed of in the preceding parts of the sentence."

Gift to "the children of A. and B."

In some cases a gift to the children of A. and B. has been held

(e) Compare the case of *Willis v. Curtois*, 1 Beav. 189, where a testator gave to A. his "carriages, horses, &c., and chattels in and about his house at M.; and also his household goods and furniture, pictures, plate, &c., and likewise his watches and personal ornaments"; Lord Langdale, M.R., held that A. was entitled to all the

testator's household goods, &c., and not those only which were at his house at M. As to the force of the word "item," or "also," see *Hopewell v. Ackland*, 1 Salk. 239: of the word "likewise," *Paylor v. Pegg*, 24 Beav. 105.

(f) 4 M. & Sel. 58; see also *Child v. Elsworth*, 2 D. M. & G. 679.

to mean the children of A. and the children of B., while in others it has been held to be a gift to B. and the children of A. These cases are considered in another place (*g*).

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II.—As to the Transposition of Words and Clauses.—"It is quite clear," says Mr. Jarman (*gg*), "that, where a clause or expression, otherwise senseless and contradictory, can be rendered consistent with the context by being (*h*) transposed, the Courts are warranted in making that transposition."

Words may be transposed, when.

Thus, where (*i*) A. devised all that his messuage, dwelling-house, or tenement, with all lands, hereditaments, and appurtenances thereto belonging, situate in Blythbury, in the parish of M. R., "now in the occupation of" T. W., except one meadow, called Floodgate Meadow; and it appeared that T. W. was in possession of the messuage, and a small part only of the lands in Blythbury, and not of Floodgate Meadow; it was held, that the words "now in the occupation of" T. W. might be transposed and applied to the dwelling-house, according to the fact, which would render the whole consistent; whereas, without this transposition, the exception of Floodgate Meadow was senseless and nugatory, as it had never been in the occupation of T. W. The effect consequently was, that the devise extended to all the lands in Blythbury, except Floodgate Meadow, whether in the occupation of T. W. or not.

Instances of transposition.

So, where (*j*) the devise was in the following words: "I devise all my hereditaments in Standon unto my sister Elizabeth Thorley and to her daughters Ann Shaw and Frances Thorley, their heirs and assigns, equally to be divided between and amongst them, share and share alike, as tenants in common, and not as joint tenants, for and during the life of my said sister Elizabeth Thorley; and from and immediately after her decease, then I devise the said third part of the aforesaid hereditaments so devised to my said sister for life as aforesaid, unto her said two daughters Ann Shaw and Frances Thorley, their heirs and assigns for ever, equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants." It was contended, that under this devise the daughters of the testator's sister took estates pur

Words transposed in compliance with context.

(*g*) Chap. XLII.

(*gg*) First ed. p. 437.

(*h*) See *Green v. Hayman*, 2 Ch. Cas. 10; *Spark v. Purnell*, Hob. 75; *Cole v. Rawlinson*, 1 Salk. 234; *East v. Cook*, 2 Ves. sen. 30; *Duke of Marlborough v. Lord Godolphin*, ib. 74; *Blamire v.*

Geldart, 16 Ves. 314; *Gibson v. Lord Montfort*, 1 Ves. sen. 491; *Mohun v. Mohun*, 1 Sw. 201.

(*i*) *Marshall v. Hopkins*, 15 East, 309.

(*j*) *Doe d. Wolfe v. Allcock*, 1 B. & Ald. 137.

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auter vie for the life of their mother concurrently with her as tenants in common ; and as to one-third with remainder in fee to the daughters, leaving the reversion in fee in the other two-thirds undisposed of ; but it was held, that the daughters took estates in fee in the entirety expectant on the decease of their mother. Lord Ellenborough said, " The testator has thrown together a heap of words, the sense and meaning of which he did not clearly apprehend ; but although the language of this will is confused, and the words are scattered in such a way, as, if taken in the order in which they stand, they do not convey any meaning ; yet, in favour of common sense, we may take the liberty of transposing them, according to that order which we may fairly suppose the testator would wish to have adopted, and by which we can best effectuate his intention. The labour of the argument has been, to make the testator dispose of only one-third of his estate, and thereby to compel an intestacy as to the remainder ; whereas, his meaning evidently was to dispose of the whole."

Observations
upon *Doe v.*
Alcock.

Speaking of the conclusion thus arrived at, Mr. Jarman remarks (*k*): " That the construction adopted by the Court accorded with the intention of the testator is highly probable ; and if, as Lord Ellenborough suggested, the words taken in the order in which they stood did not convey *any* meaning, the established rules of construction clearly authorized the transposition. But the difficulty was in saying that the words *were* unmeaning in their actual order ; for it is submitted, that the will, read in that order, contained a clear and express devise to the three devisees for the life of the mother, remainder as to one-third to the two daughters in fee ; and had the testator deliberately intended to confine his dispositions to those estates, he could hardly have expressed himself in more technical or formal language. The construction indeed was apparently absurd, but let it be remembered that the absurdity of a disposition, if unequivocally expressed, is no objection to its receiving a literal interpretation (*l*). However, the case was *professedly* decided upon the principle before laid down, and may, therefore, properly be treated as an authority in favour of that principle " (*m*).

In *Key v. Key* (*n*) a testator devised an estate to S. K. for life

(*k*) First ed. p. 439.

(*l*) *Mason v. Robinson*, 2 S. & St. 295.

(*m*) But Holroyd, J., while concurring in the decision, rested his judgment on the ground that the words " equally to be divided " down to " Elizabeth

Thorley," might be read as in a parenthesis, and so made to refer only to the mode of enjoyment during the life of E. Thorley, without affecting the quantity of estate to be taken by the devisees.

(*n*) 4 D. M. & G. 73. See also *Surtees v. Hopkinson*, L. R., 4 Eq. 98.

charged with certain annuities, but in case the annuitants, or any one of them, survived S. K. he gave the estate to S. K.'s eldest surviving son, charged with the annuities, and in default of issue male, then over; it was held that as a literal adherence to the words of the will would have defeated the manifest intention of the testator by making the devise to S. K.'s son dependent on his surviving some of the annuitants, the will ought to be construed as meaning that the son was to take subject to the annuities in case the annuitants were then living.

"Another case of transposition sometimes occurs," Mr. Jarman continues (o), "where a testator has devised lands at A. to B., and lands at C. to D., and it appears by the fact of the limitations of each devise being exactly applicable to the testator's estate in the lands comprised in the other, and other circumstances, that he has, in each instance, placed the devised estate in the position intended to have been occupied by the other.

Transposition
of the subject
of devise.

"As where (p) J. H., having an estate in the county of Monmouth, of which he was seised in fee to his own use, and another estate in the county of Radnor, of which he was also seised in fee subject to the trusts of his marriage settlement (by which he had covenanted to convey the lands to the use of himself, remainder to his wife for life, remainder to his first and other sons in tail); both which estates had formerly belonged to an uncle, and came to him, the one by descent, the other by purchase from another co-heir of his uncle, by his will, reciting that he was seised in fee of a messuage and lands at L., in the county of *Radnor*, and of a moiety of a messuage in the parish of O. R., in the county of *Radnor*, and that he was also seised of the reversion in fee expectant on the death of his wife, and of his son without issue, of lands in the counties of *Monmouth* and *Northumberland*, (whereas the settled lands were in Radnorshire, and those in Monmouthshire and Northumberland were absolutely his own), devised his said estate in the said county of *Radnor* to his wife for life, remainder to his only son for life, remainder to his (the son's) sons and daughters in tail, in strict settlement, remainder to his own daughter, &c., and devised the reversion of his said estates in the said county of Monmouth, *after the deaths of his wife and only son without issue*, to his daughter, &c. The will moreover referred to the lands devised as part of the estate of his late uncle. It was held that, comparing the devising clause with the recital and the

(o) First ed. p. 440.

(p) *Mosley v. Massey*, 8 East, 149.

Compare *Doe d. Chevalier v. Huthwaite*, 8 Taunt. 306, 3 B. & Ald. 632.

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facts, sufficient appeared to ascertain, beyond a possibility of doubt, that the devisor had made a mistake in the local description, and that his intent was to pass the present interest of his estate in fee in possession, which was in the county of Monmouth, and the reversion of his settled estate in the county of Radnor, although he had respectively misdescribed their local situations.”

Transposition
of words to
fit the general
intent.

It seems therefore that, although the words as they stand are not absolutely senseless or contradictory, transposition will be made if it be required to effectuate an intention clearly expressed or indicated by the context. *Eden v. Wilson* (q) is an instructive example of this doctrine. A testator devised his estates to his daughter for life, remainder to her first son R. for life, remainder to his first and other sons successively in tail, remainder to her second son J. for life, with like remainder to his sons in tail, with remainders to the daughter's third, fourth and other sons in tail; and with a proviso shifting the estate from any son who might become entitled to the D. estates under the will of the late D. (by which those estates were entailed on the second and younger sons); “provided always that if my said daughter shall have no issue male of her body living at her death, or no such issue male as shall be entitled, by the true meaning of this my will, to my real estates hereby limited, then and in either of those cases, I devise the said real estates to all the daughters of the body of my said daughter living at her death as tenants in common and their heirs respectively, with cross remainders amongst them in case of any one or more of them happening to die under twenty-one and without issue, and if there should be but one such daughter living at my said daughter's decease and no issue of any other daughter then in being, then to such only surviving daughter and her heirs, but if any such daughter shall die in her said mother's lifetime leaving issue” such issue to take their parents' share, “and in case my said daughter shall have no issue of her body living at her death,” then over. At the death of the testator's daughter her two sons R. and J. were living, besides several daughters; but both sons afterwards died without issue, and it was contended that the second of the two cases “in either of” which the limitation to the daughters was to take effect had thus happened: but it was held in the House of Lords, upon the whole proviso, that the estates limited by it were not designed as a mere continuation of the previous limitations (to which they did not fit on), but were intended to take effect, if at all, at the

(q) 4 H. L. Ca. 257; s.c. *Wilson v. Eden*, 1 Ex. 772, 14 Q. B. 256.

daughter's death in favour of persons then living, and that to effect this the words "living at her death" in the introductory passage must be read in connection with the verb "have," not with the words "issue male of her body," and so made to run through both branches of the proviso. In other words, the expression "living at her death" was transposed and read as if it came immediately after the verb "have." It was not, however, a limitation cutting down the previous devise, but a remainder contingent on the determination of that devise in a particular manner.

Mr. Jarman continues (r): "The same principle, too, is applicable to the *objects* of a devise; for it has been held, that, where (s) a testatrix, having two nieces, Mary who had never been married, and Ann who had been married and was dead leaving two children, bequeathed one moiety in a certain portion of her property to *the children* of her niece *Mary*, and the other moiety to her niece *Ann*; it being evident that the bequest to the children of Mary was intended for the children of Ann, and that to Ann for Mary, the Court corrected the mistake."

Transposition
of name.

III.—As to changing Words.—"To alter the language of a testator," as Mr. Jarman points out (t), "is evidently a strong measure, and one which, in general, is to be justified only by a clear explanatory context. It often happens, however, that the misuse of some word or phrase is so palpable on the face of the will, as that no difficulty occurs in pronouncing the testator to have employed an expression which does not accurately convey his meaning. But this is not enough: it must be apparent, not only that he has used the wrong word or phrase, but also what is the right one (u); and, if this be clear, the alteration of language is warranted by the established principles of construction (v). The recent and much discussed case of *Doe v. Gallini* (w) affords an apposite example of such a correction of phrase. The testator, after devising estates for life to his children, and, in case of the death of any of them, to their respective children living at their decease, for life, proceeded thus: 'And from and after the decease of all the children of *each* of my said sons and daughters *without*

As to chang-
ing words.

(r) First ed. p. 441.

(s) *Bradwin v. Harpur*, Amb. 374.

(t) First ed. p. 441.

(u) *Taylor v. Richardson*, 2 Drew. 16.

(v) It will of course be remembered that the Court of Probate has no power

to change the wording of a will: ante, p. 30.

(w) 5 B. & Ad. 621, 3 Ad. & Ell. 340, 2 Nev. & M. 619, 4 Nev. & M. 894. And see *Jarman v. Vye*, L. R., 2 Eq. 784 ("all" admitted to mean "any").

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Words
"without
issue" read
leaving issue.

issue, I give and devise the estate or estates to them respectively limited as aforesaid, unto and among all and every the *lawful issue* of such child or children during their lives as tenants in common, and to descend in like manner to the issue of my said sons and daughters respectively, so long as there shall be any stock or offspring remaining.' It was contended that the word 'all' was to be changed into 'any,' and the words 'without issue' to be read 'leaving issue,' in order to render the language of the will sensible and consistent with the context; and the Court did not hesitate in adopting this construction, though the point was not the main subject of discussion in the case."

"Fourth"
read "fifth."

So, in *Hart v. Tulk (x)*, where a testator's general intention appeared by the will to be to make an equal distribution of his property, (which he described in seven different schedules), amongst his seven children; and he subjected the properties comprised in the seven schedules to mortgage debts in such a manner, that, if in a particular clause, the words "fourth schedule" was read literally, not only would the entire plan of the will, as indicated above, be frustrated, but the payment of the debts in the manner provided by the will would become impossible; Sir J. K. Bruce and Lord Cranworth, L.JJ., held that they were warranted in reading the word "fourth" as meaning "fifth," which the context showed was the change required to render the will consistent.

"L.K." read
"C."

Again, in *Re Northen's Estate (y)* the will was read as if the words "the said C. estate" were inserted in the place of the words "the said L. K. estate."

Referential
gifts.

A somewhat similar principle is often applied in construing referential gifts, where a literal adherence to the original gift would defeat the manifest intention of the testator (*a*).

"Or" read
"of."

In *Re Dayrell (b)* the expression "son or any person" was read as "son of any person."

"One" read
"no."
Parol
evidence.

In *Moore v. Beagley (c)* "one" was read "no."

Several cases in which the court has refused to admit parol

(x) 2 D. M. & G. 300; and see *Philipps v. Chamberlaine*, 4 Ves. 51; *Dent v. Pepys*, 6 Mad. 350; *Bengough v. Edridge*, 1 Sim. 173; *Berkeley v. Palling*, 1 Russ. 496 (where "seven" was changed into "eight"); *Pasmore v. Huggins*, 21 Beav. 103 (where "future" might, it seems, have been read "former"); *Re Bayliss's Trust*, 17 Sim. 178, (where "are" was interpreted in a future sense); *Taylor v. Creagh*, 8 Ir.

Ch. Rep. 281 (400l. read 500l.); compare *Thompson v. Whitelock*, 5 Jur. N. S. 991.

(y) 28 Ch. D. 153.

(a) See *Parker v. Tootal*, 11 H. L. C. 143; *Re Hutchinson*, 55 L. J. Ch. 574; *Surtees v. Hopkinson*, L. R., 4 Eq. 98, and other cases referred to in Chap. XX.

(b) [1904] 2 Ch. 496.

(c) 33 L. T. 198.

evidence to correct alleged mistakes in names of persons and places, are referred to in other chapters (*d*).

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“The changing of words, however,” as Mr. Jarman points out (*e*), “has most frequently occurred in regard to expressions, which, in common parlance, are often used inaccurately; as the word ‘severally’ for ‘respectively,’ of which we have an instance in *Woodstock v. Shillito* (*f*), where a testator gave the interest of a fund to his wife for life, and after her death to such of his four daughters as should be then living, in equal shares, during their respective lives; and from and after the *several* deceases of his four daughters, he gave one-fourth of the capital to their respective children. One of the daughters died before the widow, leaving a child. The surviving daughters claimed to be entitled to the entire fund, under the express gift to the daughters living at the decease of the testator’s widow; but Sir L. Shadwell, V.-C., held, that the words ‘from and after the several deceases of my said daughters,’ were to be construed ‘from and after the decease of my daughters *respectively*.’ ‘It was clear,’ he said, ‘the testator meant to give to the children the share of their mother on her death.’

“Several”
used in sense
of *respective*.

“But by far the most numerous class of cases, exhibiting the *change* of a testator’s words, are those in which the disjunctive ‘or’ has been changed into the copulative ‘and’ and vice versâ. It is obvious that these words are often used orally without a due regard to their respective import; and it would not be difficult to adduce instances of the inaccuracy, even in written compositions of some note; it is not surprising, therefore, that this inaccuracy should have found its way into wills. Accordingly we find that the Courts have often been called upon to rectify blunders of this nature: so often, indeed, as to have swelled the cases on the subject into a mass requiring much attention and discriminative arrangement, in order to deduce from them any intelligible and consistent principles; and, in performing this task, the liberty must be taken of sometimes referring the cases to principles not distinctly recognised by the judges who decided them.

“Or”
changed into
“and.”

“It has been long settled that a devise of real estate to A. and his heirs, or, which would be the same in effect, to A. indefinitely, and in case of his death under twenty-one, *or* without issue, over, the word ‘or’ is construed ‘and,’ and, consequently, the estate does not go over to the ulterior devisee, unless both the specified events happen.

In case of
devise over,
in event of
death under
twenty-one
or without
issue.

(*d*) Chaps. XV., XXXV.

(*e*) First ed. p. 442.

(*f*) 6 Sim. 416.

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“ One of the earliest authorities for this construction is the case of *Soulle v. Gerrard* (g) ; where a testator, having four sons, devised lands to Richard, one of his sons, and his heirs for ever ; and if Richard died within the age of one-and-twenty years, *or* without issue, then, that the land should remain to his other three sons. Richard died under age, leaving issue a daughter. It was held, that in the event which had happened, the devise over to the three sons had failed ; for, that by the words and intent, it was not to commence unless *both* parts were performed, and that it was ‘ all one as if the disjunctive *or* had been a copulative.’

Principle of
the rule ;

“ The ground for changing the testator’s expression in these cases is, that as, by making the event of the devisee leaving issue a condition of his retaining the estate, he evidently intends that a benefit shall accrue to such issue through their parent, it is highly improbable that he should mean this benefit to depend upon the contingency of the devisee attaining majority ; while, on the other hand, it is very probable that the testator should intend, in the event of the devisee dying under age leaving issue, to give him an estate which would devolve upon the issue ; but that, if he attained twenty-one, (the age at which he would acquire a disposing competency,) he should take the estate absolutely, i.e., whether he afterwards died leaving issue or not. The change of *or* into *and*, therefore, substitutes a reasonable for a most unreasonable scheme of disposition.

—applicable
to bequests of
personalty.

“ And though it has generally happened that the subject to which this rule of construction has been applied is real estate, yet the rule is equally applicable (as the reason of it evidently is) to bequests of personalty ; and, therefore, in the case of a legacy to A., and in case of his death under age *or* without issue, to B., it is not to be doubted that A. would retain the legacy, unless he died under age *and* without leaving issue at his decease (h).

“ And, of course, it would be immaterial that the original bequest was expressly made contingent on the legatee attaining majority. As in *Mytton v. Boodle* (i), where a testator bequeathed 5,000*l.* to A. if he attained twenty-one ; but if he should not attain that age, *or* die without leaving issue, then over. It was held, that A., on attaining twenty-one, was absolutely entitled.

(g) Cro. El. 525 ; s.c. nom. *Sowell v. Garrett*, Moore, 422, pl. 590 ; *Price v. Hunt*, Pollex. 645 ; *Barker v. Suretees*, 2 Str. 1175 ; *Walsh v. Peterson*, 3 Atk. 193 ; *Doe d. Burnsall v. Davy*, 6 T. R. 30 ; *Fairfield v. Morgan*, 2 B. & P. N. R. 38 ; *Eastman v. Baker*, 1 Taunt. 174 ;

Right v. Day, 16 East, 67 ; *Morris v. Morris*, 17 Bea. 198. See also *Doe d. Herbert v. Selby*, 4 D. & Ry. 608, 2 B. & Cr. 926 ; *Morrall v. Sutton*, 1 Phill. 533.

(h) *Wright v. Marsom*, [1895] Week. N. 148.

(i) 6 Sim. 457.

"In this case (*j*) the expression which raised the question in the will was repeated in the codicil—a circumstance which was considered (and it is conceived rightly) not to indicate that it was used advisedly.

"And the same construction obtains where another event is associated with the dying under age and without issue, as in the case of a bequest to A., with a gift over in case of his dying during minority *unmarried*, or without issue (*k*); and that, too, though the copulative 'and' is found in company with the disjunctive 'or' in the same will, indeed, in this very sentence. As in *Miles v. Dyer* (*l*), where the bequest was to A. for life, and after her decease to her children on their attaining twenty-one; and in case they should die in the lifetime of A., *or* under twenty-one, *and* without leaving issue, then over, it was held that the interests of the children were not divested unless the three events happened.

Gift over in case of death during minority unmarried or without issue.

"It is obvious that the ground for changing *or* into *and* exists a fortiori where children or issue are the express objects of the prior gift; as where (*m*) there is a devise to a person when he attains twenty-one, for life, remainder to his children (the devise, in the case referred to, was to the sons successively and the daughters concurrently,) in tail, with a devise over if he die *under twenty-one or without children*.

"It would seem that the principle in question applies to every case where the gift over is to arise in the event of the preceding devisee or legatee dying under prescribed circumstances, *or* leaving an object who would, or, at least, who *might* take a benefit derivatively through the devisee or legatee, if his interest remained undivested, and to whom, therefore, it is probable the testator intended indirectly a benefit, not dependent upon the circumstance of the devisee or legatee dying under the prescribed circumstances or not. In this point of view it would seem to be immaterial whether the dying is confined to minority, or is associated with any other contingency, as in the case of a gift to A., and if he shall die *in the lifetime of B. or without issue* (*n*), [or die *without issue or*

Suggested extension of the rule.

(*j*) And in *Framlingham v. Brand*, *infra*.

(*k*) *Framlingham v. Brand*, 3 Atk. 390; See *Doe v. Cooke*, 7 East, 269, post: *Re Clegg*, 14 Ir. Ch. 70 (gift over in the event of legatee dying under age or unmarried); *Re Cantillon*, 16 Ir. Ch. 301.

(*l*) 5 Sim. 435; 8 Sim. 330.

(*m*) *Hasker v. Sutton*, 9 J. B. Moo. 2, 1 Bing. 500. [But the only question

there was whether the remainder was vested or not. The defendants could not succeed unless it was, and it could be so only by adopting Lord Hardwicke's "construction" in *Brownsword v. Edwards* (post, pp. 604 seq.): reading *or* as *and* was insufficient: and the Court certified against them. And see now *Cooke v. Mirehouse*, 34 Beav. 27, post, p. 608.]

(*n*) *Wright v. Kemp*, 3 T. R. 470, a

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intestate (o),] then over ; or whether the event is leaving issue or leaving any other object who would derive an interest or benefit through the legatee, if his or her interest was held to be absolute, as a husband or wife.

Gift over on death under twenty-one, or without leaving a husband.

“ Thus, where (*p*) a testator bequeathed the residue of his personal estate to his daughter, her executors, &c., with a proviso, that in case his daughter happened to die under twenty-one, *or without leaving any husband* living at her death, then he gave several legacies, all which he directed to be paid within twelve calendar months after his decease, *in case of the death of his daughter under age as afore said* ; and in such case he gave the residue to other persons—Sir W. Grant, M.R., held, that ‘ or ’ was to be read ‘ and,’ and that the expression ‘ under age as *aforesaid* ’ meant not leaving a husband.

“ The cases under consideration, perhaps, may seem to form an exception to the rule that words, unambiguous in themselves, are not to be rejected or changed on account of their unreasonableness ; but as this construction has obtained so long, is confined to a particular expression, and that expression one which is often used indiscriminately with the substituted word, there does not seem to be much danger in this seeming latitude of interpretation ; but it should, if possible, be made to rest upon some solid principle, fixing definite limits to its application. The cases, it is conceived, in effect though not professedly, warrant us in stating that principle to be (as before suggested), that where the dying under twenty-one is associated with the event of the devisee leaving an object, who would, if the devisee retained the estate, take an interest derivatively through him, the copulative construction prevails ; though it is by no means equally clear that the rule is *confined* to such cases.”

Whether rule applies to estates tail.

Lord Hardwicke, in *Brownsword v. Edwards* (*q*), expressed an opinion, that the construction in question was not applicable to estates tail, on the ground that there was no occasion for it ; since an estate tail was capable of a remainder, and the words might, by an “ easy construction,” be read as such ; *so as to secure the estate to the issue, if any, and yet give effect to the remainder in case*

case on a transaction inter vivos ; *Denn d. Wilkins v. Kemeys*, 9 East, 366 ; *Doe d. Knight v. Chaffey*, 16 M. & Wels. 656.

(*o*) [*Green v. Harvey*, 1 Hare, 428 ; *Beachcroft v. Broome*, 4 T. R. 441 ; and see *Incorporated Society v. Richards*, 1 D. & War. 283 ; *Greated v. Greated*, 26 Beav. 621 ; *Stretton v. Fitzgerald*,

23 L. R. Ir. 466.]

(*p*) *Weddell v. Mundy*, 6 Ves. 341.

(*q*) 2 Ves. sen. 243. The observations on *Brownsword v. Edwards*, *Mortimer v. Hartley*, *Grey v. Pearson*, and other cases contained in the following seven paragraphs, are taken from the 4th edition of this work by Mr. Vincent.

the issue failed at any time. At the present day the Court follows Lord Hardwicke in declining to change “or” into “and” (or the contrary) where the prior estate is in tail, but rejects the “construction” upon which alone his opinion was based. The course of decision deserves attention. In some of the cases, it will be seen, the gift over was if the tenants in tail should die under twenty-one or without issue, in others the conjunction “and” was used.

In *Brownsword v. Edwards* (r), the devise was to trustees and their heirs to receive the rents until A. should attain twenty-one; and if he should live to attain twenty-one or have issue then to A. and the heirs of his body; but if A. should die before twenty-one *and* without issue, then in trust for B. in like manner, with gifts over in the like words to other branches of testator’s family; and for want of such issue to his own right heirs. A. and B. were the testator’s illegitimate son and daughter, but for the purposes of the argument were taken to be legitimate. A. attained twenty-one and died without issue, and it was argued that the gift to B. had failed, only one of the two events upon which it was limited having happened. But Lord Hardwicke held B. to be entitled. He said: “There is no necessity in this case to transpose or supply material words; but there is a plain natural construction upon these words, viz. if A. shall happen to die before twenty-one, and also shall happen to die without issue; which construction plainly makes the dying without issue *to go through the whole* and fully answers the intent, which was in that manner. Had the first devise been to A. and his heirs this construction I believe could not be made; for where there is such a contingent limitation I do not know that the Court has changed heirs into heirs of the body to make it so throughout. But much stronger constructions than this have been made in devises: as, in a devise to one and his heirs, and if he should die before twenty-one *or* without issue, the Court has said it was not the intent to disinherit the issue, and therefore *or* shall be construed *and*; but if the first limitation had been in tail there would be no occasion to resort to that, but the Court would make the construction I do now” (shewing that, whether the word of the will was *and* or *or*, he thought some “construction” equally necessary), “viz. if he dies without issue before twenty-one then over by way of executory devise; if he dies without issue after twenty-one, when the estate had vested in him, it would go by way of remainder: an estate tail is capable of a remainder, and it is natural to expect a remainder after it. It is contrary to his intent to let

*Brownsword
v. Edwards.*

CHAP. XVIII. in this remainder to the right heirs to defeat all the intermediate limitations to his family."

Woodward v. Glasbrook.

Devise over if devisee in tail should die under twenty-one or unmarried.

A stricter adherence to the letter was preserved in the earlier case of *Woodward v. Glasbrook* (*s*), where a testator devised a house to his sons, James and Thomas, and the heirs of their bodies, in equal moieties, and devised other houses to his other children in like manner; and provided, that if any of his said children should die under twenty-one or unmarried (*t*), the part or share of him or her so dying should go to the survivors; and it was held by Holt, C.J., that the shares of two of the children dying unmarried, though they attained twenty-one, went to the devisees over.

Doe v. Jessep.

In *Doe d. Usher v. Jessep* (*u*), where A. devised to trustees and their heirs, in trust for his natural son J. and the heirs of his body, and if J. should die before he attained his age of twenty-one years, and without issue, then over. J. attained his majority, but died without issue. It was contended, on a mistaken view of *Brownsword v. Edwards*, that "and" was to be read *or*, which would, in the event that had happened, give effect to the devise over; but Lord Ellenborough, though he admitted the cases to be very similar, (the only distinction being that the limitation over in the cited case was in favour of a daughter, who, without such a construction as was there put upon the word "and," would have been without a provision, which is a distinction without a difference (*v*)), decided that the word was to be taken in its literal sense.

"And" not changed into "or" in limitation over after an estate tail.

Mortimer v. Hartley.

Again, in *Mortimer v. Hartley* (*w*), where the testator devised lands to John and Ann successively in tail (*x*), and "if it should please God to take away both Ann and John under age, or without leaving lawful issue" then over to X. Ann died under age and without issue, and John died without issue, but not under age. On a case from Chancery the Court of Exchequer refused to read "or" as "and," and held that the devise over took effect. Parke, B., in delivering the judgment of the Court, said, "If we abide by the words of the will, it is possible we may disappoint what we may conjecture to have been one intention of the testator, because it is

(*s*) 2 Vern. 388.

(*t*) Not "without issue." But "unmarried" equally involves the extinction of the estate tail.

(*u*) 12 East, 288; see also *Soulle v. Gerrard*, Cro. EL 525 (stated ante, p. 602), where it was considered (though, according to subsequent authorities

erroneously), that the first devisee had an estate tail.

(*v*) 6 H. L. Ca. 84, 85, 96.

(*w*) 6 Exch. 47, 3 De G. & S. 316.

(*x*) The Court of C. B. held upon the same will that the prior devise gave a fee, and then they read "or" as "and," 6 C. B. 819.

a reasonable intention to entertain, that is, to give a benefit to the issue if their parents should die under age, but we are sure of carrying into effect a manifest and declared intention of the testator to give the remainder over to X. on the determination of the estate tail: on the other hand, if we change 'or' into 'and' for the purpose of effecting the conjectured intention to give a benefit to the issue on the death of their parents respectively under age, we defeat the clear and manifest intention to give the remainder to X. on failure of the issue of John and Ann, and cause an intestacy as to that remainder, a circumstance which ought to be avoided." If the first devise had been in fee simple he admitted the authorities would have required the change; "but as none of the authorities apply to an estate tail and we have Lord Hardwicke's high authority for distinguishing such a case, we think we ought to do so, and abide by the ordinary sense of the words. *If any change should be made*, the one which would be most likely to effectuate the intent of the testator would be to read the words as if they had been 'if it should please God to take away both John and Ann under age or at any time without issue.' By so reading them the issue would take if their parents died under age and X. succeed on the determination of the estate tail. But *if this cannot be done* we think we should make no change at all."

But this was exactly the change which the Court had "Lord Hardwicke's high authority" to make. Whether it was made or not, the result, as it happened, was the same; for in either case the gift over took effect without disappointing any issue. But if there had been any issue they would have been disappointed, and it seems strange to invoke Lord Hardwicke's authority for a conclusion which it was the declared object of his construction to avoid. When the case came back to Chancery, Sir K. Bruce, V.-C., virtually adopted that construction, saying, "On the authority of *Brownsword v. Edwards* and *Murray v. Jones* (y) and other cases, I am of opinion that the testator has but inaccurately expressed that he disposed of everything after the failure of the limitations contained in the prior clauses, in whatever manner they might fail."

It is evident, however, that this construction strikes out the words "under twenty-one"; and in *Grey v. Pearson* (z), where the will was undistinguishable from the will in *Doe v. Jessep*, the devisee in tail attained twenty-one, but afterwards died without issue; and it was held in D.P., following *Doe v. Jessep*, that the words must be

*Grey v.
Pearson.*

(y) 2 V. & B. 313, stated post, Chap. LVIII.

worth and Wensleydale, diss. Lord St. Leonards.

(z) 6 H. L. Ca. 61, by Lords Cran-

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taken literally, and that the gift over failed. It was admitted that where lands were devised to one *and his heirs* with a gift over if he died under twenty-one *or* without issue, “or” was to be read “and”; it was too late to question the authorities which had so decided: but, it was said, those decisions did not govern a case where the first devise was in tail, with a gift over if the devisee died under age *and* without issue. The House refused therefore to apply those authorities to the case before it; and on the ground that Lord Hardwicke’s “construction” had not been uniformly adopted it rejected that also, deeming it to be somewhat forced and very unusual (*a*).

Modern authority, therefore, while it still distinguishes the case of an estate tail, deals with it on wholly different principles from those upon which the distinction was originally based. For (as we have seen) Lord Hardwicke never meant to read the words so as in any event to disappoint the issue; whereas *Mortimer v. Hartley* and *Grey v. Pearson* will require both “or” and “and” to be strictly construed although the issue may be thereby disappointed. The readiness with which Lords Cranworth and Wensleydale accepted the distinction of an estate tail, while rejecting the grounds for it, was plainly due to their disapprobation of the so-called speculative system of construction adopted in the old authorities; and since *Grey v. Pearson* “or” has been strictly construed even in the case (already mentioned as furnishing an *à fortiori* argument for changing “or” into “and”) where children or issue were express objects of the prior gift: as, where (*b*) the devise was to A. for life if he should attain thirty-one, with remainder to his eldest son in fee, with a gift over if A. should die under thirty-one *or* not have a son. A attained thirty-one but died without having a son, and it was held that the gift over took effect, for that “or” could not be construed “and.” Sir J. Romilly, M.R., said he never knew of a case where the change had been made for the purpose of defeating the will and creating an intestacy. It will however be perceived that if A. had had a son and afterwards died under thirty-one the son would have been disappointed: for the construction could not properly depend on the event. The literal construction however has not yet been tested by any case where such disappointment would have ensued.

(*a*) Lord St. Leonards, on the other hand, thought it “easy and natural.” As to *Doe v. Jessop* he said it was hastily decided, and that the judges of K. B. showed by their remarks that they mis-

understood the real nature of the case, 6 H. L. Ca. 97.

(*b*) *Cooke v. Mirehouse*, 34 Beav. 27. As to *Hasker v. Sutton*, 9 J. B. Moo. 2, 1 Bing. 500, vide sup. p. 603, n. (*m*).

Of changing "and" into "or" in cases where the previous estate is not in tail, more will be said hereafter (c).

To return to the cases in which "or" has been construed "and." "The argument for this construction," says Mr. Jarman (*d*), 'is of course very strong where the effect of an adherence to the words of the will would be to deprive the legatee of what was previously given to him in *either* of two alternative events, unless both events should happen, as in the case of a bequest to A. on his attaining thirty-one *or* marrying; and in case he should die under thirty-one *or* unmarried, then over; in such a case 'or' is necessarily construed *and*, in order to make the limitation over consistent with the terms of the prior gift" (*e*). So where property was given to a person in either of two events, and afterwards given over unless not only those two events, but an additional event also happened, Shadwell, V.-C., thought that, if it were necessary, the Court would read the word "or" as "and" (*f*).

Gift in either of two events, with gift over on non-happening of one or the other.

These decisions depended on the inconsistency which, upon a literal construction, would have existed between the prior gifts and the executory gifts over. Where there is no prior gift this ground fails: so that a bequest to A. after the death of testator's mother, or the second marriage, death, or forfeiture of his wife, although the testator had made life-provisions for both his mother and wife, upon whose death therefore a certain amount of the estate would be set free, was held to take effect immediately on the death of the mother without waiting for the second marriage, death, or forfeiture of the wife: in other words, the Court refused to read "or" as "and" (*g*). And a similar observation must be made with reference to the opposite change of "and" into "or" (*h*).

Where there is no prior gift.

Sometimes the general context or plan of the will calls for the conjunctive construction in cases not easily reducible to any specific head. Thus, in *Long v. Dennis* (*i*), where there was a devise to A. for life, upon condition that if he should marry with any woman not having a competent fortune, or without the consent of trustees, the estate should not vest; the Court of K. B.,

"Or" read "and" on general context.

(c) Post, p. 613.

(d) First ed. p. 450.

(e) *Grant v. Dyer*, 2 Dow, 87; *Thompson v. Teulon*, 22 L. J. Ch. 243; *Collett v. Collett*, 35 Beav. 312, cited Chap. XXXIX. Compare *Re Clegg*, 14 Ir. Ch. 70; *Re Cantillon*, 16 Ir. Ch. 301.

(f) *Grimshawe v. Pickup*, 9 Sim. 591; and *Miles v. Dyer*, ante, p. 603; *Law*

v. Thorp, 25 L. J. Ch. 75, 1 Jur. N. S. 1082; *Johnson v. Simcock*, 6 H. & N. 6, 7 ib. 344; *Bentley v. Meech*, 25 Beav. 197; *Hawkins v. Hawkins*, 7 Sim. 173. (*g*) *Hawksworth v. Hawksworth*, 27 Beav. 1.

(h) See *Malden v. Maine*, 2 Jur. N. S. 206.

(i) 4 Burr. 2052; see also *Nicholls v. Tolley*, 2 Vern. 389.

CHAP. XVIII. considering that the testator meant to require the sanction of the trustees only in case A. married a woman without a competent fortune, and also that conditions in restraint of marriage were odious, held that the estate vested upon performance of either part of the condition; that is to say, they read the word "or" as "and." And in another case (*g*), where a testator bequeathed the produce of real estate, after the cesser of certain life-estates, to J. A. for life, and after his death to his eldest son for life, "and to remain entailed on the eldest son descended from J. A. and his posterity from one generation to another for ever: but in case of death or want of issue from the said J. A.," then over: Shadwell, V.-C., read the will as if it had been "in case of death and failure of issue," so as to agree with the general intent collected from the context, that all the descendants of J. A. were to take in succession.

Gift to several
objects alter-
natively.

Mr. Jarman continues (*k*): "Where there is a gift to two objects or classes of objects alternatively, the ambiguous use of the disjunctive 'or' occasions much perplexity. Sometimes, as we have seen, the gift has been held to be void for uncertainty (*l*); but more frequently, in such cases, the word has been changed into *and*. As in *Richardson v. Spragg* (*m*), where a testatrix bequeathed money in trust for such of her daughters *or* daughters' children as should be living at her son's death—it was held, that the children, as well of the living as of the deceased daughters, came in for their shares, the word 'or' being read *and*.

Gift to A. *or*
his children,
read *and*.

"So, in *Eccard v. Brooke* (*n*), where the bequest was to L. for his life, and after his decease to the nephews and nieces who should be then living, as well on the side of the testatrix's late husband as of her own, to wit, A. *or* her children, and B. *or* his children, and C. *or* his children, and D. *or* his children, and E. *or* her children, share and share alike. Of these five persons four died in the lifetime of L., three without issue and one leaving two children. The other was living and had no child. Sir L. Kenyon, M.R., was of opinion that the word 'or' must be considered as if it had been *and*, for that otherwise he must either adopt the argument that it meant to substitute the children of each nephew and niece who should happen to die, in the room of their father or mother, for which he saw no sufficient ground, or he must say that the clause was so uncertain that he could give it to none.

(*g*) *Monkhouse v. Monkhouse*, 3 Sim. 119; see also *Hawkes v. Baldwin*, 9 Sim. 355.

(*k*) First ed. p. 451.

(*l*) Ante, p. 475.

(*m*) 1 P. W. 434.

(*n*) 2 Cox, 213.

He held that the two children of the deceased niece and the surviving niece took in equal thirds; but that, if the latter had had any children living, they would have taken equally with her.

“Again, in *Horridge v. Ferguson* (o), where the testatrix directed the residue of her property to be divided among such of the children of five persons (naming them) as should be born in lawful wedlock and living at her decease, or the issue of such of them as should be married—Sir T. Plumer, M.R., considered, that, in order to make sense of the passage, ‘or’ might be construed *and*. All the children and grandchildren, therefore, took equally.”

Gift to A. or his issue.

And in *Maude v. Maude* (p), where a testator bequeathed a sum of money to his four sons A., B., C., and D., in trust for another son E. during his life, and after the death of E. without children upon trust to divide the money equally amongst the testator’s said sons A., B., C., and D., or to such other of his sons as should afterwards be, in succession, trustees for E. under the proviso thereafter contained, Romilly, M.R., held that “or” must be read “and”: otherwise, if two of the four had died, and two others had under the proviso become trustees in their place, and then E. had died without issue, would the two original or the two new trustees take the fund? If they did not all take, one class must be excluded.

“Or” read “and” to prevent uncertainty.

In *Re Delmar Charitable Trust* (q) the income of certain property was given to the P. A. Society “or some one or more kindred institutions”; it was held that the gift was in favour of the P. A. Society and such one or more kindred institutions as the Court might by scheme select.

In *Solly v. Solly* (r) there was a gift “to each of the children, grandchildren, or other direct descendants of A.,” and it was held that all the descendants of A. were entitled. Wood, V.-C., said that this was the grammatical meaning of the gift, and that it was not a question whether the word “or” should be read conjunctively or not.

Grammatical construction of “or.”

Mr. Jarman continues (s): “‘Or,’ too, has often been changed into *and* where interposed between the name of the devisee and words of limitation introduced into the devise, as in the case of a devise

To A. or his heirs.

(o) Jac. 583. See *Parkin v. Knight*, 15 Sim. 83.

(p) 22 Beav. 290.

(q) [1897] 2 Ch. 163. The expression attributed to Stirling, J., that the word “or” imported “not a substi-

tutional but an alternative gift” must have been used per incuriam, for “alternative” implies mutual exclusion: see Chap. XXXVI.

(r) 5 Jur. N. S. 36.

(s) First ed. p. 452.

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"Or" read as introducing a substituted gift.

Gift to "assigns" implies an absolute interest.

"Or" introducing divesting clause.

Gift to "A. or B."

of real estate to A. *or* his heirs, or to A. *or* the heirs of his body (*t*). Whether the same construction would be applied to bequests of personalty to A. *or* his executors or administrators is not quite clear, for in such a case, as the words of limitation are not necessary to confer the absolute interest (a difference, however, which the new law extinguishes), there may seem to be more reason for contending that they are inserted *diverso intuitu*. The strong tendency of the modern cases certainly is to consider the word 'or' as introducing a substituted gift in the event of the first legatee dying in the testator's lifetime: in other words, as inserted, in prospect of, and with a view to guard against, the failure of the gift by lapse (*u*).

But if the gift be to the specified persons "or their heirs or assigns," it is clear that the words are words of limitation only; for the power of assigning implies an absolute and indefeasible interest (*v*).

And where there was a gift to four persons in succession for their lives, with an ultimate gift on the death of the survivor to "the heirs and assigns" of the survivor, the Court refused to read "and" as "or," the plain construction of the ultimate gift being to the heir of the survivor as *persona designata* (*w*).

It sometimes happens that the word "or" has the effect of adding a divesting clause; as where the gift is to A., B., and C., "or such of them as shall be living" at a future time: this gives each of them a vested interest, subject to be divested in the event of his dying before the time, and of the others (or one of them) surviving that time (*x*).

The case of a simple gift in the alternative to two individuals (as a gift to "A. or B.") is more difficult, and if there is nothing in the will or in the surrounding circumstances to

(*t*) *Read v. Snell*, 2 Atk. 642; *Wright v. Wright*, 1 Ves. sen. 409; *Harris v. Davis*, 1 Coll. 416; *Greenway v. Greenway*, 2 D. F. & J. 128; *Adshead v. Willetts*, 29 Beav. 358. So in the case of a devise to A. *or* his issue, where "issue" has been taken to be a word of limitation: *Parkin v. Knight*, 15 Sim. 83; but of course not where substitution, and not succession, is clearly intended, see *Speakman v. Speakman*, 8 Hare, 180; *Holland v. Wood*, L. R., 11 Eq. 91; *Burt v. Hellyar*, L. R., 14 Eq. 160. It seems open to question whether a devise to A. *or* his heirs since the Wills Act would not be construed as substitutional, so as to prevent a lapse in the event of A. predeceasing the testator.

See Hawkins on Wills, 180; *Re Ibbetson*, 88 L. T. 461, and post Chap. XXXVI.

(*u*) Mr. Jarman's examination of the authorities bearing on this subject has been transferred to Chap. XXXVI.

(*v*) *Re Walton's Estate*, 8 D. M. & G. 173; *Re Hopkins' Trust*, 2 H. & M. 411; *Leach v. Leach*, 35 Bea. 185; *Re Masterson*, [1902] Week. N. 192; ante, p. 426.

(*w*) *Milman v. Lane*, [1901] 2 K.B. 745. See *Quested v. Michell*, 24 L. J. Ch. 722 and other cases cited in Chap. XXIII.

(*x*) *Sturges v. Pearson*, 4 Mad. 411; *Penny v. Comm. for Railways*, [1900] A.C. 628, post, Chap. XXXVII.

shew what the testator meant, such a gift appears to be void for uncertainty (*y*). CHAP. XVIII.

Here we may distinguish those cases where, under a power to appoint in favour of A. "or" B. (A. and B. being either classes or individuals), a gift in default of appointment is implied between A. and B. (*z*). This is an apparent but not a real change of "or" into "and"; the true reason that A. and B. both take being that both are objects of the power, and no selection having been made by the person empowered to select, the Court divides the subject of gift equally between the objects of the power (*a*). Again, a gift to A. for life, and after his death to a class of persons "or the issue of such of them as shall then be dead" (*b*), or to A. for life, and after his death to such of a class as shall be then living "or their next of kin" (or "heirs"), will generally be construed to mean such of the class as shall be living at the death of the tenant for life, and the issue or next of kin (or heirs) of such as shall then be dead (*c*).

Power to appoint to A. or B. Implied gift to A. and B. in default.

The word "and," too, is sometimes construed "or." This change (being the converse of that which is exemplified by the preceding cases, but, like it, generally made to favour the vesting of a legacy, and not to divest it (*d*)) may be called for by the general frame and context of the will, as in *Jackson v. Jackson* (*e*), where a testator bequeathed a leasehold house to his wife for her life; "and after her death, if my son R. shall be living, then to him" for his life, "but if he should be living at the time of the death of my wife, and shall then or hereafter have any issue male of his body, then all the right therein to go to R.; but if R. should die in the life of my wife without leaving issue male," then over:

As to turning "and" into "or."

(*y*) See ante, p. 475.

(*z*) *Brown v. Higgs*, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561; *Longmore v. Broom*, 7 Ves. 124; *Burrough v. Philcox*, 5 My. & Cr. 72; *White's Trust*, Joh. 656; *Penny v. Turner*, 15 Sim. 368, 2 Phil. 493, overruling *Jones v. Torin*, 6 Sim. 255.

(*a*) 7 Ves. 128; 2 Phil. 495. The power is exclusive, ib. and *Re Veale's Trusts*, 4 Ch. D. 61, 5 Ch. D. 622. And see *McGibbon v. Abbott*, 10 App. Ca. 653 (Canadian case in P. C.).

(*b*) *Shand v. Kidd*, 19 Beav. 310.

(*c*) *King v. Cleaveland*, 26 Beav. 26, 4 De G. & J. 477; *Re Philips' Will*, L. R., 7 Eq. 151; *Burt v. Hellyar*, L. R., 14 Eq. 160; *Wingfield v. Wingfield*, 9 Ch. D. 658. But in *Lachlan v. Reynolds*, 9 Harc. 796, "their" was strictly construed as referring to the

"children then living," so that "heirs" must if anything necessarily be deemed a word of limitation, and *or* be read *and*, which was confirmed by another gift to the children living at another period *and* their heirs.

(*d*) See per Wood, V.-C., *Day v. Day*, Kay, 708; *Maddison v. Chapman*, 3 De G. & J. 536.

(*e*) 1 Ves. sen. 217. This is an analogous case to *Grant v. Dyer*, 2 Dow, 87, ante, p. 609. The L.C. added, that if R. had survived the wife, but had no issue then living, he would have taken only a life interest, and that by the express words of the gift; so that it seems the Court, in effect, struck out of the clause introducing the bequest over the words "if he should be living at the time of my wife's death."

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Lord Hardwicke thought it clear, on the face of the will, that the testator did not intend the property to go over unless R. died in the lifetime of the wife without issue male; and to effect this end he construed "and" as "or"; so that, although R. died in the lifetime of the wife, yet, as he left issue male, he took the estate absolutely.

So, in *Hetherington v. Oakman* (*f*), where the ultimate bequest after the failure of certain prior interests under the will, was to the testator's nephews and nieces and such of them as should be then living, it was impossible, upon any reasonable construction, to read the word "and" otherwise than as "or." So if a testator give a power to be exercised by A. and his heirs and assigns, the words as they stand requiring the heirs to join with the ancestor, would prevent a sale being ever made at all; for *nemo est hæres viventis*: "and" must therefore be read disjunctively (*g*).

And where a testator made a bequest after a specified period "to such of his grandchildren and their issue as should then stand to him in equal degree of consanguinity, and their heirs as tenants in common," the word "and" was read "or," it being impossible that grandchildren and their issue could be in equal degree of consanguinity to the testator (*h*).

There are cases in which a gift to certain persons "and" their children, descendants, &c., has been read as a gift to them "or" their children, &c., so as to make the gift to the children substitut-
tional (*i*).

The change of "and" into "or" may be called for, as Mr. Jarman points out (*j*), not only "by the general frame and context of the will," as in the cases above mentioned, but also "by the circumstance that a literal adherence to the testator's language occasions that one member of his apparently copulative sentence is included in, and, therefore, reduced to silence by another. On this ground, probably, the construction has prevailed in several cases where an ulterior gift was to take effect on the death of the first devisee unmarried and without issue."

Thus, in *Wilson v. Bayly* (*k*), where a testator devised certain

Unmarried
and without
issue.

(*f*) 2 Y. & C. C. 299; see *Hawes v. Hawes*, 1 Ves. sen. 13, 1 Wils. 165; *Stubbs v. Sargon*, 2 Kee. 255; *Stapleton v. Stapleton*, 2 Sim. N. S. 212; *Davidson v. Rook*, 22 Beav. 206. *Malmesbury v. Malmesbury*, 31 Bea. 407, where the change was not made, was the case of a deed.

(*g*) *Jones v. Price*, 11 Sim. 557; see

acc. Sugd. Pow. 844, pl. 24, 8th ed.

(*h*) *Maynard v. Wright*, 26 Beav. 285.

(*i*) *Burrell v. Baskerfield*, 11 Bea. 525; *Tucker v. Billing*, 2 Jur. N. S. 483. But see *Penny v. Turner*, 2 Ph. 493.

(*j*) First ed. p. 455.

(*k*) 3 Br. P. C. Toml. 195.

leasehold lands to trustees, in trust for his son John until his marriage, and then to make provision for his wife; and if John should have any issue, then to assign the premises to him, to enable him to make provision for his children; and if John should happen to have no issue lawfully begotten, in trust for testator's son Mark in like manner; it being his intention that, if his son should die before he was married, or, if he were married, and should have no issue lawfully begotten, then the lands should be enjoyed by Mark; and in case both his sons, Mark and John, should "happen to die unmarried, and neither of them should have any issue lawfully begotten," then over. Mark died unmarried. John married, but had no issue. The devise over was held to have taken effect, the clause being construed in the disjunctive.

So, in *Hepworth v. Taylor* (*l*), a bequest over, in case the legatees died unmarried "and" without issue, was held to take effect on the death of one married but without leaving issue.

Again, in *Maberley v. Strode* (*m*), where the bequest was in trust for the testator's son A. for life, and after his decease for his children; but in case he should die unmarried "and" without issue, or having issue, they should all die, if sons, before they attained twenty-one, or, if daughters, before they attained twenty-one or were married, then over. A. married but died without issue; and Sir R. P. Arden, M.R., held that the gift over took effect.

So, in *Bell v. Phyn* (*n*), where a residue was bequeathed equally between the testator's three children, and in case of the death of any of his children, "without being married and having children," the share of the child so dying to be divided between the surviving children: Sir W. Grant, M.R., on the authority of the last case, held, that the word "and" was to be construed "or," for as, legally speaking, there could be no children without a marriage, it was almost necessary, in order to give effect to all the words, to construe the copulative as disjunctive. However, the daughter whose share was in question having married and also had a child, it was unnecessary to decide the point.

"Without being married and having children."

And in *Mackenzie v. King* (*o*), where real and personal property was given in trust for A. for life, and after her death for her children; but in the event of her not intermarrying nor having children, then the same property to be subject to her disposal by will or otherwise; Sir K. Bruce, V.-C., held that "nor" (the component

(*l*) 1 Cox, 112. See also *Long v. Lane*, 17 L. R. Ir. 11.
(*m*) 3 Ves. 450.

(*n*) 7 Ves. 453.
(*o*) 17 L. J. Ch. 448.

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parts of which are "and not") must be read "or not," and that the fund was at A.'s disposal, in the event either of her remaining single or marrying and not having a child.

Mr. Jarman continues (p): "But though, by construing the contingency of dying unmarried and without issue copulatively, the latter member of the sentence is rendered inoperative, (since the fact of being unmarried includes the not having or leaving issue, which always means *lawful* issue,) yet, on the other hand, the disjunctive construction reduces to silence the word 'unmarried'; for if the condition upon which the first taker retains the estate is his marrying and having issue, or, in other words, if the estate is to go over on the non-happening of *either* of these events, then, as the having issue includes the event of marriage, the result of the two events, placed disjunctively, is precisely the same as if the contingency of having issue stood alone. In these cases, it will be observed, the disjunctive construction can never operate to let in the devisee over to the exclusion of the children or issue of the first taker, as in the class of cases before noticed; which accounts for the seeming anomaly of torturing the words in both instances to produce a contrary effect." But since *Grey v. Pearson* (q) the cases last noticed have lost much of their weight as authorities for applying to any given case the rule which would change "and" into "or" in order to prevent one member of a compound sentence being rendered inoperative. Though it be a canon of construction that effect is if possible to be given to every word used, it is one which must bend to circumstances (r); and where the result of changing "and" into "or" would be only to render one member of the sentence inoperative instead of the other, the change certainly ought not to be made (s). It was made in the Irish case of *Long v. Lane* (t), but with this exception, it does not appear to have been made in any case since *Grey v. Pearson*; which indeed was treated by Romilly, M.R. (u), as

(p) First ed. p. 456.

(q) 6 H. L. Ca. 61, ante, p. 607.

(r) Per Lord Cranworth in *Clarke v. Colls*, 9 H. L. Ca. 612; and in *Earle v. Barker*, 11 H. L. Ca. 280, Lords Cranworth and Chelmsford (agreeing with Romilly, M.R., 33 Beav. 353) preferred construing an ambiguous clause, forming one member of a copulative sentence, in a way that rendered it inoperative, to changing "and" into "or." Lord Westbury would have preferred the latter course; but both led to the same decision.

(s) *Re Kirkbride's Trusts*, L. R., 2 Eq. 400.

(t) 17 L. R. Ir. 11. In that case the gift over was to take effect in the event of the devisee dying unmarried and without legal issue; he had a power to charge the lands with a jointure, and this necessarily excluded the conjunctive construction.

(u) In *Seccombe v. Edwards*, 28 Beav. 440, treated as rightly decided in *Steen v. Steen*, Ir. R., 6 C. L. 8; and see *Re Sanders' Trusts*, L. R., 1 Eq. 680, post, p. 619. "The cases of *Maberley v.*

having overruled *Bell v. Phyn* and *Maberley v. Strode*, as well as *Brownsword v. Edwards*. The decision in *Doe d. Usher v. Jessep (v)*, where the Court refused to change "and" into "or," has been already referred to.

The decision in *Grey v. Pearson* is sometimes referred to as if the rule that words are *primâ facie* to be taken in their ordinary and grammatical sense was new, and as if a more strict and literal construction was now generally required than had previously obtained. But the rule is an old one (*w*). The application of it in that particular case was strict, and within its particular scope the decision is of course conclusive: but that no new principle of general application has been introduced by it is shewn by the subsequent decision of the House of Lords in *Abbott v. Middleton (x)*, and by other cases noticed above (*y*).

"The word *unmarried*," as Mr. Jarman points out (*z*), "means either never having been married, or, not having a husband or wife at the time. The former is its ordinary signification; and it was considered as so used in the [cases stated above (*a*)], where, however, the effect of such construction was to render the word inoperative. But the sound rule in such cases would seem to be, to construe the expression as used in the latter, being its less accustomed sense (*b*), which has a twofold advantage, that it removes the necessity of changing the particle 'and' to 'or,' and gives effect to all the testator's words."

Grey v. Pearson and *Abbott v. Middleton*.

Whether "unmarried" means not having been married, or not being married at the time.

Strode, and *Bell v. Phyn*, were much canvassed in the case of *Dillon v. Harris*, 4 Bligh, N. S. 321, where Lord Brougham seemed very reluctant to consider them as general authorities for turning into *or* the word 'and,' occurring in a limitation over, in case of the prior legatee dying unmarried and without leaving lawful issue; his Lordship's opinion being that Sir W. Grant, in deciding *Bell v. Phyn* upon the authority of *Maberley v. Strode*, did not sufficiently advert to the special circumstances of the latter case. The case in the House of Lords, however, did not raise the point, as the prior bequest was to take effect upon the legatee marrying with consent, and the bequest over was in case he should so die unmarried and without leaving lawful issue; which Lord Brougham thought referred to such a marriage as had been previously referred to, namely, marriage with consent; and as the legatee had married without consent and had left no issue, (so that,

even according to the disjunctive construction, the bequest over failed,) the question did not arise." (Note by Mr. Jarman, 1st ed., p. 457.)

(*v*) 12 East, 288, ante, p. 606.

(*w*) See Chaps. XV., LIX.

(*x*) 7 H. L. Ca. 68, ante, p. 583, where Lords Cranworth and Wensleydale were again opposed to Lord St. Leonards, but were not on this occasion in a majority.

(*y*) Pp. 590 seq.

(*z*) First ed. p. 457.

(*a*) *Wilson v. Bayly*, *Hepworth v. Taylor*, *Maberley v. Strode*, and *Bell v. Phyn*.

(*b*) "The word 'unmarried' is used in this sense in the stat. 3 W. & M. c. 11, s. 7, which provides, that, 'if any *unmarried* person, not having a child or children, shall be lawfully hired,' &c.; as no one, *not having been married*, can have children in the legal sense." (Note by Mr. Jarman.) The effect of the word "unmarried" is discussed in Chap. XXXV.

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“Unmarried”
construed to
mean not
having hus-
band or wife
at the time.

As illustrations of this mode of construction, Mr. Jarman cites two cases, *Doe v. Cooke* and *Doe v. Rawding*. In *Doe v. Cooke* (c), the bequest was to B. and his assigns (after the death or marriage of A.) for his life, and after his decease then to the child or children of B. by any future wife, his, her, or their executors, administrators and assigns ; but the testator declared his will to be upon this further condition, that in case B. should die an infant unmarried and without issue, then over to C. and his children. B. attained his majority, and died, leaving a widow, but without having had issue ; and it was held, that in these events the gift over failed. Lord Ellenborough said : “ The most rational construction we can give this will is, to construe it as Lord Hardwicke did the devise in *Framlingham v. Brand* (d), as one contingency, namely, B.’s dying an infant, attended with two qualifications, viz., his dying without leaving a wife surviving him, or dying without children. Had he left a wife, and had died an infant, and no children, the testator might have intended that, in such event, the widow should be benefited by taking her share under the Statute of Distribution with the next of kin, or that B. should be able to make a testamentary disposition in her favour ; meaning, also, that if he left children, they should have the estate in preference to the wife ; and that if he left neither wife nor children at his death during his minority, C. and his children should have the estate ; but that if he arrived at the age of twenty-one, he should have a power to dispose of it, though he left neither wife nor children.”

In *Doe v. Rawding* (e) a testator devised his lands to his daughter and any other children he might leave, and to her or their heirs and assigns for ever ; but in case his daughter and such other children as aforesaid should die under the age of twenty-one years unmarried and without lawful issue, then to his wife in fee. The daughter died under age and without issue, but leaving a husband surviving ; and it was held, on the authority of the last case, that the devise over failed.

“Unmarried”
ought to be
construed
according to
the context.

As B. in the former case left a wife, and the daughter in the latter case left a husband, surviving, neither of them was “ unmarried ” in any sense, and it was therefore unnecessary to decide upon the actual meaning of the word. The former case shows the opinion of Lord Ellenborough ; but in the latter, Bayley and Holroyd, JJ., seem to have thought that either of the two meanings might be

(c) 7 East, 269.
(d) 3 Atk. 390.

(e) 2 B. & Ald. 441.

ascribed to it according to the context, and Lord Cottenham was of the same opinion (*f*).

The principle stated by Mr. Jarman has, however, been adopted by the courts. Thus in *Re Sanders' Trusts* (*g*), where there was a gift over in the event of the primary legatee dying "unmarried and without issue," Wood, V.-C., declined to change "and" into "or," and held that "unmarried" meant "without leaving a widow." The same principle was applied in *Re King* (*h*), and *Re Chant* (*i*).

In *Roberts v. Bishop of Kilmore* (*j*) a testatrix devised property to her son H., and declared that if he died "unmarried and without issue" it should go over to her two elder sons. The devise was preceded by gifts in favour of such of her daughters as "remained unmarried," where the word "unmarried" clearly meant "spinsters," that is, "not having been married," and it was held by Porter, M.R., that the same construction was to be placed on the expression "unmarried and without issue" as used in the gift over following the devise to H. But this does not seem conclusive, for in the expressions "remaining unmarried" and "dying unmarried" the word "unmarried" does not necessarily mean the same thing (*k*).

A testator may by the context shew that he did not use "unmarried" in the sense of "without leaving a widow"; as where he devises land subject to a gift over in the event of the original devisee dying unmarried and without issue, and gives him a power to charge a jointure in favour of his widow (*l*).

If a gift over is to take effect in the event of the legatee "dying before marriage and leaving no issue," no question can arise (*m*). And if a testator expressly gives property to his two daughters, to be vested at the age of twenty-four or marriage, and if they both die under twenty-four and unmarried, then over, the Court will not alter "and" into "or," or give "unmarried" any other than its primary sense of "never having been married" (*n*).

(*f*) *Maugham v. Vincent*, 9 L. J. N. S. Ch. 329. See Chap. XLI., where the cases on the construction of gifts to the persons who would have been the next of kin of a married woman "if she had died unmarried" are considered. As to "unmarried" meaning "not married with consent," see *Dillon v. Harris*, referred to ante, p. 616, n. (*u*).

(*g*) L. R., 1 Eq. 675. See *Carolyn v. Carolyn*, 17 L. R. Ir. 25 n.

(*h*) 62 L. T. 789.

(*i*) [1900] 2 Ch. 345.

(*j*) [1902] 1 Ir. R. 333.

(*k*) Compare the case of *Pratt v. Mathew*, 8 D. M. & G. 522, where the word "unmarried" alone was used in two different senses in the same instrument.

(*l*) *Long v. Lane*, 17 L. R. Ir. 11.

(*m*) *Secombe v. Edwards*, 28 Beav. 440; *Steen v. Steen*, Ir. R., 6 C. L. 8 ("die without marrying and leaving no legal issue").

(*n*) *Gonne v. Cook*, 15 W. R. 576.

"Unmarried" construed to mean "not having been married."

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"And" not construed "or" where a previous gift would be thereby divested.

It has already been observed that in the majority of cases where "and" has been construed disjunctively, it has been in order to favour the vesting of a legacy, and not in order to defeat a previously vested gift; and generally it will not be so construed where the latter consequence would follow; as, where the bequest is to A. for life, remainder to his eldest son (or to his children), with a gift over if A. should die under twenty-one and without issue (or under twenty-one and without children) (*o*). Again in *Day v. Day* (*p*), where a testator bequeathed the interest of his residuary personal estate to his wife for life, and after her death to his brother for life, and after the death of the survivor, the capital to A., subject to the payment of 1,000*l.* each to B., C., and D., which the testator gave to them to be paid to each of them at the end of twelve months next after the decease of the survivor of his wife and brother; provided, that if either of the said B., C., and D. should die "in the lifetime of my said wife and my said brother" his legacy should lapse. Sir W. P. Wood, V.-C., refused to read "and" as "or," and thereby cause a lapse of B.'s legacy, who had survived the wife but died before the brother (*q*). And this is independent of *Grey v. Pearson*.

"And" read "or" in power to apply fund "for advancement and benefit" of legatee.

Where a will contained a power for the trustees to apply the capital of a fund for the "benefit and advancement in the world" of the person entitled to the income of the fund for life, it was held (*r*) that the word "and" in the clause conferring the power must be read "or," and that the trustees might apply the fund not merely for "advancement" in the strict sense of the term, but for any purpose for the benefit of the legatee.

(*o*) *Malcolm v. Malcolm*, 21 Beav. 225; *Key v. Key*, 1 Jur. N. S. 372. See also *Coates v. Hart*, 32 Beav. 349, 3 D. J. & S. 504, 516.

(*p*) *Kay*, 703. See also *Barker v. Young*, 33 Bea. 353; *Re Kirkbride's Trusts*, L. R., 2 Eq. 400; *Reed v. Braithwaite*, L. R., 11 Eq. 514; *W— v.*

B—, 11 Beav. 621.

(*q*) It was held that "die in the lifetime of my said wife and my said brother" meant "die in their joint lifetime": and *Brudnel's Case*, 5 Co. 9, was cited.

(*r*) *Re Brittlebank*, 30 W. R. 99.

CHAPTER XIX.

GIFTS BY IMPLICATION.

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I.—Effect of Mistake.—“Sometimes,” says Mr. Jarman (*a*), “a testator shows by the recitals in his will, that he erroneously supposes a title to subsist in a third person to property which, in fact, belongs to himself. Such recitals do not in general amount to a devise; for, as the testator evidently conceives that the person referred to possesses a title independently of any act of his own, he does not intend to make an actual disposition in favour of such person; and though it may be probable, or even apparent, that the testator is influenced in the disposition of his property by this mistake, yet there is no necessary implication that, in the event of the failure of the supposed title, he would give to the person that benefit to which it is assumed he is entitled.”

Recitals, whether they create an actual gift.

Thus, in *Wright v. Wyvell* (*b*), a testator bequeathed unto A., his wife, 600*l.*, to be paid to W., saying it was for payment of lands lately purchased of W., and was already estated as part of a jointure to A. his wife during her life, being of the value of 67*l.* per annum; that of Wiskow, York, and Malton, the lands there amounting to the yearly value of 63*l.*, in all 130*l.*, which, being also estated upon A. his wife, was in full of her jointure.

(*a*) First ed. p. 460. Compare the rule as to the execution of special

powers of appointment, Chap. XXIII. (*b*) 2 Vent. 56.

CHAPTER XIX. It appeared that these lands had not been settled on the wife. And it was held by Pollexfen, C.J., Rokeby, and Ventris, (Powell, J., dissentiente), that these expressions did not amount to a devise to the wife, for it appeared "that the testator did not intend to devise her anything by the will, for he mentions that she was estated in it before." Powell, J., relied upon a case (c) in which "I have made a lease to J. S., at 10s. rent," was held to be a good devise; but the other Judges considered the case to be of little authority.

So, where (d) J. S., tenant for life, with remainder to his wife for life, remainder to his own right heirs, expressed himself in his will as follows: "Item, my land at W. my wife Mary is to enjoy for her life, and after her death it of right goes to my daughter E. for ever, provided she has heirs." The Court held that the first clause was not a devise to the wife, for the lands were settled upon her for life; and what was said as to the daughter was only a declaration of the devisor what the condition of the estate was, and how she was to enjoy it; and he could not say of right who was to enjoy them, if she claimed under the will.

Again, where (e) B., by his will, reciting that he was entitled for life, under the will of A., to the advowson of the rectory of D., with remainders over, "subject to a direction in the said will, that my brother J. D. shall be presented to said rectory when it shall next become vacant, which it is my wish may be complied with; now, I hereby declare it to be my desire and earnest wish that, in case upon the vacancy of the said living the said J. D. shall not be then living, or in case the said rectory shall again become vacant after the said J. D. shall have been presented to and accepted said presentation, then" A. P. was to be presented. The fact was, that, under the will of A., J. D. was only entitled to the presentation on a certain contingency, which had not happened. The question then arose, whether the expressions in the will of B. raised a gift in him by implication,

(c) Moore, 31.

(d) *Wright v. Hammond* (Right v. Hamond), 1 Stra. 427, 1 Com. Rep. 231, 8 Vin. Abr. 110, Devise, L. 2, pl. 32, 2 Eq. Ab. 338, pl. 11.

(e) *Dashwood v. Peyton*, 18 Ves. 27; and see *Doe d. Vessey v. Wilkinson*, 2 T. R. 209, stated Chap. XXXVII.; *Lane v. Wilkins*, 10 East, 241. See also *Smith v. Maitland*, 1 Ves. jun. 362; *Langslow v. Langslow*, 21 Beav. 552; *Circuit v. Perry*, 23 Beav. 275; *Box v.*

Barrett, L. R., 3 Eq. 244; *Clibborn v. Clibborn*, 9 Ir. Jur. 381; *Harris v. Harris*, Ir. R., 3 Eq. 610; *Haverty v. Curtis*, [1895] 1 Ir. R. 23. But see also *Poulson v. Wellington*, 2 P. W. 533; *Wilson v. Piggott*, 2 Ves. jun. 351; both which, however, arose on dispositions by deed. *Circuit v. Perry*, and the later case of *Re Bagot*, [1893] 3 Ch. 348, are referred to in Chap. XXIX. in connection with the question of residuary bequests.

so as to put the persons actually entitled under the will of A., who took benefits under the will of B., to their election. Lord Eldon decided in the negative, observing that he found no authority for holding mere recital, without more, to amount to gift, or demonstration or intention to give.

And in *Adams v. Adams* (f), a devise and bequest to trustees of real and personal estate, subject to the dower and thirds at common law of the testator's wife in and out of his real estates, (the testator's interest therein being an equity of redemption and not liable to dower,) upon trust to receive the income, and pay the same or the overplus thereof after deducting the dower or thirds of his said wife for the maintenance of his children, was held not to give the wife by implication a rentcharge equal to what dower out of the whole estate would have amounted to.

Adams v. Adams.

Nor, it seems, will a mistaken belief by a testator as to the ownership of property enlarge the operation of an express gift (g).

"It seems, however, that if a testator unequivocally refer to a disposition as made in that his will, which, in fact, he has not made, the intention to make such a disposition, at all events, will be considered as sufficiently indicated" (h). In such cases "the Court has taken the recital as conclusive evidence of an intention to give by the will, and, fastening upon it, has given to the erroneous recital the effect of an actual gift," differing, in this respect, from the cases in which "the testator says that only which amounts to a declaration that he supposes that a party who is referred to has an interest independent of the will, and in which the recital is no evidence of an intention to give by the will, and cannot be treated as a gift by implication" (i).

Reference by testator to a disposition made in that his will.

Thus, where (j) a testator bequeathed one moiety of certain leasehold estates to E.; and if she should die before twenty-one, to G.; and if he should die before a certain event, to another person; and after her death, to A.; and provided that in case A. should die without issue, and E. or G. should be then living,

(f) 1 Hare, 537; see also *Doolan v. Smith*, 3 J. & Lat. 547; *Ralph v. Watson*, 9 L. J. Ch. 328; cf. *Westcott v. Culliford*, 3 Hare, 265, where the words were more properly words of original charge than of recital.

(g) *Hounsell v. Dunning*, [1902] 1 Ch. 512. Sed quære, whether the dictum of Joyce, J., in this case is consistent with the decision in *Re Bagot*, [1893] 3 Ch. 348.

(h) Mr. Jarman, in the first edition of this work, p. 462.

(i) Per Wigram, V.-C., *Adams v. Adams*, 1 Hare, 540, and per Lord Brougham, *Yates v. Thomson*, 3 Cl. & Fin. 572. The difference appears to have been overlooked in *Hall v. Lietch*, L. R., 9 Eq. 376.

(j) *Bibin v. Walker*, Amb. 661. As to *Frederick v. Hall*, 1 Ves. jun. 396, qu. See also *Furniss v. Phear*, 36 W. R. 521, where the obliterated name of a legatee was supplied by a subsequent reference in the will; ante, p. 160.

CHAPTER XIX. or either of them, the said moiety of his leasehold messuages, before given to the said A., should go to E. and G. Sir T. Sewell, M.R., thought it quite clear that the second devise related to the other moiety not before devised, as the manner in which it was given was inconsistent with the disposition of the first moiety, which A. was not to take until after the death of E. and G. He further held, that the Court would imply a gift of the second moiety to A. and her issue, (the issue taking, since there was no gift over except on the death of A. without issue,) with contingent limitations over. There could, he said, be no doubt of the intention, and the words of gift being omitted by mistake, the Court would supply them.

Implication
of bounty
from
direction to
pay debt.

A mere direction to pay a debt which the testator supposes to be due from him, does not involve any intention of bounty, and therefore, if a testator directs his executors to pay "a debt of 300*l.* due by me to A.," and he only owes A. 200*l.*, this is not an implied legacy to A. of 100*l.* (*k*). But an intention of bounty may appear from the terms of the will. Thus, in *Re Rowe* (*l*), a testatrix who was executrix and residuary legatee of her deceased husband's will, bequeathed to her grandniece "the sum of 300*l.* in addition to the sums owing to her from my late husband's estate," and it was held that this amounted to a bequest to the grandniece of two sums of 500*l.* each, for which the husband had given her an I O U and promissory note, which were not enforceable for want of consideration (*m*).

Assumption
by testator
that his will
contains a
devise.

"Implication," said Lord Westbury in *Parker v. Tootal* (*n*), "may either arise from an elliptical form of expression, which involves and implies something else as contemplated by the person using the expression, or the implication may be founded upon the form of gift, or upon a direction to do something which cannot be carried into effect without of necessity involving something else in order to give effect to that direction, or something else which is a consequence necessarily resulting from that direction." The case in which this was said affords an example of the former kind of implication, a devise "to the first son of T. severally and successively in tail male" being read as a devise "to the first and every other son"; otherwise the phrase "severally and successively" would have been without meaning.

(*k*) *Wilson v. Morley*, 5 Ch. D. 776.

(*l*) [1898] 1 Ch. 153. See *Whitfield v. Clement*, 1 Mer. 402, not so clear a case.

(*m*) Compare *Re Hodgson*, [1899]

1 Ch. 666. These cases may be treated as illustrations of the rule *falsa demonstratio non nocet*; see Chap. XXXV.

(*n*) 11 H. L. Ca. 143, 161.

Implication of the latter kind described by Lord Westbury is seen when from a direction that certain persons shall deal with the rents of an estate in a particular manner, a devise of the estate to those persons has been implied (o); or when from a direction to invest real and personal estate is implied a trust to sell the real estate (p).

But a gift which is confined by unambiguous terms to a specific part of a testator's property, as a bequest of "all his capital in ready money and bank billets," will not be extended so as to include the entire personalty by a mere introductory clause declaring the testator's intention to dispose of all his property. It would be different if the testator himself referred to the bequest as including all his property (q).

An example of an erroneous reference in a codicil to a disposition made by the will operating as a gift occurs in *Jordan v. Fortescue* (r): under a gift by codicil of "500l., in addition to 1,500l. before bequeathed" to the same person, there having, in fact, been only two legacies of 500l. each bequeathed to him by will and first codicil, it was held that there was a gift by implication of 2,000l. But it must be remembered that though words such as those used in the last case may by implication effect an increase in the amount of the first gift, yet the rule that a clear gift is not to be cut down by subsequent words of doubtful import prevents them from having any operation where their effect would be by implication to diminish the first gift (s).

And where a testator expresses an intention to make up a person's existing fortune, derived either under his own will or from other sources, to a certain sum, and for that purpose gives

Intention to give what will make up a certain sum.

(o) See *Ex parte Wynch*, 5 D. M. & G. 188, and cases there cited. See also *Newburgh v. Newburgh*, Sug. Law of Prop. 367; a devise of the estates in the omitted county (see above, p. 486) was implied from the name and arms clause, the leasing power, and other parts of the context. And see *Langston v. Langston*, 2 Cl. & Fin. 194, and other cases, ante, pp. 586 et seq.

(p) *Affleck v. James*, 17 Sim. 121.

(q) *Wylie v. Wylie*, 1 D. F. & J. 410. Compare *Hounsell v. Dunning*, supra, p. 623, note (g). See also cases cited Chap. XLV. showing the inefficacy of the word "estate," occurring in the introductory clause of a will made before 1838, to pass the fee-simple.

(r) 10 Beav. 259; see also *Hayes d.*

Foorde v. Foorde, 2 W. Bl. 698; *Edmunds v. Waugh*, 4 Drew. 275; *Farrer v. St. Catharine's College*, L. R., 16 Eq. 19. In *Morgan v. Middlemiss*, 35 Bea. 278, Romilly, M.R., refused to follow *Jordan v. Fortescue*, although the intention was clear.

(s) *Mann v. Fuller*, Kay, 624; *Gordon v. Hoffmann*, 7 Sim. 29, ante, p. 188. As to recitals in wills as to amounts of advances made by testators to their children, see *Re Aird's Estate*, 12 Ch. D. 291; *Re Taylor's Estate*, 22 Ch. D. 495; *Re Wood*, 32 Ch. D. 517; *Re Kelsey*, [1905] 2 Ch. 465. The statement in the text was referred to with approval by Joyce, J., in *Re Segelcke*, infra, p. 626, note.

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a legacy which proves to be insufficient, the legatee shall, nevertheless, have the sum specified and intended for him. Thus, in *Ouseley v. Anstruther* (t), where a testator, reciting that under a settlement his wife would have an income of 1,560*l.*, directed his trustees to add an annuity of 440*l.*, so as to raise his wife's jointure to 2,000*l.*; the income under the settlement being less than was supposed, the wife was, nevertheless, held entitled to have it made up to 2,000*l.* It does not follow, however, that in the converse case of the income being more than the testator supposed, the wife would have been entitled only to the 2,000*l.*, for a clear gift will not be cut down by subsequent words of doubtful import (u).

And in *Ives v. Dodgson* (v), a testatrix, upon a contingency which (as she showed by her will) she expected not to be (and which was not) ascertained until after her own death, bequeathed a life annuity of 40*l.* to A.; she then bequeathed to A. 30*l.* free of duty, and afterwards by codicil said, "I increase the immediate annuity of 30*l.* left by my will to A. to an annuity of 50*l.* duty free." It was held by Sir W. James, V.-C., that the plain meaning of the words of the codicil was that A. was to have an annuity of 50*l.* in addition to the contingent annuity of 40*l.*

In these cases, it will be noticed, there were words of gift as well as of recital.

Mr. Jarman continues (w): "And even where the testator has evidently mistaken the law respecting the devolution of his property, yet, if he has by his will shewn very clearly an intention that it shall devolve according to such mistaken notion, the intention will prevail. An early case (x) presents a very nice question of this nature.

Reference to a person as heir held to create a devise by implication.

"A testator having issue by C. three daughters, S., A., and E., devised to C. for life all his freehold wherever, until S. his heir came to twenty-one, paying to the heir 10*s.* during the term, and to the rest, after fifteen years old, 20*s.* a-piece, and the heir to pay to A. and E. 100*l.* a-piece, 40*l.* at the decease of the wife, &c.; and if S. his heir died without heir before twenty-one, so that the lands descended and fell to A., then A. to pay to E., &c. It was argued that S. took nothing under the will by implication,

(t) 10 Beav. 453. Compare *Thompson v. Whitelock*, 5 Jur. N. S. 991. See also *East v. Cook*, 2 Ves. sen. 30.

(u) *Re Segelcke*, [1906] 2 Ch. 301, dissenting from Lord Hardwicke's dictum in *Milner v. Milner*, 1 Ves. sen.

106, which, however, was repeated by Leach, M.R., in *Trevor v. Trevor*, 5 Russ. 24.

(v) L. R., 9 Eq. 401.

(w) First ed. p. 463.

(x) *Tilly v. Collyer*, 3 Keb. 589.

there being no express devise to her. But, on the other side, it was contended that S. was sole heir; for, it was all one to devise to her as to make a stranger heir of his land; and here the daughter S. was not sole heir unless made so by the intent of the will, which six times called the eldest daughter his heir; otherwise A., the younger daughter, would have equal share in the land and also the legacies. Lord C. J. Hale—"The testator was mistaken in his intent that the eldest daughter was his heir, but intended his lands should go according to that mistake; also she that is called heir is to pay the portions to the younger daughters, and no provision is made for her. Therefore, albeit there is no express devise to S., yet, she being named his heir, this is sufficient to exclude the rest, and to make her sole heir" (y).

But in *Gould v. Gould* (z) Romilly, M.R., declined to infer from the testator describing his nephew as his heir-at-law that he meant him to take under a devise to "my customary heir," although that construction was supported by another part of the will.

An erroneous recital or statement as to the devolution of property will not operate to prevent it from being included in a residuary gift. These cases are considered elsewhere (a).

It is explained in Chap. XXX., sect. iv., that a clear bequest made in consequence of a mistake on the part of the testator is, nevertheless, as a general rule, effective.

The dispositions of a will may be modified by a codicil shewing a clear indication of the testator's intention to make some disposition inconsistent with the dispositions of the will, even if the disposition in the codicil is preceded by an erroneous recital of the dispositions of the will. Thus in *Re Margitson* (b) a testator by his will gave to his daughter an estate tail in his real property, and an absolute interest in his personal property. By a codicil, after reciting that his daughter would take an estate for life in his property with remainder to her issue, he directed that the life estate should be for her separate use, that she should have a power of appointing a life estate to a husband, and that if she should have more than one son, and her eldest son should inherit certain property, then her second son should succeed to the property, given by the will; it was held that the estates given by the will were modified by the codicil.

Misrecital
of will by
codicil.

(y) See *Tayler v. Web*, Sty. 301, ante, p. 455, note (l); *Parker v. Nickson*, 1 D. J. & S. 177. Compare *Jackson v. Craig*, 15 Jur. 811.

(z) 32 Bea. 391.

(a) Chaps. XXV. and XXIX.

(b) 48 L. T. 172.

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"But the disposition of a will," as Mr. Jarman points out (c), "will not be disturbed by an erroneous recital of its contents in a codicil, unless a design to revoke or modify the disposition in the will can be fairly collected from the whole instrument.

Erroneous reference in codicil to the disposition of the will.

"Thus, where (d) a testator, after bequeathing certain legacies to his wife, devised to her for her life certain leasehold premises at Northwood, and he gave his leasehold estate at Wrentnall, and his estate at Northwood, after his wife's death, and the residue of his estate, to other persons. In a codicil, executed on the same day, he directed that the bequest to his wife in his will should be in full of all her claims on his estate, except the estate for life of his 'wife and her assigns, in the premises at Wrentnall, anything in the foregoing will to the contrary notwithstanding.' It was contended, that the widow was entitled to the Wrentnall estate, under her husband's codicil, it being manifest by the concluding clause that he intended to give her something to which she had no right by the will; but the Court decided against the widow's claim. Lord Kenyon said, that the intention must be collected from the will and codicil taken together, and it was impossible not to see that the word 'Wrentnall' was written in the codicil instead of the word 'Northwood.'"

So in *Vaughan v. Foakes* (e), where a testatrix bequeathed the residue of her estate to A., and by a codicil, reciting that gift, and that A. might die before her, she in that case appointed B. and C. her residuary legatees; and afterwards the testatrix made a second codicil to her former one, as follows:—"As the death of Mrs. W. [the mother of B. and C.] has taken place, and as her two children will ultimately become my residuary legatees, the 15*l.* she was to have I give to D." It was held by Lord Langdale, M.R., that the first codicil was not disturbed by the second. "There is a misrecital," he said, "of what she had previously given; she recites that as an absolute which is only a contingent gift; if the word *may* had been used, instead of *will*, the recital would have been in exact conformity with the prior gift."

Misrecital of disposition in the same instrument.

But this principle of construction is not confined to the case of a will and codicil; it has also been applied to a misrecital occurring in the same instrument as the disposition sought to be disturbed.

(c) First ed. p. 464.

(d) *Skerratt v. Oakley*, 7 T. R. 492.

(e) 1 Kce. 58; see also *Bamfield v. Popham*, 1 P. W. 54, 2nd point; *Re Smith*, 2 J. & H. 594; *Re Arnold's Estate*, 33 Beav. 163; *Richardson v.*

Power, 19 C. B. N. S. 780 (on same will); *Mackenzie v. Bradbury*, 35 Beav. 617; *Cosby v. Millington*, 38 L. J. C. P. 373; *Nugent v. Nugent*, 8 Ir. Ch. R. 78. Compare the cases of additional legacies given by codicil, ante, p. 625.

Thus, in *Smith v. Fitzgerald* (f), where a testator bequeathed several legacies to be paid out of the debt owing to him from the Nabob of A., and if any of the legatees died before him he gave their legacies to S., and “after all the legacies are paid (except those mentioned from the Nabob’s debt, as they may require time) all such balance as shall remain overplus (exclusive of the Nabob’s, willed to S.) to be equally divided among the trustees,” it was held by Sir W. Grant, M. R., that the residue of the debt not exhausted by the legacies was not given to S. by implication. He said: “The language refers to something as already done, something that he had given or supposed he had given to S. If in the preceding part there was nothing that could in any way answer the description of what he here says he had willed to S., there would then be room for the application of the doctrine, that a declaration by a testator that he had given something is sufficient evidence of an intention to give it, and amounts to a gift; but the question here is, whether he did not mean to describe, however inaccurately, that which he had before actually given. Without denying that the recital of a gift as antecedently made may amount to a gift, the Court ought to see very clearly that there is nothing in the will to which the recital can refer, before it is turned into a distinct bequest.”

Where, however, the terms of the prior disposition are themselves ambiguous, their construction may properly be guided by a recital, couched in more precise language, in a codicil. Thus, in *Darley v. Martin* (g), where a testator bequeathed leaseholds to A. for life, and after her death to her issue, and “in default of such issue,” to B.; and, by a codicil, recited that he had bequeathed the leaseholds to B. after the death of A. and “in default of her leaving lawful issue”; it was held, that the gift over in the will being capable of importing a bequest over if no issue were living at the death, it ought to be inferred that the testator employed it in that sense, because in the codicil he referred to it as if it were a gift over in default of A.’s leaving issue.

Ambiguity in will controlled by recital in codicil.

II.—Implication from Devices and Bequests on Death of a Person simply.—1. *As to Real Estate.*—“It is a well-known maxim,” says Mr. Jarman (h), “that an heir-at-law can only be disinherited

1. Doctrine of implication as to real estate.

(f) 3 V. & B. 2; see also *Phillips v. Chamberlaine*, 4 Ves. 51.

[1904] 2 Ch. 52.

(g) 13 C. B. 683; see also per Lord Brougham, 10 Cl. & Fin. 17; *Grover v. Raper*, 5 W. R. 134; *Re Venn*,

(h) First ed. p. 465. The leading case on the doctrine in question is *Gardner v. Sheldon*, Vaughan, 259; Tudor, L. C. (4th ed.), p. 388.

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by express devise or necessary implication, and that implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed (*i*). In the application of this principle one chief topic of controversy has been, how far a devise to any person, in the event of the non-existence or on the decease of another, indicates an intention to make the last-named person a prior object of the testator's bounty. In such cases it is probable that the person, whose non-existence is made the contingency on which the devise over is to fall into possession, is placed in this position for the purpose of taking the property in the first instance; and this probability is, of course, greatly strengthened, if the devisee is the person on whom the law, in the absence of disposition, would cast the property. Hence it has become a settled distinction, that a devise to *the testator's heir* after the death of A., will confer on A. an estate for life by implication; but that, under a devise to B., *a stranger*, after the death of A., no estate will arise to A. by implication (*j*). This is an exact illustration of the difference between necessary implication and conjecture. In the former case, the inference that the testator intends to give an estate for life to A. is irresistible, as he cannot, without the grossest absurdity, be supposed to mean to devise real estate to his heir at the death of A., and yet that the heir should have it in the meantime, which would be to render the devise nugatory. On the contrary, where the devisee is not the heir, however plausible may be the conjecture, that by fixing the death of A. as the period when the devise to B. was to take effect in possession, the testator intended A. to be the prior tenant for life, yet it is *possible* to suppose that, intending the land to go to the heir during the life of A., he left it for that period undisposed of. In some cases, indeed, we find it laid down without any qualification, that a devise to B. upon the death of A., raises an implied estate in A.; but such dicta, even if accurately reported (which is often doubtful), cannot weigh against the current of authorities, grounded on acknowledged principles of law (*k*).

Devise to the heir after the death of A. gives A. an estate by implication.

(*i*) 1 V. & B. 466; "necessary implication is that which leaves no room to doubt," per Lord Mansfield, in *Jones v. Morgan*, Fearn, C. R. App. No. III.; and see 3 Ves. 113. "There is hardly any case where implication is of necessity, but it is called necessary, because the Court finds it so to answer the intention of the devisor," per Lord Hardwicke, *Conynton v. Helyar*, 2 Cox, 348, cited by Knight Bruce, L.J., 6 D. M. G. 554.

(*j*) Year Book, 13 Hen. 7. fol. 17;

Bro. Ab. Dev. pl. 521; 8 Vin. 214, pl. 5; 2 Freem. 270; T. Jon. 98; Vaugh. 263; 1 Eq. Ab. 197, pl. 6; 1 Vern. 22; 2 Vern. 572; 5 Ves. 804; 18 Ves. 40; 1 Mer. 414; 1 S. & St. 544; 5 B. & Ald. 722; 9 B. & Cr. 218; but see contra, 1 P. W. 472; 2 Eq. Ab. 343, pl. 5, 363, pl. 14, which seems inconsistent with, and is overborne by, the mass of authorities. The point, indeed, was not definitely disposed of.

(*k*) *Ex parte Rogers*, 2 Mad. 449. See also *Den d. Franklin v. Trout*, 15 East,

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Devisee need not be described as heir.

Whether devisee must be heir at the death.

To one of several coheirs.

“Of course, it is not essential to the doctrine that the will should describe the devisee as the heir apparent or heir presumptive of the testator. Thus, a devise ‘to my eldest son B. after the death of A.’ would raise an implied estate for life in A., the fact being that B. is the heir apparent, though not designated as such. The authorities do not distinctly inform us, however, whether, in order to raise the implication, the devise must be to the person who, according to the state of events at the making of the will, would be the testator’s heir, or the person who eventually becomes such. The former seems to be the preferable doctrine; for to treat it as applying to the eventual heir, would be to construe the will according to subsequent events, in opposition to a fundamental principle of construction. If, therefore, a testator having two sons, A. and B., devise real estate to B. (the younger son) after the decease of his (the testator’s) wife, this would not, it is conceived, give to the wife an estate for life by implication, though it should happen that, by the decease of A., the elder son, without issue in the testator’s lifetime, the younger son (i.e. the devisee) had become his heir. On the other hand, if a testator, whose issue was an only daughter, devised real estate to such daughter after the death of his wife, and it happened that he had a son afterwards born, who survived him, the sound conclusion would seem to be, that the wife *would* take an implied estate for life, though the ulterior devisee was not in event the testator’s heir; the result, in short, being that the implication occurs wherever the express devise is to the person who is the testator’s heir apparent or presumptive at the date of the will, and not otherwise (*l*). Perhaps, when the distinction between a devise to the heir and to a stranger was originally established, the difficulty attending the application of the doctrine to an heir or heiress presumptive, who is liable to be superseded by the birth of a son of the testator, was not sufficiently considered.

“It has been said that the implication arises in the case of a devise as well to one of several coheirs, as to a sole heir; and, therefore, that where a man devises to one of his two daughters (his coheirresses), after the death of his wife, she (the wife) takes an estate for life by implication (*m*). This, it must be admitted, is a considerable extension of the doctrine, and carries it beyond the

394, where, however, the person in whose favour it was said the implied gift would have been raised, was himself heir, and the point, therefore, could not have arisen.

(*l*) See acc. per cur. *Ralph v. Carrick*, *infra*.

(*m*) *Hutton v. Simpson*, 2 Vern. 723; s. c. nom. *Simpson v. Hornsby*, Gilb. Eq. Rep. 115.

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principle on which it is founded, since there seems to be not the same absurdity in supposing a testator to give to *one* of his coheirresses after the death of another person, intending it to descend to *all* in the meantime, as where the devisee is the same and the *only* individual upon whom the intermediate interest would have descended. The point, too, rests rather on *dictum* than decision, for the case in which Lord Cowper advanced this position was decided upon another point, and it is not to be found in the contemporary reports of the same case; but it was referred to *arguendo* as a settled rule of law in another case" (n).

Hutton v. Simpson, however, is not really an authority on the point, for it appears from the fuller report in Gilbert that some of the lands were expressly devised to the wife for life, and that after her death all the lands were devised to the daughters successively; the distributive construction was therefore adopted (o).

In *Re Willatts*, the testator gave his wife power "to sell all property and land belonging to me, and at her death what is left to be divided between my two daughters by my second wife." He had five daughters, who were his coheirresses. It was held by Farwell, J. (p), that the gift being to two only of the coheirresses, the wife did not take an estate for life by implication, or any other interest, but the Court of Appeal (q) held that on the true construction of the will the wife took an estate for life, with power to expend any part of the capital as she might think fit, what was left at her death going to the two daughters.

Devise to heir
and others
after the
death of A.

In cases which are the converse of the last, viz., where there is a devise to the heir and other persons after the decease of A., the implication does not arise, because, as Mr. Jarman points out (r), "there is no incongruity in the supposition that the testator intended the heir to take a share at the period in question, and the entirety in the meantime." Thus in *Ralph v. Carrick* (s), a

*Ralph v.
Carrick.*

(n) *Willis v. Lucas*, 1 P. W. 472.

(o) Post, pp. 633 seq. See *Dyer v. Dyer*, 1 Mer. 414. The point was decided as to personal estate in *Re Springfield*, [1894] 3 Ch. 603, following the principle laid down in *Ralph v. Carrick*, *infra*.

(p) [1905] 1 Ch. 378.

(q) [1905] 2 Ch. 135. The order was made by consent.

(r) First ed. 468.

(s) 5 Ch. D. 984; 11 Ch. D. 873. The earlier cases of *Blackwell v. Bull*, 1 Keen, 176 (referred to with implied

disapprobation by Mr. Jarman, 1st ed. 468); *Bird v. Hunsdon*, 2 Sw. 342, and *Humphreys v. Humphreys*, L. R., 4 Eq. 475, some of which related to personal estate, or a mixed fund of real and personal estate, are referred to in the judgment of Hall, V.-C.; in so far as they profess to lay down a doctrine inconsistent with the decision in *Ralph v. Carrick*, they may be considered as overruled. As to *Blackwell v. Bull*, *Cockshott v. Cockshott*, 2 Coll. 432, and *Barnet v. Barnet*, 29 Bea. 239, see post, p. 648.

testator gave all his real and personal property to his executors, with full power to sell and convert, and upon trust out of the proceeds to pay debts and legacies, and directed that in the event (which happened) of his death without lawful issue, and after the death of his wife and payment of debts and legacies, the whole residue of his property real and personal should be divided in specified proportions among the children of his late aunts (naming them), the descendants of any child then dead taking the share of its deceased parent; and he directed the surplus proceeds of his real estate to be invested to provide for the jointure payable to his wife under their marriage settlement. It was held that, although the testator's coheirs and next of kin were included among the children of his aunts, the wife did not take a life estate by implication. Sir C. Hall, V.-C., relied on the circumstance of the gift being to an unascertained class, and also on the clause expressly providing for payment of the wife's jointure out of the very fund in which she claimed a life estate, as repelling the implication. But the L.JJ. (affirming the decision of the V.-C.) proceeded entirely on the general principle that a devise to the heir and another after the death of A. will not raise a life estate by implication in A.: for as heir he takes the whole, while as devisee he takes a share only. The same principle must, it should seem, govern the case of a devise after the death of A. to one of several coheirs.

Mr. Jarman next proceeds to deal with a number of cases which were decided by the rule of construction known as *reddendo singula singulis*, and in some of which the question of implication did not really arise. "Where," he says (*t*), "there is an anterior express devise for life of part of the lands to the person on whose decease the devise in question is to take effect, the implication has been sometimes avoided by having recourse to what may, for convenience of distinction, be called the distributive construction, by which the words *after the death* are applied exclusively to the lands devised expressly for life; and the words of devise, without these expressions of postponement, are applied to the rest of the property, which, therefore, passes immediately to the devisees: a construction which, doubtless, was adopted in the first instance on account of the improbability that a testator should intend a person

Distinction where there is an express anterior devise of part to the person on whose death devise is to take effect.

(*t*) First ed. p. 469. It will be noticed that in *Cook v. Gerrard* and *Doe v. Brazier* no question arose as to whether the person on whose decease the devise

was to take effect took an estate by implication: these cases merely illustrate the doctrine of distributive construction.

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to whom he had expressly given part, to take the rest by implication. But the rule seems not to have been restricted (as this reasoning would imply) to cases in which the devise over is to the heir, but has obtained where such devise was to a stranger, and in which, as the estate would, if the devise were postponed, devolve to the heir in the meantime, and not belong to the devisee for life by implication, there would seem to be no reason for denying to the words of postponement their full effect, in regard to all the subjects of devise.

Cook v.
Gerrard.

“ Thus, in *Cook v. Gerrard* (*u*), where the testator, Sir R. Kempe, being seised of demesne lands in fee, and also of the reversion of other lands expectant on the death of A., directed that his wife should have the demesne lands for one year after his death; and then, after stating that he was desirous to continue the capital messuage in the name and blood of the Kempes, he devised the demesnes and the reversion to B., habendum immediately from the expiration of one year next after his decease, and the decease of A., for the life of B., he doing no waste. The testator further directed that B. should, after the death of A., pay three annuities of 20*l.* each by half-yearly payments. The testator died, and the year expired. It was contended that, in order to effect the intention of the testator, the words must be taken distributively: First, because if the lands descended to the testator’s daughter and heir, she might change her name by marriage, and then his intention that the demesne lands should remain in the name of the Kempes would be defeated. Secondly, if A. died within the year after the testator, the annuities given by the will could not be paid, unless B. took the land immediately after the death of A. notwithstanding the year was not expired (*v*). And, thirdly, if the demesne lands should descend to the heir in the meantime, until the death of A., then he might commit what waste he pleased, and there would be no means to prevent it, which would be directly against the true meaning of the testator. The Court of K. B. held that the words of the will should be taken distributively, and that B. had good title to the demesne lands after the expiration of the year, and before the death of A.

Simpson v.
Hornsby.

“ So, in *Simpson v. Hornsby* (*w*), where a testator devised to his

(*u*) 1 Saund. 183, cited 9 B. & Cr. 225.

(*v*) This argument supposes, that if both were postponed for the life of A., then both would be postponed for the year.

(*w*) Gilb. Eq. R. 115, 120, s.c.

Simpson v. Hornsby, 1 Pre. Ch. 439, 452, s.c. *Hutton v. Simpson*, 2 Vern. 722; stated from R. L., 9 B. & Cr. 228; see also *Boon v. Cornforth*, 2 Ves. sen. 276, where, however, the construction was aided by the context.

wife for life all his lands in J., *and after the death of his wife*, he devised all his lands in J., *and certain other lands, and all other his real estate whatsoever*, to his daughter B. and the heirs of her body, with remainder to his daughter J. for life, with remainder to his first and other sons in tail. Lord Cowper was of opinion that the wife took nothing by implication, and that she was entitled to a life estate in only those lands which were expressly devised to her; and that the rest of the real estate was intended to pass by the will immediately to B.

“Again, in *Doe d. Annandale v. Brazier* (x), where the testator gave to B. the rents of a messuage situate in A., for his life, *and after the decease of the said B.*, he gave the same rents, *together with* the rents of all his other houses and lands in A. aforesaid, unto certain persons for their lives and the life of the survivor, with remainder over. The question was, whether these devisees were entitled to the *other* lands at A. immediately on the testator’s decease, or not until after the death of B.; and it was decided that the words ‘from and after the decease of the said B.’ were to be confined to the lands devised to B. for his life, and did not postpone the interest of the devisees in question in the rest until that period (y).

“A different construction, however, prevailed in *Aspinall v. Petvin* (z), where a testator devised his real estate to trustees, in trust to pay one moiety of the rents to his wife E. for life, and the other moiety to his son W. (who was his heir at law), *and after the death of his said wife*, upon trust to convey the said hereditaments unto W. in fee; but if he died without issue in the lifetime of the wife, then, upon trust, *after the death of the wife*, to convey the same to testator’s nephew J. in fee. W. died without issue in the lifetime of the wife; and the question was, whether J. was entitled immediately to the moiety of the rents not expressly devised to the wife, and, if not, whether she did not take it by

(x) 5 B. & Ald. 64.

(y) See also *Dyer v. Dyer*, 1 Mer. 414; *Drew v. Killick*, 1 De G. & S. 266, (where the words of the will seemed to point to the distributive construction); *Simmons v. Rudall*, 1 Sim. N. S. 115, (devise in fee with executory gift over to strangers of that “together with” the residue).

(z) 1 S. & St. 544. “It was ingeniously argued in this case that, as J. was heir, as well to the testator as to W., in the events on which the estate was given to him, namely, the death to

W. without issue, it came within the principle of the case of an estate given to the heir after the death of the widow; but the answer to this reasoning is, that in those events the vacant interest did not necessarily devolve upon J., as W. in his lifetime might have devised or otherwise aliened it, and, consequently, the argument founded on the absurdity of his taking both did not apply.” (Note by Mr. Jarman.) But see *Doe d. Driver v. Bowling*, 5 B. & Ald. 722.

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implication (a). Sir J. Leach, V.-C., after very clearly laying down the general rule as before stated, considered this to be the common case of a devise to a stranger after the death of A.; and that, accordingly, no estate was raised in E. by implication, but the moiety in question for her life descended to the testator's heir at law.

Remarks on
Aspinall v.
Petwin.

"It is remarkable that the point suggested by the class of cases under consideration was not presented to the view of the Court in this case, namely, that the words referring to the death of the wife applied exclusively to the moiety before devised to her, and did not prevent W. (aa) from taking the other moiety immediately; but, perhaps the frame of the will scarcely admitted of such a construction. The words 'after the death of my wife' had been just before used in reference to both moieties in the devise to the son, and the terms of the *executory trust* seemed to import that no conveyance was to be made to J. until the death of the wife.

Distributive
construction
not the
general rule.

"This decision, therefore, appears not to clash or interfere with the preceding cases, which might seem to have established the distributive construction as the ordinary rule; but we are taught not so to consider them by a decision, in which all the cases in favour of this construction were treated as standing on special grounds, and as constituting an exception to the general rule.

King v.
Ringstead.

"The case here alluded to is *King v. Inhabitants of Ringstead* (b), where a testator devised to the widow of his late son T. M. part of a messuage, to hold to her and her assigns for the term of her natural life, if she should so long continue a widow; *and from and after her decease, or day of marriage*, he gave the same and *other real property therein mentioned*, unto the four children of his late son T. M., deceased, their heirs and assigns for ever. It was contended, on the authority of the preceding cases, that the words were to be construed distributively, and, consequently, that the children took an immediate estate in possession in the property not devised to the wife; but the Court, after taking an elaborate view of those cases, and showing that in each of them the intention of the testator, as collected from the context of the will, required such a construction, considered that they did not apply to the will under discussion, where the words must be construed in their ordinary grammatical sense. It was held, therefore, that, until the death or marriage of the son's widow,

(a) "No arguments appear to have been advanced in favour of the hypothesis, that if the widow did not take, it descended to the heir."

(aa) Thus in Mr. Jarman's text; but "W." seems to be a misprint for "J."

(b) 9 B. & Cr. 218. See *Rhodes v. Rhodes*, 7 App. Ca. 192.

the estate not devised to her descended to the testator's heir at law. CHAPTER XIX.

"It will be perceived that, as in this case the widow took no implied estate, (the express devise on her decease or marriage not being to the heir of the testator,) the construction adopted by the Court did not involve the difficulty of giving by implication to a person, in the lands not expressly devised to her, an estate corresponding to that which she derived in the lands so devised, in opposition to the maxim, *expressio unius est exclusio alterius*. Had it been attended with this result, the conclusion of the Court might have been different. Possibly the distributive construction will, in future, be (as it ought originally to have been) restricted to such cases; but, considering how extremely slight is the difference of language in the will which was the subject of adjudication in *King v. Ringstead*, and in some of the preceding cases, particularly *Simpson v. Hornsby*, it must be confessed that *King v. Ringstead* does not place the doctrine on such a footing as to exclude future controversy."

Remarks
upon *King*
v. Ringstead.

In *Attwater v. Attwater* (c) a testator gave to his cousins A. and B. his freehold house and premises, for their use during the life of each; and at the decease of both gave the same to C., together with his copyhold and leasehold property at N. Sir J. Romilly, M.R., said that although there was considerable conflict between the authorities, he considered that the case was governed by the rule laid down and settled by *King v. Ringstead*; that C. therefore took nothing in the copyholds and leaseholds until after the decease of both A. and B., and that the customary heir (who was also sole next of kin) took the intermediate interest.

King v. Ring-
stead followed.

However, a few years later, in *Lill v. Lill* (d), where after gifts to A. B. and C. for their several lives, there was a gift "after their decease" of the same property, together with all the residue of the testator's estate, to the children of X., Romilly, M.R. applied the distributive construction, holding that "after their decease" merely meant that the gift to the children of X. was subject as to the specifically devised property to the life interests of A., B. and C. The learned judge pointed out that "it would be a very strained and inconvenient construction to arrive at the other conclusion" (e).

King v. Ring-
stead not
followed.

(c) 18 Beav. 330. See also *Davenport v. Coltman*, 9 M. & W. 481, 12 Sim. 588, where, however, the distributive construction was not suggested, and the income during the wife's life was not claimed by the daughters.

(d) 23 Bea. 446, distinguished in *Jennings v. Hanna*, [1904] 1 Ir. R. 540.

(e) *Attwater v. Attwater* was apparently not cited, so that the implied condemnation by the M.R. of his decision in that case was unconscious.

CHAPTER XIX. And in *Rhodes v. Rhodes* (*f*), the Privy Council, in applying the distributive construction to the will before them, referred to *Rex v. Ringstead* in terms of covert disapprobation.

Effect of residuary devise in excluding the implication arising from devise to heir. Mr. Jarman continues (*g*): "The position that a devise to the heir after the death of A. creates in A. an implied estate for life, supposes that the will does not contain a residuary devise; for a clause of this nature would, by disposing of such intermediate estate, and thereby intercepting the descent to the heir, clearly exclude all ground for the implication. Thus, if a testator devises Whiteacre to his heir apparent or heir presumptive after the death of his wife, and in the same will devises the residue of his real estate to A., (a stranger,) since the estate for life, not included in the devise to the heir, would, if no implied gift were raised, pass to A. as real estate not otherwise disposed of, which might possibly be intended, the residuary devisee, and not the wife, would, it is conceived, take the estate during her life (*h*).

Application of doctrine to residuary devises. "Another remark is, that where the will contains a residuary disposition of real estate, a devise of particular lands to the residuary devisee, to take effect in possession on the decease of another person, supplies exactly the same argument for implying an estate for life in that person, as a similar devise, in the cases already discussed, to the heir; for to suppose that the testator intends lands, which he has specifically devised to the residuary devisee at the death of A., to go to him in the meantime under the residuary clause, involves precisely the same absurdity as to suppose that an heir is intended to take immediately what is expressly given to him at a future period; and therefore, in the case supposed, A. would, undoubtedly, have an estate for life by implication."

Doctrine of implication in regard to personal estate. 2. *Doctrine of implication in regard to personal estate*.—Mr. Jarman continues (*i*)—"The general principles before stated, as governing the doctrine of implication in regard to real estate, it is conceived, are applicable to bequests of personal estate, including terms for years; although certainly the reason on which the doctrine is professedly founded, namely, that the heir is not to be disinherited by any implication other than a necessary one, applies exclusively to real estate (*ii*).

(*f*) 7 A. C. 192.

(*g*) First ed. p. 474.

(*h*) *Stevens v. Hale*, 2 Dr. & Sm. 22; *James v. Shannon*, Ir. R., 2 Eq. 118.

See *Re Rawlins's Trusts* (*Scalé v. Rawlins*), post, p. 677.

(*i*) First ed. p. 477.

(*ii*) It may be doubted whether there

"In an early case (*g*), it was held by three justices, that if a man gave a term to his son after the death of the wife of the testator, this shall not raise any estate in the wife, because it does not appear that his intent was so, inasmuch as the son ought not to have it by the law by the death of the testator without any devise, but the executor.

"But in *Doe d. Bendale v. Summerset* (*k*), where A possessed of a term of ninety-nine years, determinable on the lives of his daughter B. and J. S., bequeathed the premises to his daughter M. after the death of his daughter B., during the life of J. S.; Willes and Blackstone, JJ., held that B. took an estate for life by implication. A strong probable implication was, they said, sufficient: it need not be a necessary implication. Willes, J., it is said, spoke slightly of the case in *Moore*; and Blackstone, J., still more slightly of the case in *Croke James*, which, he observed, was not determined, but was only upon a collateral point.

"If *Doe v. Summerset* is to be considered as identified with a proposition that the bequest of a term of years to B. after the death of A. gives a life interest to A. by implication, it is as difficult to reconcile it with *Horton v. Horton* as with sound principle."

Observations upon *Doe v. Summerset*.

It was indeed followed by Stuart, V.-C., in *Humphreys v. Humphreys* (*l*) but both cases were in effect overruled by *Ralph v. Carrick* (*m*), which shews that the analogy between a devise of real estate to the heir, and a gift of personal estate to the next of kin, after the death of A., is complete. If, therefore, a testator bequeaths personalty after the death of A. to his (the testator's) next of kin, A. takes a life interest by implication (*n*). But if the gift after A.'s death is to strangers (*o*), or is to the testator's next of kin along with other persons, or to persons who happen to be

is now any difference in this respect between real and personal estate, for the true reason of the doctrine above stated by Mr. Jarman is that no person's interest should be displaced by conjecture, and this applies equally to next of kin: *Pickering v. Stamford*, 3 Ves. 492; ante, p. 550.

(*j*) *Horton v. Horton*, Cro. Jac. 74; s. c. nom. *Burton v. Horton*, 8 Vin. Ab. 214, Dev. (Pa.) pl. 3 (a case before the Executors Act, 1830; see Chap. XXI.). See also *Rayman v. Gold*, Moore, 635, where, however, the point did not arise, as the wife, at whose death the property was devised, was appointed

executrix, and became entitled *quâ-cunque viâ*.

(*k*) 5 Burr. 2608. The correct name of the case is *Roe d. Bendale v. Summerset*.

(*l*) L. R., 4 Eq. 475.

(*m*) 5 Ch. D. 984, 11 Ch. D. 873, stated ante, p. 632.

(*n*) *Stevens v. Hale*, 2 Dr. & Sm. 22. The cases of *Cock v. Cock*, 21 W. R. 807, and *Davies v. Hopkins*, 2 Bea. 276, appear to have been decided on this principle.

(*o*) See *Cranley v. Dixon*, 23 Bea. 512.

CHAPTER XIX. some (but not all) of his next of kin, this does not give A. a life estate by implication (*p*).

In *James v. Shannon* (*q*) a testator gave all his real estate, including chattels real, in trust for B. and her heirs; if B. died under the age of twenty-one years and unmarried, he gave all his property to A.; he bequeathed a legacy of 500*l.* to A.; it was contended that B. took an absolute interest in the pure personal estate by implication, defeasible on her death under twenty-one and unmarried, but it was held that there was nothing to give her any interest in the personalty by implication, and that in any case any presumption in her favour was excluded by the provision made for her by the will.

Bird v.
Hunsdon.

Mr. Jarman appears (*r*) not to have approved of the decision in *Bird v. Hunsdon* (*s*), where a testator directed, after payment of debts and legacies, the residue of his money to be put into government security, and the interest to be paid to bring up and educate M., adding, "the said M. to have the interest so long as she continues single and no child; and when it shall please God to call her, that money shall come to my brother's and sister's children, all share alike." M. married and had a child; nevertheless, she was held to be entitled to the income during the remainder of her life. Sir T. Plumer, M.R., observed, that the testator contemplated three periods: "First, he gives the interest for maintenance, that is, during minority; and, again, for maintenance after minority, while she lives single and has no child. To the third period, the interval between her marriage and her death, there are no words expressly applicable; but the interest being first given to a favoured object, and the capital not given over till the death of that person, the Court is driven to the necessity of saying either that there is intestacy during the remainder of her life, or that she is to take during her whole life. The latter seems the more reasonable alternative."

The decision has been frequently cited in support of claims to a life interest by implication, but does not appear to have been followed in any modern case of authority (*t*).

3. *Implication may be rebutted.*—No implication of a life estate,

(*p*) *Ralph v. Carrick*, *supra*; *Re Springfield*, [1894] 3 Ch. 603; *Woodhouse v. Spurgeon*, 52 L. J. Ch. 825; *Greene v. Flood*, 15 L. R. Ir. 450.
(*q*) Ir. R., 2 Eq. 118, approved in *Harris v. Du Pasquier*, 26 L. T. 689.

(*r*) First ed. p. 479.
(*s*) 2 Sw. 342. See *Blackwell v. Bull*, 1 Kee. 176.
(*t*) *Sarel v. Sarel*, 23 Bea. 87; *Brown v. Jarvis*, 2 D. F. & J. 168; *Ralph v. Carrick*, *supra*.

in the cases above referred to, arises where the gift after the death of the cestui que vie is to the testator's heir (or next of kin) and there is a residuary devise (or bequest) to some other person (*u*), or where the gift takes the form of an appointment under a power, and the instrument creating the power contains a gift over in default of appointment (*v*). In a clear case, such as that of a devise of land to the testator's heir after the death of A., the fact that the testator gives other property to A. does not prevent A. from taking an estate for life in the land by implication (*vv*). But in a doubtful case, the fact that the will makes an express provision for the person on whose death the gift is to take effect (*w*) tends to rebut any implication of a life interest. The implication does not arise if the will, after a direct gift to a class of persons, directs that no division shall take place until the death of A. (*x*).

As to devises
in the first
instance to
survivors.

4. *Gifts to Survivors*.—Mr. Jarman continues (*y*): “As a devise to a stranger after the death of A. creates no estate in A. by implication in the meantime, it might seem to follow that a devise to the survivor of several persons would not raise an estate by implication in the whole during their joint lives; but, in the actual state of the authorities, it would be hazardous to advance any such proposition, seeing that, in one instance at least, a different construction prevailed, though certainly not without some aid from the context. A testator (*z*) devised lands at T. to trustees, in trust to receive the rents and profits during the lives of his four daughters and the survivor of them; and ‘afterwards to pay such rents and profits to and among such survivor, and the child or children of such my daughters who shall first happen to die; and from and immediately after the decease of my said four daughters, my will is, that they do sell the premises, and pay the monies arising therefrom, in four equal parts’ to the children of his daughters. By a subsequent clause, he bequeathed his chattels among his children, except his daughter

(*u*) *Stevens v. Hale*, 2 Dr. & Sm. 22. Compare *Cranley v. Dixon*, 23 Bea. 512.

(*v*) *Henderson v. Constable*, 5 Bea. 297.

(*vv*) Per Vaughan, C.J., in *Gardner v. Sheldon*, Vaughan, 259, citing 13 Hen. VII.

(*w*) *Stevens v. Hale*, *Cranley v. Dixon*, *supra*; *James v. Shannon*, Ir. R., 2 Eq. 118, *supra*. Compare *Cockshott v. Cockshott*, 2 Coll. 432, post, p. 648.

(*x*) *Barnet v. Barnet*, 29 Bea. 239.

The M.R. seems to have treated the direction as meaningless and nugatory.

(*y*) First ed. p. 475.

(*z*) *Saunders v. Lowe*, 2 W. Bl. 1014. For other cases in which the implication arising from the whole will was held to be equivalent to, and to supply the place of a direct gift, see *White v. Barber*, 5 Burr. 2703; *Browne v. De Laet*, 4 Bro. C. C. 527; *Crowder v. Clowes*, 2 Ves. jun. 449; *Wainwright v. Wainwright*, 3 Ves. 558.

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H., who was only to receive three shillings a week during her life, or 'until her distributory share were exhausted,' out of his estate at T., for her separate use. The Court was clearly of opinion that the testator never intended to leave all his daughters without any provision until three of them were dead; and with reference to the subsequent clause, which showed that his daughter H. was in his opinion entitled for life, they held all the daughters to take.

As to implication of devise to survivors.

"Cases the converse of the preceding have sometimes occurred, namely, where the income is expressly disposed of during the joint lives of several co-devisees or co-legatees only, with a gift over on the decease of the survivor, thus leaving unprovided for the destination of the intermediate interest accruing in the interval between the determination of the joint lives and the death of the survivor. In several such cases (a), the interest in question has been held to belong to the survivors, either under an implied gift to them, or in virtue of the right of survivorship incident to a joint tenancy; and the latter seems to have been the chosen ground of determination, though this result was only attainable by the rejection of words which, unless controlled by the context, would have had the effect of making the co-devisees or co-legatees tenants in common.

"In *Townley v. Bolton* (b), the bequest was in these words: 'I give to my sister M. T. and her husband G. S. T. 50*l.* per annum Long Annuities for their joint lives, and after their decease, to go to my own nephew, C. P.' Sir J. Leach, M.R., held, that the gift over being after the decease of the husband and wife, it was plain that the testator intended that the survivor should be entitled.

"Here, too, it is doubtful whether the survivor became entitled by the effect of the implication of a gift in remainder for life, expectant on the determination of the joint lives, or as surviving joint tenant for life, the words 'for their joint lives' (which otherwise would have determined the interest of both on the death of either) being rejected. The latter appears to have been the ground taken in the arguments at the bar" (c).

(a) *Tuckerman v. Jeffries*, 4 Bac. Abr. Gwillim's ed. 467; *Armstrong v. Eldridge*, 3 Br. C. C. 215; *Pearce v. Edmeades*, 3 Y. & C. 246; all stated post, Chap. XLIV.; *Cranswick v. Pearson*, 31 Beav. 624; *Kelsey v. Ellis*, 38 L. T. 471; *Chatfield v. Berchtoldt*, 18 W. R. 887. But see *Re Drakeley's Estate*, 19 Beav. 395; *Stevens v. Pyle*, 28 Beav.

388; and other cases cited, Chap. XLIV.

(b) 1 My. & K. 148; see also *McDermott v. Wallace*, 5 Beav. 142; *Moffatt v. Burnie*, 23 L. J. Ch. 591; *Draycott v. Wood*, 8 L. T. 304; *Day v. Day*, Kay, 703; *Jennings v. Hanna*, [1904] 1 Ir. R. 540.

(c) As to gifts to two persons for their joint lives, see Chap. XLIV.

So in *Re Buller* (d) a gift of income to A., B. and C. in equal sums for life and "on their deaths" over, was held to make the income payable to the survivors and survivor. And in *Re Telfair* (e) where there was a gift of income to A. and B. "in equal parts, that is to say, that they shall each receive the half amount of the interest during their natural lives," with a gift over after "their deaths," was held to entitle the survivor by implication to the whole income during her life.

A narrower construction prevailed in *Rownd v. Pickett* (f) where a testator gave A. and B. "each a moiety" of certain income "and at the death of the last survivor" gave the property over: it was held by Bacon, V.-C., that on the death of A. there was an intestacy as to one moiety of the income.

In *Armstrong v. Eldridge*, and some other cases (g) in which a gift of the whole income to the survivors and survivor of two or more tenants for life was implied, the gift over after the death of the tenants for life was to their children, and this did not affect the construction. But in other cases the Court has laid hold of slight indications of an intention in favour of the children, and has held that on the death of each tenant for life his share goes to his children (h).

In *Jones v. Randall* (i), a testator bequeathed an annuity, upon trust for A. for life, and after her death to pay and divide the same amongst the children of A. who should happen to survive her, in equal shares if more than one child, and if but one child, then to such only child; such annuity to be paid during the lives of such children, and the life of the survivor of them. It was contended that the survivors were entitled by implication; but Sir T. Plumer, M.R., held that the argument, that because the annuity was for the life of the survivors, therefore the survivors were to take, amounted only to conjecture; the words in question only described how long the annuity was to last; they determined the subject-matter of the bequest, regulating the duration, but not the persons to participate in it: and the children took as tenants in common an annuity for their lives and for the life of the survivor.

Annuity to several for lives of them and survivor.

So in *Bryan v. Twigg* (j), a bequest of an annuity to the children

(d) 74 L. T. 406.

(e) 86 L. T. 496.

(f) 47 L. J. Ch. 631.

(g) *Pearce v. Edmeades*, 3 Y. & C. 246; *Alt v. Gregory*, 8 D. M. & G. 221; *Begley v. Cook*, 3 Dr. 662, and other cases cited post, Chap. XLII.

(h) *Hawkins v. Hamerton*, 16 Sim. 410; *Doe d. Patrick v. Royle*, 13 Q. B. 100.

(i) 1 Jac. & W. 100.

(j) L. R., 3 Ch. 183. See also L. R., 3 Eq. 433 (similar bequest in the same will): *Eales v. Earl of Cardigan*, 9

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of J. B. equally share and share alike, for and during the term of their joint natural lives or the life of the survivor of them, was held by Sir J. Rolt, L.J., to make the children tenants in common of an annuity which was to endure until the death of the survivor; so that on the death of one his share went to his representatives. With reference to *Armstrong v. Eldridge* and similar cases (*k*), he said that where the duration of the annuity was not clearly defined, a gift over on the death of the survivor was material, but was immaterial where the duration of the annuity had already been distinctly marked out as extending till the death of the survivor; and that it was important to observe that in none of those cases were the representatives of the deceased annuitants parties to the suit.

Implication
from express
gift on death
combined
with some
contingency.

III.—Implication from Gift on Death combined with some Contingency, &c.—Mr. Jarman continues (*l*): “Hitherto the doctrine of implication has been viewed chiefly in its application to the simple case of devise or bequest on the decease of some person or persons; but it is obvious that the principle may come under consideration in a somewhat more complex form, as where the event, upon which the express devise is to take effect, is the death of a person, combined with some other contingency. For instance, in the case of a devise to B. in the event of A. dying under age; in which case, as there is no devise to A. in the alternative event of his attaining his majority, the question arises, whether he can take the fee (*m*) by implication in such event. If B. were the testator’s heir apparent or presumptive, there would be no difficulty in arriving at the affirmative conclusion; the case then being evidently analogous to that of a devise to the heir, to take effect in possession on A.’s decease, which, we have seen, raises an estate for life in A. By parity of reason, it would seem that a devise to a stranger, in the event of A. dying under age, supplies no more valid ground for holding A. to take an estate in fee by implication, than is afforded for the implication of an estate for life to a person on whose decease the lands are devised to a stranger: for a testator *may* intend the fee to descend to the heir on the alternative contingency of A. attaining his majority. And, perhaps, the authorities rightly considered, do not militate against this hypothesis, for though an

Sim. 384; *Kelsey v. Ellis*, 38 L. T. 471; and Chaps. XXXI. and XLIV.

(*k*) Vide ante, n. (*g*).

(*l*) First ed. p. 480.

(*m*) As to the old law, see *Doe v. Cundall*, 9 East, 400, and other cases referred to in Chap. XLV.

estate in fee was held, in one instance, to arise by implication under such a devise to a person who was not the testator's heir (*n*), yet the construction was founded on reasoning partly derived from the context.

"Thus, in *Goodright d. Hoskins v. Hoskins* (*o*), a testator bequeathed unto his son Richard certain leasehold premises called S., to hold the same unto his said son Richard until his (R.'s) son Thomas should attain the age of twenty-one years, and no longer; but in case his said son Thomas should die in his minority, then the testator gave the said leasehold premises unto John and Richard, sons of the said Richard, or either of them, attaining the age of twenty-one years as aforesaid; and he desired that his premises at S. might be quitted and delivered up as aforesaid by his said son Richard; and the testator, in a certain event, revoked, but otherwise confirmed, the said bequest of S. and the other legacies given to his son Richard's family. Thomas attained twenty-one, and was held to be entitled: Lord Ellenborough relying much upon the direction that the premises should be *quitted and delivered up as aforesaid* by the testator's son Richard, that is, when Richard's son Thomas came of age, to Thomas; 'for to whom else' (said his Lordship) 'could Richard deliver up the possession in that event?' (*p*).

Gift implied from limitation over if the object died under twenty-one.

"But might not these words (which merely imported *by* whom the premises were to be delivered up) have been satisfied by their delivery up to *any* person entitled under or *dehors* the will? Unless Thomas were to become entitled at twenty-one, the limitation over, in case he died under that age, was certainly very absurd, and the case may be considered as somewhat analogous in principle to those in which a devise has been enlarged to a fee by such a devise over (*q*).

Remark upon *Goodright v. Hoskins*.

"This case was much relied on in *Davis v. Davis* (*r*), in support of the argument for raising an implied gift to the testator's daughter, from the following words:—'It is my wish that my brother S. be my executor, to arrange, dispose of, and settle all my affairs; and I appoint him guardian to my daughter.' Sir J. Leach, M.R., decided in favour of the implication. He said that it was plain it was not the intention of the testator that his brother should take a beneficial interest, but that he should only arrange and

Davis v. Davis.

(*n*) Mr. Jarman's description of the case, it will be seen, is not quite accurate, as the property in question was leasehold.

(*o*) 9 East, 306.

(*p*) Lord Ellenborough also relied on *Roe v. Summerset*, which is clearly bad law; see ante, p. 639.

(*q*) Vide Chap. XLV.

(*r*) 1 R. & M'y. 645.

CHAPTER XIX. settle his affairs ; and, from his appointment as guardian to the daughter, it was to be implied that the arrangement and settlement was to be for her benefit ; but Lord Brougham, on appeal, reversed this decree, his Lordship conceiving that there was nothing in the language or provisions of the will from which a bequest to the daughter could be safely and reasonably implied. He observed that the cases of *Newland v. Shephard* (s) and *Goodright v. Hoskins* (the former of which had been often questioned (t) and the latter had been rested by Lord Ellenborough on special grounds), fell far short of this."

Absolute gift at twenty-one implied from limitation until twenty-one and gift over on death under that age.

The analogy suggested above is closer where there is in the first place an estate devised to be enlarged. Thus in *Cropton v. Davies* (u), where a testator devised three houses to trustees upon trust, as to the first, for his daughter A., her heirs and assigns ; as to the second, for his daughter B., her heirs and assigns ; and, as to the third, to apply the rents for the advancement and benefit of his granddaughter C. until she attained twenty-one, but in case she should die under that age, then he devised the same to A. and B. and their heirs as tenants in common : all the residue of his real and personal estate he devised to X., Y., and Z. C. attained twenty-one, and the Court of C. P., without saying that the devise alone would have raised a fee by implication, thought that, looking to it and to the other provisions together, the intention was clear to give C. the whole interest in the third house, to go over to A. and B. only in an event which had not happened. If this were not so, the strange consequence would follow that if C. died under twenty-one the house would go over to A. and B., whereas if she attained twenty-one it would go over to the residuary legatees, who were other persons. Such an intent the Court thought could not be presumed from the structure and language of the will.

In *Tomkins v. Tomkins* (v) there was nothing but a bare devise "to his brother in trust for his eldest son B. till he should attain twenty-one, and, if he should die before twenty-one, then a devise over"; yet it was held that on attaining twenty-one B. took

(s) 2 P. W. 194. In this case (which is often cited), a testator gave the residue of his real and personal estate to trustees, upon trust to apply the income for the maintenance of his grandchildren during minority, but went no further. Lord Macclesfield—"The intention is most plain, that the grandchildren should have the surplus, both

of the real and personal estate, after their age of twenty-one."

(t) 3 Atk. 316. "I say nothing as to whether it was rightly decided," per Wood, V.-C., 2 J. & H. 128.

(u) L. R., 4 C. P. 159.

(v) As cited by Lord Mansfield, 1 Burr. 234.

the whole by implication. So, in *Gardiner v. Stevens* (w), where leaseholds were bequeathed "in trust for A. and B. till B. is twenty-five years old, and in case they, A. and B., should die before B. attains twenty-five," then over, it was held by Wood, V.-C., that, on B. attaining twenty-five, A. and B. became absolutely entitled in equal moieties. And in *Wilks v. Williams* (x) the same judge treated it as clear that upon a devise or bequest of real or personal estate, upon trust for the child or children of any person until they attain twenty-one, followed by a gift over to a third person in case the children do not live to attain twenty-one, the children, if they live to attain twenty-one, take absolutely. The case itself went somewhat further. The testatrix desired her trustees to invest the residue, and gave the interest to A. and B. equally, and at their decease the dividends were "to be continued to their children till they come to the age of twenty-one." There was no gift over, but the testatrix added, "I constitute and appoint C. and D. trustees for the said A. and B. and their children." The children were held to take absolutely on attaining twenty-one; for the trust during minority was complete without the last clause, which therefore must be looked upon as indicating that, after the children attained twenty-one, the trust for their benefit was still to continue.

But, of course, the children will not take an absolute interest by implication, if in the same event there is an express gift to them of a less interest (a). And it has been held that the event upon which the gift over is to take effect must exactly correspond with that upon which the limited trust is to cease. If the gift over depends on a further collateral event, as on death under twenty-one and unmarried, the implication does not arise (b). And where (c) the trust during minority was for the minor and his mother, with a gift over to her if he died under twenty-one, Sir R. Kindersley, V.-C., held that there was not enough to shew that the minor, if he attained twenty-one, was to be benefited exclusively of his mother.

Other examples of estates by implication arising from a testator having provided for only one of two contingencies will be found in *Re Betty Smith's Trusts* (d) and *Re Blake's Trust* (e). In the latter case a testator gave personalty in trust for a married woman for

When this implication fails.

Other examples of contingency, expressly provided for, not occurring.

(w) 30 L. J. Ch. 199.

(x) 2 J. & H. 125. In *Paylor v. Pegg*, 24 Bea. 105, it was held that the son took by descent.

(a) *Savage v. Tyers*, L. R., 7 Ch. 356.

(b) Ibid.

(c) *Fitzhenry v. Bonner*, 2 Drew. 36.

(d) L. R., 1 Eq. 79.

(e) L. R., 3 Eq. 799.

CHAPTER XIX. life, and after her decease, if she left children, in trust for her husband for life, and after his decease upon trust to divide it among the children, but if no child, then upon trust, after the decease of the husband and wife, for other persons absolutely: it was held that the husband took a life estate by implication after the death of the wife, although there were no children.

In *Isaacson v. Van Goor* (*f*), there was a gift of income to A., one of the testator's three daughters, with a direction that if either or both of the other two should become widows she or they should participate equally with A. in the income, so that the same should be enjoyed by his said daughters and the survivors or survivor of them during their or her lives or life, with a gift over of the capital upon the death of the last survivor: A. died leaving her two sisters and their husbands surviving her, and Bacon, V.-C., refused to imply a life interest in them.

Implication
of life estate
from scheme
of whole will.

It is hardly necessary to say that if the scheme of a testator's will shews a clear intention to give A. a life estate in his property, effect will be given to that intention, even in the absence of express words. Thus, in *Cockshott v. Cockshott* (*g*), the testator disposed of the various portions of his property among his children, without making any express provision for his wife, except that in the event of her ceasing to occupy a certain farm belonging to the testator, his sons should pay her 25*l.* a year during widowhood; all the provisions in favour of the children were expressly directed not to take effect so long as she remained a widow, and it was held by Knight Bruce, V.-C., that she took an interest during widowhood in all the testator's estate.

Hall, V.-C., seems to have approved of this decision in *Ralph v. Carrick* (*h*). He also seems to have thought that the decision in *Blackwell v. Bull* (*i*) and similar cases might be supported on the ground that "the interest of the widow was more or less connected with the carrying on of a business and supporting a family, which seems to have been a sort of indication as to how the property was to be enjoyed during her life."

In *Acheson v. Fair* (*j*), personal property was given "in trust to the use of A. to be disposed of by him" by deed or will among certain persons: it was held that A. took a life estate by implication, chiefly on the ground that an express estate for life in other property had previously been given to him.

(*f*) 42 L. J. Ch. 193.

(*g*) 2 Coll. 432.

(*h*) 5 Ch. D. at p. 995. See also *Barnet v. Barnet*, 29 Bea. 239,

where Romilly, M.R., refused to apply the principle of *Cockshott v. Cockshott*.

(*i*) 1 Keen, 176; ante, p. 632.

(*j*) 3 Dr. & W. 512.

In *Re Willatts* (*k*) a testator appointed his wife A. and X. executors of his will, and after giving his wife all his household effects absolutely proceeded: "and at my death A. to have power to sell all property and land belonging to me, and at her death what is left to be divided between M. and N": it was held by the Court of Appeal (reversing Farwell, J.) that this gave A. a life interest, with power to expend any part of the capital as she might think fit, and that M. and N. were entitled to what might remain at A.'s death.

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Gift of "what is left" at the death of A.

IV.—Implication of Trust.—"Where a testator gives several distinct subjects of disposition to trustees, and then proceeds to dispose of the equitable or beneficial interest in terms applicable to one of those subjects only, there is no necessary implication that he intended the legal and equitable disposition to be co-extensive, though it may be highly probable that he did so, and more especially when the omitted subject is convenient (though not essential) to the enjoyment of the other (*l*).

No implication that equitable is to be co-extensive with legal disposition.

"As in *Stubbs v. Sargon* (*m*), where a testatrix devised to trustees and their heirs her copyhold dwelling-house, (wherein she principally resided,) garden and ground, *together with the furniture and effects therein*, and the coach-house and stable thereto belonging, and also the ten cottages, and two new cottages built by her, with their appurtenances, at L., upon trust, that the trustees and the survivors, &c., and the *heirs* or assigns of the survivor, should pay the rents of the said *hereditaments* to her niece S. S., the wife of G. S., or permit and suffer her to use and occupy the said *hereditaments* during her life, to the intent that the same hereditaments, and the rents, issues, and profits thereof, might be for her separate use; and after her decease to G. S. for his life; and after his decease, upon trust, that the trustees and the survivors and survivor of them, and the *heirs* or assigns of such survivor, should be possessed of and interested in the said hereditaments, in trust for such of the testatrix's nephews and nieces, or grand-nephews and grand-nieces, as S. S. should appoint; and in default of appointment, upon trust that the said trustees and the survivors and survivor of them, or the heirs or assigns of such survivor, should sell and dispose of the said hereditaments and premises (*n*). And the testatrix directed that the produce of such

(*k*) [1905] 1 Ch. 378; 2 Ch. 135, and see the case cited on another point, ante, p. 632. The order was made by consent.

(*l*) Mr. Jarman, first ed. p. 483.

(*m*) 2 Kee. 255, 3 My. & Cr. 507; compare this case with *Ackers v. Phipps*, 9 Bli. N. S. 430, 3 Cl. & Fin. 665.

(*n*) "The addition of the word 'premises,' in this instance, afforded ground

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sale should constitute part of her residuary personal estate. The will contained a general residuary clause (o). Lord Langdale, M.R., held that the furniture and effects did not pass to S. S., but belonged to the residuary legatees, the testatrix having, in the statement of the trusts, employed words only applicable to the real estate; and Lord Cottenham, on appeal, was of the same opinion, observing that it was probable the testatrix intended that the furniture and effects should accompany the copyholds, but she had omitted to declare such to be her intention.

Omission to dispose of equitable interest not cured by implication.

“So, in *Jackson v. Noble* (p), where a testator gave certain freehold, copyhold, and leasehold estates (particularly describing them) and 1,000*l.* Three per cent. stock, to trustees, their heirs, executors, administrators and assigns, to hold the last-mentioned *freehold and leasehold* estates and stock unto the trustees, their heirs, executors, administrators and assigns, in trust for his daughter A. for life, for her separate use; and after her decease, upon trust, to convey and assign the several last-mentioned freehold and leasehold estates and 1,000*l.* stock unto the heirs, executors, administrators and assigns of A. And the testator empowered his daughter to grant leases of the freehold and leasehold estates so given to her. Lord Langdale held that as the testator had omitted all mention of the copyhold estates after the devise to the trustees, he could not consider them as comprised in the trust.”

Implication from discretionary trust.

In many cases where property is given to trustees with power to apply it for the benefit of A., in terms which imply that the exercise of the power is left to the discretion of the trustees, it has been held that a trust is created for the benefit of A., whether the trustees exercise the power or not. These cases are considered in another chapter (q).

Gifts implied from powers of selection or distribution.

V.—Implication from Powers. (1) *Powers of Selection or Distribution.* “Implied gifts may be and often are created by powers of selection or distribution in favour of a defined class of objects; for, where property is given (r) to a person for life, and after his or her decease to such children, relations, or other defined objects as he or she shall appoint, or among them in such shares as the donee

for extending the ultimate trust, unless restricted by the preceding trusts to the furniture; but as the proceeds under this trust were to form part of the residuary personal estate, the point was immaterial.”

(o) “This fact is to be assumed, but is not stated in the report.”

(p) 2 Kee. 590.

(q) Chap. XXIV.

(r) The same rule applies where the power of selection or distribution is created by the exercise by the testator of a general power vested in him: *White v. Wilson*, 1 Drew. 298.

shall appoint, and there is no express gift over to these objects in default of appointment, such a gift will be implied; the presumption being, that the testator could not have intended the objects of the power to be disappointed of his bounty, by the neglect of the donee to exercise such power in their favour" (s).

But the implication only arises where there is some indication that the testator intends the class (or some of the class) to take: in other words, where the power is in the nature of a trust (t); it does not arise from a mere power of appointment. Thus in *Re Weekes' Settlement* (u) a testatrix bequeathed to her husband a life interest in certain real property, and give him "power to dispose of all such property by will amongst our children"; the will contained no gift over in default of appointment; there were children, but the husband died intestate without having exercised the power, and it was held that there was no gift to the children by implication. It follows that the implication does not arise where the donee of the power has a discretion whether he shall exercise it or not (v). Nor does it arise where the objects of the power are vague and uncertain (w), or where the testator expressly says that he does not intend to provide for them by his will (x), or where the whole beneficial interest in the property is given to a person in the first instance, with a superadded power to appoint to certain objects (y). But the fact that the property is given to the donee of the power for her sole and separate use does not prevent the implication (z).

Power must be in the nature of a trust.

Where implication does not arise.

The leading authorities usually cited for the proposition stated by Mr. Jarman are *Brown v. Higgs* (a), and *Harding v. Glyn* (b).

(s) Mr. Jarman, first ed. p. 485. The early cases of *Crossling v. Crossling*, 2 Cox, 396, and *Duke of Marlborough v. Godolphin*, 2 Ves. sen. 61, which are opposed to this construction, would probably be decided differently at the present day; see Sugd. Pow. 8th ed. 592.

(t) See *Wilson v. Duguid*, 24 Ch. D. 244; *Moore v. Ffolliot*, 19 L. R. Ir. 499.

(u) [1897] 1 Ch. 289, following *Healy v. Donnelly*, 3 Ir. C. L. Rep. 213. See also *Ahearne v. Aherne*, 9 L. R. Ir. 144; *Re Hall*, [1899] 1 Ir. R. 308.

(v) *Re Eddowes*, 1 Dr. & Sm. 395. Some passages in the judgment of Wood, V.-C., in *Joel v. Mills*, 3 K. & J. 458, seem to be not quite consistent with principle. See Chap. XXIV.

(w) *Bernard v. Minshull*, Johns. 276.

(x) *Carberry v. M'Carthy*, 7 L. R. Ir. 328.

(y) *Brook v. Brook*, 3 Sm. & G. 280. See *Re Brierley*, 43 W. R. 36, where a testator gave property to his wife for life, with a power of appointing part of it among his relatives or next of kin, and made her residuary legatee, and it was held that this did not amount to an absolute gift to her with a super-added power of appointment. In *Gray v. Gray*, 11 Ir. Ch. R. 218, the decision did not turn wholly on the words of the will.

(z) *Re Haly's Trusts*, 23 L. R. Ir. 130.

(a) 4 Ves. 708; 5 Ves. 495; 8 Ves. 561.

(b) 1 Atk. 469. See also *Doyley v. A.-G.*, 2 Eq. Ca. Abr. 195; *Longmore v. Broom*, 7 Ves. 124; *Birch v. Wade*, 3 V. & B. 198; *Cruweys v. Colman*, 9 Ves. 319; *Forbes v. Ball*, 3 Mer. 437; *Witts v. Boddington*, 3 B. C. C. 95; *Walsh v.*

CHAPTER XIX. In *Brown v. Higgs* the bequest was, "to such children of my nephew S., as my nephew I. shall think most deserving, and that will make the best use of it, or to the children of my nephew W., if any such there are, or shall be." I. died in the lifetime of the testator. Sir R. P. Arden, M.R., and subsequently Lord Eldon, after great consideration, held the children to be entitled under the implied trust. And this decision was affirmed in D. P.

Implied gift in one, not precluded by express gift in another, event.

"And the implication, it seems (c), is not repelled by the circumstance that the testator has expressly given the property to the persons who are objects of the power, in the event of the donee dying before him (d); which event, it is to be observed, would have prevented the power from arising; so that the express gift and the implied one are alternative and not inconsistent.

Implication precluded by express gift in same event.

"An express gift over in default of appointment, in favour of either the objects of the power or any other person, of course precludes all implication" (e), even if the gift over is void for remoteness (f). But a residuary gift is not a gift over for the purposes of the foregoing proposition (g). And a gift over in default of objects of the power does not prevent an implication in their favour from arising (h).

Objects of power and implied gift must be identical.

"A gift arising *by implication* from a power of selection or distribution," as Mr. Jarman points out (i), "applies to the persons who are objects of the power, and to them only; and consequently, if the appointment is to be testamentary, the gift takes effect in favour of the objects living at the decease of the donee, to the exclusion of any who may have died in his lifetime, and who of

Wallinger, 2 R. & My. 78; *Grievson v. Kirsopp*, 2 Kee. 653; *Jones v. Torin*, 6 Sim. 255 (as to which see ante, p. 613, n. (z)); *Martin v. Swannell*, 2 Beav. 249; *Fenwick v. Greenwell*, 10 ib. 412; *Fordyce v. Bridges*, 10 Beav. 90, 2 Phil. 497; *Burrough v. Philcox*, 5 My & Cr. 72; *Faulkner v. Lord Wynford*, 15 L. J. Ch. 8, s.c., *Falkner v. Lord Wynford*, 9 Jur. 1006; *Penny v. Turner*, 15 Sim. 368, 2 Phil. 493; *Alloway v. Alloway*, 4 D. & War. 380; *Salisbury v. Denton*, 3 K. & J. 535; *Joel v. Mills*, ib. 474; *Reid v. Reid*, 25 Beav. 469; *Izod v. Izod*, 32 Beav. 242; *Re Caplin's Will*, 2 Dr. & Sm. 527; *Re Haly's Trusts*, 23 L. R. Ir. 130; *Acheson v. Fair*, 3 Dr. & W. 512.

(c) Mr. Jarman, first ed. p. 485.

(d) *Kennedy v. Kingston*, 2 J. & W. 431.

(e) *Pattison v. Pattison*, 19 Beav. 638; *Roddy v. Fitzgerald*, 6 H. L. Ca. 823; *Goldring v. Inwood*, 3 Gif. 139; *Re Lyons and Carroll*, [1896] 1 Ir. R.

383. In *Re Jeffery's Trusts*, L. R., 14 Eq. 136, Malins, V.-C., is reported as having laid down a different rule of construction in such cases, viz., that the words "in default of such appointment" must be read as "in default of children" notwithstanding that there is an express gift over; but the decision of the Vice-Chancellor, if correctly reported, and intended to be of general application, is overruled by the decision of the Court of Appeal in *Richardson v. Harrison*, 16 Q. B. D. 85; see the observations of Lord Esher, M.R., at p. 103, where the passage in the text is cited by his lordship as rightly laying down the law on this point.

(f) *Re Sprague*, 43 L. T. 236.

(g) *Re Brierley*, 43 W. R. 36; where the general doctrine was much discussed; *Re Hall*, supra.

(h) *Butler v. Gray*, L. R., 5 Ch. 26.

(i) First ed. p. 486.

course could not have been made objects of an appointment by will" (j). Consequently if all the objects die in the donee's lifetime, no gift at all can be implied (l). On the other hand, if the power is exercisable by any writing, the objects of the power will take even if they predecease the donee (k), unless upon the true construction of the instrument creating the power the objects of it are required to be living at a deferred period, in which case the implied gift in default will also be to those persons only (l).

"And it should seem," Mr. Jarman continues (m), "that a gift arising by implication from a power of selection or distribution in favour of *relations*, will apply exclusively to the relations living at the death of the donee, even though the power is not in terms confined to an appointment by will" (n). But whether this principle applies except where the donee of the power is also tenant for life, is not clear (o).

In *Carthew v. Enraght* (p) the testator directed his trustees after the death of A. to divide 1,000*l.* equally between such ten of the descendants of a certain person as the trustees should think fit; there were only six descendants living at A.'s death: it was held that the 1,000*l.* was divisible among them equally.

Lord St. Leonards doubted who would be the proper person to take by implication, in the case of a power to appoint to one only of a class (q), and previous editors of this work have drawn from his remarks the conclusion that in such a case, "if any gift

Power to
appoint to
one person
only of a class.

(j) *Walsh v. Wallinger*, 2 R. & My. 78; as to *Kennedy v. Kingston*, 2 J. & W. 431, and *Freeland v. Pearson*, L. R., 3 Eq. 658, see 13 Ch. D. 189. In *Falkner* (or *Faulkner*) v. *Wynford*, 15 L. J. Ch. 8, the power was to appoint by deed or will, and, consequently, the gift by implication was not restricted to the objects living at the decease of the donee. See also *Wilson v. Duguid*, 24 Ch. D. 244. As to what words create a testamentary power of appointment, see Chap. XXIII. An express gift in default of appointment applies to the same class of persons as a simple gift unconnected with any power, *Pattison v. Pattison*, 19 Beav. 638; *Richards v. Davies*, 13 C. B. N. S. 69, 861.

(k) *Wilson v. Duguid*, 24 Ch. D. 244; *Cole v. Wade*, 16 Ves. 27.

(l) *Halfhead v. Shepherd*, 28 L. J. Q. B. 248; *Re White's Trusts*, Johns. 656; *Re Phene's Trusts*, L. R., 5 Eq. 346; *Winn v. Fenwick*, 11 Beav. 438; *Stothworthy v. Sancroft*, 33 L. J. Ch. 708; *Lambert v. Thwaites*, L. R., 2

Eq. 151; *Re Veale's Trusts*, 4 Ch. D. 61; *Moore v. Ffolliot*, 19 L. R. Ir. 499.

(m) First ed. p. 486.

(n) *Att.-Gen. v. Doyley*, 4 Vin. Abr. 485; and see the observations of Chitty, J., on this case, in *Wilson v. Duguid*, 24 Ch. D. 251. See also *Harding v. Glyn*, 1 Atk. 469, cited 5 Ves. 501; *Birch v. Wade*, 3 V. & B. 198. The case of *Pope v. Whitcombe*, as reported, 3 Mer. 689, is contra, in regard to a power of distribution; but as corrected from R. L., Sugd. Pow. 8th ed. pp. 663, 953, is an authority on the same side. *Finch v. Hollingsworth*, 21 Beav. 112, and *Re Patterson*, [1899] 1 Ir. R. 324, are to the same effect.

(o) The question is considered more in detail post, Chap. XLI.

(p) 20 W. R. 743.

(q) Sugden on Powers, 8th ed. 593. In this edition the last sentence of the paragraph as printed is unintelligible. In the 6th ed. it runs as follows: "Which one would be the proper *cestui que trust*, or the person in whose favour the implied gift was made?"

CHAPTER XIX. could be implied in default of appointment, it ought to be to one person only of the class; but as no gift can be implied to one more than another, it seems that none of the class can take by implication" (r).

But the Court would no doubt avoid this construction if possible. In *Sinnott v. Walsh* (s) a testator gave freeholds to his two sons, and directed that if either of his sons should die without issue, his part of the property should fall "to whatever existing member of my family he may be disposed to will it to." This term was held to be *nomen collectivum*, authorizing a testamentary appointment to one or more persons, and the power not having been exercised, the property went to the testator's three children living at the date of his will.

Mode of
division.

The persons in whose favour a gift by implication takes effect take as tenants in common in equal shares (t). In the absence of a trust for conversion out and out, they take the property as they find it (u).

Where a person has a power to direct part of a fund to be applied to charitable purposes and to divide the remainder among the testator's relatives, and the donee of the power dies without having exercised it, the bequest is not void for uncertainty, but the Court will divide the fund in equal moieties, and give half to charitable purposes and half to the testator's relatives (v).

If the subject of the implied gift resulting from a power of selection or distribution be real estate of inheritance, the implication confers an estate in fee, if the power authorizes the limitation of estates in fee (w).

Life interest
not implied
in donee from
power of dis-
tribution.

Although a power of selection or distribution is usually preceded by the reservation of a life interest to the donee, yet such a gift, where omitted, will not be implied. Thus, it was decided that where a testatrix, after bequeathing her property to her mother, requested her to leave 500*l.* to each of her (the testatrix's) sister A.'s children, (and some legacies to other persons,) and the remainder to her sister B., "to dispose of among her children as she may think proper," B. herself took no interest (x).

Distinction
where there is
a direct gift.

But a gift arising by implication must be distinguished from

(r) Messrs. Wolstenholme and Vincent in the 3rd ed. of this work, p. 516.

(s) 5 L. R. Ir. 27.

(t) *Re White's Trusts*, Johns. 656; *Wilson v. Duguid*, supra.

(u) *Walter v. Maunde*, 19 Ves. 424.

(v) *Salisbury v. Denton*, 3 K. & J. 529.

(w) *Bradley v. Cartwright*, L. R., 2 C.

P. 511. And see *Casterton v. Sutherland*, 9 Ves. 445; *Crozier v. Crozier*, 3 D. & War. 383; *Whitelaw v. Whitelaw*, 5 L. R. Ir. 120.

(x) *Blakeney v. Blakeney*, 6 Sim. 52. See *Hudleston v. Gouldsburg*, 10 Bea. 547; *Ramsden v. Hassard*, 3 Br. C. C. 236.

those cases where there is a direct gift to a class, coupled with a power of selection or distribution : in such a case the property vests in all the members of the class, subject to being divested by an exercise of the power, and therefore the gift is not restricted to those members who are living at the decease of the donee. Thus, in *Lambert v. Thwaites* (y) real estate was settled upon trust for the children of W. in such shares as he should by will appoint : there were seven children living at the date of the settlement, one of whom died before W., who died without having executed the power ; it was held that the representatives of the deceased child were entitled to his share.

(2) *Other Powers*.—A gift is sometimes implied from a power of transferring property to a certain person, or of settling or applying it for his benefit. Thus, in *Wheeler v. Warner* (z), a testator bequeathed a fund to trustees upon trust for his daughter while she remained single, and he declared that if she married with the consent of the trustees, they should transfer to the husband for his sole use such part of the fund, not exceeding one-third, as they thought proper ; the daughter married during the testator's lifetime, and it was held by Leach, M.R., that the husband was entitled to one-third of the fund.

Discretionary power.

But a mere power does not give rise to any gift by implication. Thus, in *Bull v. Vardy* (a), a testator empowered his wife "to give away at her death 1,000*l.* ; to A. and B., 100*l.* each, the rest to be disposed of by her will." It was held that in the absence of a disposition by the wife, A. and B. were not entitled to anything.

Power of disposition.

The distinction stated above with reference to powers of selection or distribution, applies also to the kind of powers now under consideration. Thus, in *Lancashire v. Lancashire* (b), the testator devised real estates to two persons upon trust in either of two events to settle the same or such part thereof as they should think proper upon S. L. and her children, with remainder to the use of A. L. and her heirs, and as to such parts as the trustees should not think fit so to settle, with respect to which the testator gave them absolute discretion, upon trust to convey the same to S. L., her heirs, &c., absolutely. S. L. died after the happening of one of the events, but before any settlement was made : it was held

Absolute interest subject to discretionary power.

(y) L. R., 2 Eq. 151. Compare *Carthew v. Enraght*, 20 W. R. 743, ante, p. 653.

7 Ch. D. 633.

(a) 1 Ves. jun., 270.

(z) 1 S. & S. 304. Followed by *Malins, V.-C.*, in *Tweeddale v. Tweeddale*,

(b) 1 De G. & Sm. 288, on appeal, 2 Ph. 657.

CHAPTER XIX. that the will contained an absolute gift to S. L., subject to being intercepted by an exercise of the discretion vested in the trustees, and that this not having been exercised, the heir at law of S. L. was entitled.

Implication
of estates tail.

VI.—Implication of Estates Tail.—Mr. Jarman continues (c): “It remains to consider the implication of estates tail. According to the doctrine which has been the subject of discussion in the second section, it is not to be doubted, that if lands were devised to the testator’s heir apparent or heir presumptive in fee in case A. should die without issue, (which, if the will were made before 1838, would import a *general* failure of issue (d),) this would make A. tenant in tail, with reversion in fee to the testator’s heir—the event described being precisely that which would involve the extinction of an estate tail; and it being impossible to suppose that the testator could intend to make a devise to take effect at a future period, to the very person who would in the absence of disposition take the property by act of law, without intending that it should in the meantime devolve to some other person. The reports, however, do not present exactly such a case.

“It has been long settled, however, that a devise in a will which is regulated by the old law, to a person indefinitely, or to a person and his heirs, with a limitation over in case he die without issue, confers an estate tail, on the ground that the testator has, by postponing the ulterior devise until the failure of the issue of the prior devisee, afforded an irresistible inference that he intended that the estate to be taken by the prior devisee under the indefinite devise, should be of such a measure and duration as to fill up the chasm in the disposition, and prevent the failure of the ulterior devise, which, as an executory devise to take effect on a general failure of issue, would, of course, be void for remoteness. According to some early cases, however, an express estate for life cannot be so enlarged into an estate tail by implication, on the ground that implication can only be admitted in the absence of, and never in contradiction to, an express limitation.” But the contrary was

Whether an
express estate
for life can be
enlarged to an
estate tail by
implication.

(c) First ed. p. 487. I have not thought it desirable to interfere with Mr. Jarman’s treatment of this subject, but it will be obvious to the reader that it is closely connected with the questions dealt with in Chaps. XLVII. and LII., and that in some ways it would have been more convenient if the whole subject had been treated of in one chapter.

(d) Under the old law before the Wills Act, 1 Vict. c. 26, words referring to death without issue were generally held to import an indefinite failure of issue. What force of context was requisite to explain them to be used in any other than this their ordinary sense was a subject of much intricacy from the accumulation of authorities. See post, Chap. LII.

well established in Mr. Jarman's time by numerous decisions (e). CHAPTER XIX.
Mr. Jarman continues (ee):

"A devise, in a will which is governed by the old law, to a person and his heirs, followed by a limitation over in case of his dying without issue, confers an estate tail, on the ground that the testator has, by the words introducing the limitation over, explained himself to have used the word 'heirs' in the preceding devise in the qualified and restricted sense of heirs of the body.

Devise to A. and his heirs, and if he die without issue, over.

"And it is to be observed, that where the person, on whose general failure of issue a devise is expressly made expectant, is the heir-at-law of the testator, he becomes, by the application of the rule under consideration, tenant in tail by implication, in precisely the same manner as if there had been a prior devise to him and his heirs in the will.

Rule where person whose issue is referred to is heir-at-law of testator.

"If, however, the person, in default of whose issue the estate is given over (or the person to whom it is so given), be not the heir-at-law of the testator, and if the former take no prior estate under the will susceptible of enlargement or modification from these words, an estate will not accrue to him by implication; and consequently the devise, to take effect on the contingency in question, is void for remoteness, as an executory devise limited to arise after an indefinite failure of issue (f). It follows, that if lands, by a will made before 1838, be devised to A. and his heirs, and in case A. and another person die without issue, then over, A. takes an estate in fee simple absolute, the devise over being, for the reason just assigned, incapable of taking effect (ff).

(e) Per Parker, L.C., *Blackborn v. Edgley*, 1 P. W. 605; *Langley v. Baldwin*, 1 P. W. 759; *Stanley v. Lennard*, 1 Ed. 87; *Att.-Gen. v. Sutton*, 1 P. W. 754; 3 B. P. C. 75; *Doe d. Bean v. Halley*, 8 T. R. 5; *Machell v. Weeding*, 8 Sim. 4; *Parr v. Swindels*, 4 Russ. 283; *Key v. Key*, 4 D. M. & G. 73; *Andrew v. Andrew*, 1 Ch. D. 410; *Re Bird and Barnard's Contract*, 59 L. T. 166. The following cases, which bear on the doctrine of the old law stated in the text, will be found referred to in the 4th edition of this work; *Bamfield v. Popham*, 1 P. W. 54; *Goodright v. Goodridge*, Willes, 369, 7 Mod. 453; *Daintry v. Daintry*, 6 T. R. 307. See *Doe d. Cape v. Walker*, 2 M. & Gr. 113; *Parker v. Tootal*, 11 H. L. C. 143.

(ee) First ed. p. 490. Mr. Jarman does not cite any authority for the proposition that, under the old law, a devise to A. and his heirs, with a limitation over in the event of his dying

without issue, gave A. an estate tail, but the doctrine is recognized in the cases cited in note (e). On the same principle, a devise to two men or two women, and their heirs, with a limitation over in the event of their death without issue, made them, under the old law, joint tenants for life with several inheritances in tail: *Forrest v. Whiteway*, 3 Exch. 367; *Stanhouse v. Gaskell*, 17 Jur. 157.

(f) Ante, p. 321.

(ff) It has not been thought necessary in this edition to reprint Mr. Jarman's remarks on the cases of *Scrape v. Rhodes*, Com. Rep. 542; *Gardner v. Sheldon*, Vaugh. 259; *Tenny v. Agar*, 12 East, 252; *Romilly v. James*, 6 Taunt. 263, and *Doe v. Lucraft*, 1 Moore & Sc. 573, which relate to this branch of the subject: they will be found in the 4th and earlier editions of this work.

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Effect of stat.
1 Vict. c. 26,
upon the
implication of
estates tail.

“No implication of an estate tail can arise from words importing a failure of issue, in a will made or republished since the year 1837, unless an intention to use the phrase as denoting an indefinite failure of issue be very distinctly marked (*g*), as the stat. 1 Vict. c. 26, s. 29, provides, that such words shall be held to mean a failure of issue in the lifetime or at the death of the person referred to, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise; and it is also provided, that the act shall not apply to cases where the words import, if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue (*h*).

Distinction
where prior
devise is in
fee or
indefinite,
and where
expressly for
life.

“Under this clause, coupled with the preceding section, which makes a devise confer an estate in fee without words of inheritance, it will generally happen, in cases in which, according to the old law, the prior devisee would have been tenant in tail, by the effect of words devising over the property on the failure of his issue, that he will, under the new rule of construction, take an estate in fee simple, subject to an executory devise in the event of his dying without leaving issue at his death; and this, no doubt was the effect contemplated and designed by the legislature. A different and less desirable result, however, will occur where the prior devise being expressly for life, will not be enlarged by the statute to a fee simple; while, on the other hand, the words importing a failure of issue will nevertheless be restricted.

“Thus, if by a will subsequent to 1837, real estate be devised to A. for life, and in case he should die without issue, to B., A. will take an estate for life only, with a contingent remainder to B., to take effect in the event of A.’s dying without leaving issue at his decease; whether in such case the issue, if any, living at the decease of A., would take the fee by implication, will remain to be decided (*i*).

Effect where
there is no
prior gift.

“If, in a will which is subject to the new law, property, real

(*g*) In *Crumpe v. Crumpe*, [1900] A. C. 127, where there was a gift over in the event of S. M. dying without male issue him surviving, the Court held that S. M. took an estate tail, not by implication from these words, but because upon the true construction of the

whole will the testator’s intention to give S. M. an estate tail was clear.

(*h*) See this section of the statute further observed upon, post, Chap. LII.

(*i*) This point is referred to post, p. 674, where the continuation of Mr. Jarman’s remarks is given.

or personal, is given in the event of the death without issue of a person to whom no preceding interest is given, the effect is simply to create a contingent gift to take effect on this event (*j*), leaving the property in the alternative event undisposed of; for, in such cases there is, of course, the same difficulty in raising an implied gift to the issue living at the death, as where the gift in question is preceded by a life interest in the person whose failure of issue is made the contingency on which such gift is to take effect.

“ If, however, the devisee on the contingency of the failure of issue of another, were the heir apparent or the heir presumptive of the testator, an argument would arise for implying a fee simple in the parent or ancestor of the issue, in order to avoid the supposition (so stultifying to a testator) that he intends to give to a person at a future time, that which will intermediately devolve to him by act of law, without providing for its destination in the meantime.

“ The chief advantages attending the newly enacted mode of construing words importing a failure of issue are, 1st, that it brings all executory limitations depending on such a contingency within the limit prescribed by the rule against perpetuities, (supposing, of course, that the person referred to is existing at or before the death of the testator, or necessarily comes in esse within twenty-one years afterwards,) which limitations otherwise were, we have seen, void for remoteness; and this was the inevitable result whenever there was not sufficient ground for implying an estate tail in the first taker; in other words, when the person whose issue was referred to took no estate under the will, and neither he nor the express devisee was the heir-at-law of the testator; and, 2ndly, that by excluding the implication of an estate tail in the person whose issue is so referred to where he takes an estate under the will, or where he or the express devisee happens to be the heir-at-law of the testator, the new construction has the effect of exempting the interest of the ulterior devisee from its liability to be defeated or destroyed by the act of the prior devisee; the result being, that instead of the ulterior devisee having (as formerly) a remainder in fee expectant on an estate tail in such prior devisee (which of course the latter might have barred by a disentailing assurance), he takes by executory devise engrafted on a preceding fee simple, to arise on the event of the first devisee

Advantages and disadvantages of the new enactment.

(*j*) The reader will of course bear in mind the provisions of s. 10 of the Conveyancing Act, 1882.

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dying without leaving issue at his death, the estate of such prior devisee being absolute in the alternative event.

"Against these advantages must be set the inconvenience which is consequent on the rejection of the implication of an estate tail in the first taker, where he takes an estate, expressly restricted to life, and therefore not capable of being enlarged by the recent act to a fee simple; in which case, the existence of issue at his death produces, as already shewn, a vacancy in the disposition."

Example of estate tail being implied since the Wills Act.

In *Neville v. Thacker (k)*, there was a devise to the testator's son T. "during his life, and to his eldest son, and his heirs in tail male; and in default of issue male," then to the testator's other sons for life and their issue in tail male "and in default of male issue," over: it was held that the words "in default of male issue" meant an indefinite failure of male issue, and that T. took an estate for life, with remainder to his eldest son in tail male, with remainder to T. in tail male.

Introductory remarks.

VII.—Implication of Cross-Remainders.—(1) *Among Devisees in Tail or for Life.*—Mr. Jarman remarks (l): "Where lands are devised to several persons as tenants in common in tail, with remainder over, the question arises, whether, upon the determination of the entail in each share, such share devolves upon the other co-devisees in tail, or immediately goes over to the remainder-man of the entirety. Such reciprocal limitations to the tenants in common in tail, inter se, are, in professional language, denominated cross-remainders. It is settled that in wills, as distinguished from deeds (m), they need not be limited expressly (though in correctly drawn wills they are never omitted), but may be implied from the context. To shew what expressions have been held, in judicial construction, sufficient to raise such implication, is the object of the present chapter.

General principle of the cases.

"The principle has been long admitted, that wherever real estate is devised to several persons in tail as tenants in common, and it appears to be the testator's intention that not any part is to go over until the failure of the issue of all the tenants in common, they take cross-remainders in tail among themselves. The great

(k) 23 L. R. Ir. 344.

(l) First ed. vol. II. p. 457. This section formed Chap. XLII. in the original work.

(m) *Edwards v. Alliston*, 4 Russ. 78; *Doe v. Birkhead*, 4 Exch. 110. The latter case, though not impugning the

principle stated in the text, overrules the former on another ground. And see *Doe v. Wainwright*, 5 T. R. 427; *Doe v. Dorvell*, ib. 518. As to marriage articles see *Duke of Richmond's Case*, 2 Coll. Jur. 347.

struggle has been to determine when the words *in default of such issue*, or other expression, used to connect the devise in tail with the succeeding limitation, may be construed to demonstrate such an intention. In order to place this subject fully before the reader, it will be convenient briefly to trace the steps by which the rule has been gradually placed on, or rather restored to, its present enlarged and liberal footing; and then to state the general conclusions which the cases warrant."

Mr. Jarman then proceeds to state and discuss critically an anonymous case in *Dyer* (n), *Holmes v. Meynel* (o), *Wright v. Holford* (p), *Phipard v. Mansfield* (q), *Atherton v. Pye* (r), *Watson v. Foxon* (s), *Roe d. Wren v. Clayton* (t), *Doe d. Gorges v. Webb* (u), *Green v. Stephens* (v), *Doe d. Southouse v. Jenkins* (w), *Livesey v. Harding* (x), which clearly establish the general principle that if land is devised to two or more persons as tenants in common in tail, "and if they happen to die without issue," or "in default of such issue," then over, cross-remainders between them will be implied. The same authorities have also settled that the construction is not affected by the number of the devisees, or by the fact that the limitation is to the devisees and the heirs of their "respective" bodies (y).

Mr. Jarman continues (z): "Here closes the long line of cases establishing the operation of the words 'in default of such issue,' and other similar expressions, to raise cross-remainders among devisees in tail. It may seem to be extraordinary that so large an assemblage of decisions should have grown up in relation to a

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What expressions raise cross-remainders.

General observations upon the cases.

(n) 303 b, 13 Eliz., sometimes erroneously referred to as *Clache's Case*, as to which see below, p. 664 (devise over if all the devisees died without issue).

(o) Raym. 452, 2 Show. 136 (in case the devisees died without issue).

(p) Cowp. 31, 2 Ed. 239 nom. *Wright v. Lord Cadogan*; Amb. 468 nom. *Wright v. Englefield* (to daughters in tail, and for default of such issue).

(q) Cowp. 797 (to three in tail, and in default of such issue).

(r) 4 T. R. 710 (class gift to daughters in tail and in default of such issue).

(s) 2 East, 36 (class gift to children, and the heirs of their respective bodies, and for default of such issue). See also *Staunton v. Peck*, 2 Cox, 8, where Lord Kenyon, then M.R., had made a similar decision in regard to the word "respective," but without the same explicit denial of the doctrine respecting it.

(t) 6 East, 628; affirmed in D. P. 1 Dow. 384, Sug. Prop. 283 (several stocks

of issue).

(u) 1 Taun. 234 (devise to three in tail respectively, and in default, &c.).

(v) 12 Ves. 419, 17 Ves. 64 (to B., C. and D. and their several and respective heirs for ever, and in default of such issue over).

(w) 3 M. & Pay. 59, 5 Bing. 469 (for want of issue males).

(x) 1 R. & My. 636 (and for default of such issue).

(y) More recent cases to the same effect are *Powell v. Howells*, L. R., 3 Q. B. 655; *Hannaford v. Hannaford*, L. R., 7 Q. B. 116; *Stanhouse v. Gaskell*, 17 Jur. 157. And see the general principle stated in *Re Hudson*, post p. 672.

(z) First ed. vol. II. p. 474. It has not been thought necessary in this edition to set out the cases referred to by Mr. Jarman, as the principles are now well established. The reader is referred to the former editions of this work.

CHAPTER XIX. point which appeared to have been determined more than two centuries ago (a); but the reluctance evinced by some of the Judges of an early day to admit the implication between more devisees than two, the pertinacious retention, in terms at least, of the distinction in regard to that number, by several of their successors until a much later period, and more particularly the exception to the implication-doctrine, founded on the words 'several' and 'respective,' introduced by *Comber v. Hill* (b), *Williams v. Browne* (c), and *Davenport v. Oldis* (d) (which was too absurd to be submitted to even with such reiterated adjudication in its favour), are the sources from which the controversies have sprung that have rendered one of the simplest doctrines of testamentary construction in our books one of the most voluminous.

"Lord Kenyon's attack upon *Comber v. Hill* and that line of cases, in *Watson v. Foxon*, was certainly bold, recognized as they had repeatedly been by his immediate predecessor; but as his Lordship's decision has been since, after much consideration, confirmed in *Doe v. Webb* (f) and *Green v. Stephens* (g), we may confidently hope that the argument founded on the words 'several' or 'respective,' (h), or the exploded distinction in regard to the number of the devisees (which is equally untenable upon principle and authority), will never more be seriously advanced in a court of justice."

Cross-remainders implied from gift over on failure of issue at death.

Cross-remainders have also been implied where the gift over was on failure of issue at a particular period. Thus, in *Maden v. Taylor* (i), where a testator devised freehold property in trust for his nieces A., B., C., and D., as tenants in common for life, and after the death of any of them, in trust as to her part for her children and the heirs of their bodies; and in case any of the nieces should die without leaving issue living at her death, then for the survivors or survivor of the nieces, and the heirs of her and their body and bodies; and in case all the nieces but one should die without leaving lawful issue, then for such only or surviving niece and the

(a) See *Anon.* Dyer, 303 b; *Holmes v. Meynell*, Raym. 452, 2 Show. 136; and *Taafe v. Conmee*, 10 H. L. C. at pp. 80-81 (per Lord Westbury, C.).

(b) 2 Stra. 969; Lee's Cas. t. Hardwicke, 22.

(c) 2 Stra. 996.

(d) 1 Atk. 579.

(f) Ante, p. 661.

(g) Ibid.

(h) But although the mere fact that the original limitation is to two or more persons and the heirs of their respective bodies, does not prevent the implication of cross-remainders, it must not be inferred that the use of the word "respective" in the gift over would be without effect: see *Turner v. Frederick*, post, p. 671.

(i) 45 L. J. Ch. 569.

heirs of her body; and in case of a total failure of issue of the nieces (which was held still to mean at the death), then for testator's right heirs. Sir G. Jessel, M.R., said that the true rule was laid down in *Doe v. Webb* (j), that you must ascertain whether the testator intended the whole estate to go over together. If you once found that to be intended, you were not to let a fraction of it descend to the heir at law in the meantime. You were to assume that what was to go over together, being the entire estate, was to remain subject to the prior limitations until the period when it was to go over arrived. He thought that principle applied to a case like that before him, where it was plain in one event the whole estate was to go over together, although it was possible that another event might happen in which that intention might be disappointed. He therefore held that cross-remainders must be implied between the children of each niece; otherwise, while the particular event was still in suspense, a fraction might, by the death of one child without issue, descend to the heir at law.

In *Doe d. Burden v. Burville* (k), cross-remainders were implied from a devise to several persons as tenants in common in tail, "with remainder" over. In *Pery v. White* (l), on the other hand, the same judge (Lord Mansfield) held that cross-remainders were not raised by a limitation of the reversion following a devise to several for life as tenants in common, with remainder to their sons "successively" in tail male, &c. The learned judge thought that "successively" was synonymous with "respectively," and the decision therefore seems to have turned on the exploded doctrine as to the effect of the word "respective" (m), and not on any distinction between the words "remainder" and "reversion." Mr. Jarman remarks (n), "So far as the case of *Pery v. White* rests upon the force of the word *respective*, it is now clearly overruled."

Cross-remainders, raised by the words "remainder" or "reversion."

Cross-remainders may also be implied among devisees for life. Thus, in *Ashley v. Ashley* (o), a testator devised real estate to the use of his daughter A. for her life, and after the determination of that estate, to the use of trustees to preserve, and after her decease,

Cross-remainders implied among devisees for life.

(j) 1 Taunt. 234.

(k) 2 East, 47n, 13 Geo. 3.

(l) Cowp. 777, 18 Geo. 3.

(m) See *Doe d. Georges v. Webb*, 1 Taunt. 234; *Green v. Stephens*, 12 Ves. 419; 17 Ves. 64.

(n) First ed. vol. II. p. 477.

(o) 6 Sim. 358, as to which see ante, p. 348 n. (p). See also *Pearce v. Edmeades*, 3 Y. & C. 246; *Walmsley v. Foxhall*, 1 D. J. & S. 451, 605, as to the share of the child that died without issue.

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to the use of all and every the child or children lawfully begotten and to be begotten on the body of A., to take as tenants in common and not as joint tenants; and for want of such issue of A., then to the use of another daughter and her children in like manner. The Master reported that the children of A. took life estates only, without cross-remainders between them; but on the latter point, Shadwell, V.-C., expressed a strong opinion against the finding of the Master. He observed that but one subject was given throughout; the expression "for want of such issue" meant want of issue whenever that event might happen, either by there being no children originally, or by the children ceasing to exist. Accordingly he declared that the children of A. took estates for life as tenants in common, with cross-remainders between them for life.

Executory
trusts.

Cross-remainders are more readily implied in executory trusts than in direct devises. It may be further remarked, in regard to such trusts, that in *Horne v. Barton (p)*, where a testator devised his real estate to trustees and their heirs, upon trust for the use and benefit of all and every his children who should live to attain the age of twenty-one years or be married, which should first happen, in equal shares or proportions undivided, for their respective lives, with remainder to their issue severally and respectively in tail general, with cross-remainders, and the testator directed his trustees to execute a settlement accordingly; Sir W. Grant, M.R., held that cross-remainders were to be inserted, not only as between the children respectively, but also as between the families.

Whether
express cross-
limitation
excludes
implication.

It was held in *Clache's Case (q)*, that cross-remainders could not be implied where there were express cross-limitations among the devisees in tail in certain events. A testator devised a messuage to his daughter A. and her heirs for ever, and his principal messuage he gave to T. his youngest daughter and her heirs, and if she died before the age of sixteen, A. then living, he willed that A. should enjoy the principal messuage to her and her heirs for ever; and, if A. should die having no issue, T. living, then he willed that T. should enjoy the share of A. to her and her heirs for ever; and if both his daughters should die having no issue, then the testator devised all his said messuages over to the two daughters of H. C. T. died having attained sixteen, without issue, which raised the question whether cross-remainders could be implied

(p) Coop. 257, 19 Ves. 398. But see same double implication in case of a

direct devise, *Roe v. Clayton*, 6 East, 628.
(q) Dy. 330 b.

between the daughters; and the Court held that they could not; for the testator never intended that the principal house should go to A., unless T. had died within the age of sixteen years; and no implication of cross-remainders could arise when an express and special gift and limitation was made by the deviser himself. Dyer thought there was no entail, but a fee simple conditional: but the other three Judges were of a contrary opinion.

The doctrine of *Clache's Case* was much canvassed in *Vanderplank v. King* (r), in which Sir J. Wigram, V.-C., decided, after much consideration, that the introduction of an express limitation of cross-remainders among another class of devisees in the same will did not repel the implication; observing, that an express gift of cross-remainders in one event did not preclude the Court from giving cross-remainders by implication in another, where either case was clearly within the scope of all the reasoning upon which Courts have proceeded in implying cross-remainders.

Vanderplank v. King is clearly distinguishable from *Clache's Case* (s). The latter case was followed in *Rabbeth v. Squire* (t), where a testator devised real and personal estate in trust to pay the rents of one-fifth part to each of his five sons and daughters for life, and after the death of each, to his or her children whom he or she should leave at his or her death, in equal shares (for life, as it was held), but if he or she should leave none, then in trust for the other sons and daughters for their lives and the issue of such as should be dead, as before directed, and when all his children should be dead the testator gave the whole property in trust for all the children of his five children equally in fee. A daughter of the testator died leaving a son, who died before the last survivor of the testator's five children. The share of the deceased daughter not being expressly disposed of in the interval after the death of her son, it was contended that cross-remainders to the other children of the testator and their children must be implied; but it was held otherwise by Sir J. Romilly, and on appeal by Lord Chelmsford, the testator having himself expressed the event in which such remainders should take effect in favour of those objects; viz. on the death of a child without leaving a child living at his or her death.

(r) 3 Hare, 1. See also *Atkinson v. Holtby*, 10 H. L. Ca. 313, and *Fitzgerald v. Fitzgerald*, 12 Ir. C. L. R. 551.

(s) See per Sir E. Kay, J., in *Re Hudson*, L. R., 20 Ch. D. at p. 412, *infra*

p. 671.

(t) 19 Beav. 77, 4 De. G. & J. 406. As to implying cross-remainders among tenants for life, see *ante*, p. 663.

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Again, in *Atkinson v. Barton (u)* the M.R. said the rule in *Clache's Case* was that cross-remainders cannot be implied between objects where there are express cross-remainders between the same objects in different events; and he applied the rule to the case before him, refusing to imply cross-remainders between several stocks or branches of issue on the ground that there were express cross-remainders between the individuals of each stock or branch. But this was going beyond *Clache's Case*, and involved a denial of *Vanderplank v. King*, which in *Rabbeth v. Squire* the M.R. had clearly distinguished: and his decision was reversed by the L.JJ., K. Bruce and Turner.

Turner, L.J.,
on *Clache's*
Case.

Sir G. Turner, indeed, went further: he denied that *Clache's Case (v)* had laid down the supposed rule, and he thus stated the result of the cases: "Cross-remainders are to be implied or not to be implied according to the intention. The circumstance of such remainders having been created between the same parties in particular events is a circumstance to be weighed in determining the intention, but is not decisive upon it" (*w*).

Implication
not excluded
by partial
express limi-
tation, on the
context.

There is, perhaps, no great practical difference between the rule thus stated and the rule deduced from *Clache's Case*; for no rule of construction is decisive, the intention as shewn by the context being in every case the ultimate test. Thus, in *Coates v. Hart (x)*, where a testator gave the income of one-fourth of his residuary estate to each of four individuals for life, and if either of them should die under twenty-one and without issue, his share of income to go to the survivors for life; and from and after the death

(*u*) 31 Beav. 277, 3 D. F. & J. 339. The decision of the L.JJ. was varied in D. P., *Atkinson v. Holby*, 10 H. L. Ca. 313, but the particular question here discussed in the text was not affected by such variation.

(*v*) He said, that the decision in that case proceeded upon an express limitation over (not stated above), in case T. should die having no children, and not upon a cross-remainder having been before created in a different event, and that it decided "that a cross-remainder could not be implied against an express limitation." Now, the limitation here alluded to is contained in the following clause, which follows the statement in the text: "Provided always that if A. do marry I. H., then testator wills all her part to T. and to her heirs for ever; provided also that if T. die having no children then he willeth all the premises to the said two daughters of H. C.," i.e., if the first proviso took effect, whereby

T. would get "all the premises" (both houses), then both houses were to go over if she died having no children. But A. "refused I. H. and took to husband G.," so that (it is submitted) the L. J.'s "express limitation" did not come into operation. Hence, doubtless, its omission from the text, and (it may be added) from the statement of *Clache's Case* by Vaughan, C.J., *Vaugh.* 259.

To prevent a misconception which some of Sir G. Turner's remarks are calculated to produce, it should be added that Mr. Jarman was himself the author of the whole of vol. II. of "Powell on Devises," and that the present treatise was published by him twelve years before *Rabbeth v. Squire* was heard.

(*w*) See also per Wood, V.-C., *Re Clark's Trusts*, 32 L. J. Ch. 525; and per Kay, J., *Re Hudson*, 20 Ch. D. at pp. 414, 415.

(*x*) 3 D. J. & S. 504.

of either of the four leaving issue, the principal, to the income whereof their deceased parent had been entitled, was given to such issue; and the testator also gave to such issue the share of the principal to the income whereof their deceased parent would have been entitled if he had survived any other of the four who should afterwards die without issue (not repeating "and under twenty-one"); and if all the four should die without either of them leaving issue, the whole residue was given to other persons. One of the four attained twenty-one and died without ever having a child. It was held that her share of the income belonged to the others by implication for their lives. The clause immediately preceding the ultimate gift over, followed as it was by the gift over only in the event of all four dying without leaving issue, appeared to Sir G. Turner, L.J., to furnish a necessary inference that the survivors were to take during their lives the income of the share to the income of which any of the four dying without leaving issue had been entitled. Sir J. K. Bruce, L.J., thought the age which the deceased legatee attained was immaterial, and that whether she died before or after twenty-one the ulterior enjoyment of the income was intended to be the same.

Whichever way the rule is stated, the result in this case must on the context have been the same.

It has been long settled that, in regard to executory trusts (y), an express direction to insert cross-remainders among another class of objects, or even an express cross-limitation among the same objects, does not exclude the implication.

In the case of executory trusts, express limitation not exclusive of implication.

Thus, in *Burnaby v. Griffin* (z), where a testatrix devised her real estate to trustees, upon trust to pay one moiety of the rents to her sister E. for life, and after her decease, the testatrix directed the trustees to convey and settle the said moiety unto and upon the daughters of E. as tenants in common in tail general, "with cross-remainders for the benefit of such daughters," remainder to the younger sons of E. successively in tail male, remainder to the eldest son in tail general; and as to the other moiety, upon trust for the testatrix's niece C. for life, "with the same limitations to her daughters and sons as to the children of E."; and if C. should depart this life without leaving any issue of her body living at her decease, the testatrix directed that her sister E. should receive all the rents for life; and in case E. and C. should die without issue of

(y) As to such trusts, see post, Chap. XXIV.

(z) 3 Ves. 266, 268, 274; that is, an express limitation to E. in default of

C's issue did not exclude an implied reciprocal limitation to C. in default of E.'s issue.

CHAPTER XIX. their respective bodies, or all such issue should die without issue, she then gave her real estate to four cousins. Lord Hardwicke decreed that, in the settlement to be executed under this trust, cross-remainders were to be inserted not only between the children of E. and C. inter se, but between the two families.

Conclusions
from the
cases.

Mr. Jarman states the conclusions from the cases as follows (a):—

“1st. That under a devise to several persons in tail, being tenants in common, with a limitation over for want or *in default of such issue*, cross-remainders are to be implied among the devisees in tail.

“2ndly. That this rule applies whether the devise to be two persons or a larger number, though it be made to them ‘*respectively*,’ and though in the devise over the testator have not used the words ‘the said premises,’ or ‘all the premises,’ or ‘the same,’ or any other expression denoting that the ulterior devise was to comprise the entire property, and not undivided shares (b).

“3rdly. That the rule applies, in regard to executory trusts at least, though there be an *express* direction to insert cross-remainders among *another* class of objects, or a limitation over among some of the *same* objects; and even in direct devises an express limitation of cross-remainders among *another* class of objects has been held not to repel the implication.

“4thly. That the word ‘remainder,’ following a devise to several in tail, will raise cross-remainders among them (c).

“5thly. That it is no objection to the implication of cross-remainders that there is an inequality among the devisees whose issue is referred to; some of them being tenants in tail, and others tenants for life, with remainder to their issue in tail (d).

“6thly. That a devise to the children of A. for life and *for want and in default of such issue* then over, creates cross-remainders by implication for life among such devisees” (e).

(a) First ed. vol. II., p. 479.

(b) See the author's first and second conclusion adopted, *Taaffe v. Conmee*, 10 H. L. Ca. 81, 85; *Hannaford v. Hannaford*, L. R., 7 Q. B. 116.

(c) As to “reversion,” see ante, p. 663.

(d) *Vanderplank v. King*, 3 Hare, 1. “In this case the inequality was produced by the application of the *cy-près* doctrine in regard to the member of a class who was born after the death of the testator, and is therefore an important case in reference to that doctrine, as to

which vide ante, vol. I. p. [293]. See also Lewis on the Law of Perpetuity, 426.” (Note by Mr. Jarman.)

* (e) “The reader will probably have inferred, from the absence throughout the present chapter of any allusion to the failure of issue clause in the recent Statute of Wills, that the writer conceives that the enactment does not affect the implication of cross-remainders from expressions of this nature [that is, such expressions as those referred to in the first five

* Implication
of cross-
remainders
not affected
by Wills Act.

It may be added that the first rule applies, though the ulterior devise is on failure of issue at a particular period (*f*).

(2) *Among Devisees in Fee of Realty or Legatees of Personality.*—Mr. Jarman remarks (*g*):—"The question whether cross-executory limitations can be implied among devisees *in fee*, arises when real estate is devised to several persons in fee, with a limitation over in case they all die under a given age, or under any other prescribed circumstances; in which case it is by no means to be taken as a necessary consequence of the doctrine respecting the implication of cross-remainders among devisees *in tail*, discussed in the last chapter, that reciprocal executory limitations will be implied among such devisees in fee. The principal difference between the two cases seems to be this:—In the case of a devise to several persons in tail, assuming the intention to be clear that the estate is not to go over to the remainder-man until *all* the devisees shall have died without issue, the effect of not implying cross-remainders among the tenants in tail would be to produce a chasm in the limitations, inasmuch as some of the estates tail might be spent, while the ulterior devise could not take effect until the failure of *all* (*h*). On the other hand, in the case of limitations in fee of the realty, and of absolute interests in personality (both which are clearly governed by the same principle), as the primary gift includes the testator's whole estate or interest, and that interest remains in the objects in every event upon which it is not divested, a partial intestacy can never arise for want of a limitation over.

Cross-executory limitations not to be implied.

"To introduce cross-limitations among the devisees in such a case would be to divest a clear absolute gift upon reasoning merely conjectural; for the argument, that the testator could not intend the retention of the property by the respective devisees to depend upon the prescribed event not happening to the whole, however plausible, scarcely amounts to more than conjecture. He *may*

conclusions above stated]. Such undoubtedly is his opinion; in support of which it will be sufficient to observe, that s. 29 expressly excepts out of the statutory rule of construction, cases in which a contrary intention appears by the will, by reason of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise. Here an express estate tail is, by the prior devise, given to the person whose issue is referred to by the

words, 'in default of such issue,' &c., from which the cross-remainders are implied; and hence it is clear that this point of construction remains wholly untouched by the enacted doctrine."

(Note by Mr. Jarman.)

(*f*) See *Maden v. Taylor*, *supra*, p. 662.

(*g*) First ed. vol. II. p. 481.

(*h*) "Indeed, it should seem that the doctrine against perpetuities would have presented an obstacle to its taking effect at all." (Note by Mr. Jarman.)

CHAPTER XIX. have such an intention; and if not, the answer is, *voluit sed non dixit*.

"If, therefore, a gift is made to several persons in fee-simple as tenants in common, with a limitation over in case they *all* die under age, the share of one of the devisees dying during minority will devolve upon his representatives, unless and until the whole die under age."

Where interests are vested.

The general principle therefore is, that if a testator gives the whole of his interest in land or personalty to several persons as tenants in common, in such a way that they take vested interests, with a gift over upon the death of all in certain events, cross-limitations will not be implied, because in no case can there be a partial intestacy (*i*).

Class gift.

So in the case of a contingent gift to a class—as where property is given to such of the children of A. as attain twenty-one, with a gift over in the event of A. not having any child who attains twenty-one—the property either goes to those who acquire vested interests, or it passes under the gift over, and no question of implying cross-limitations can arise (*j*).

Contingent gift to several nominatim.

But if the gift is to two or more named persons as tenants in common, and the interests given are contingent, with a gift over in the event of all dying before their interests become vested, the event of one dying before attaining a vested interest is not provided for, and this affords a ground for implying cross-limitations to supply the gap (*k*).

Gift to several for life, with remainder to issue.

Again, where property is given to several named persons as tenants in common during their respective lives, with separate remainders to their issue, and if they all die without leaving issue, then over, cross-limitations will be implied between the primary legatees (or devisees) and their families (*l*).

(*i*) *Skey v. Barnes*, 3 Mer. 335; *Templeman v. Warrington*, 13 Sim. 267; *Cohen v. Waley*, 15 Sim. 318; *Baxter v. Losh*, 14 Bea. 612; *Bromhead v. Hunt*, 2 J. & W. 459; *Edwards v. Truck*, 23 Bea. 268; *Beaver v. Nowell*, 25 Bea. 551; *Re Rubbings*, 78 L. T. 218; 79 L. T. 313. The decision in *Beauman v. Stock*, 2 Ba. & Be. 406, is contrary to principle. Most of the cases above cited are stated and commented on at length in previous editions of this work.

(*j*) *Mair v. Quilter*, 2 Y. & C. C. 465.

(*k*) *Scott v. Bargeman*, 2 P. W. 68; *Graves v. Waters*, 10 Ir. Eq. R. 234. In *Mackell v. Winter*, 3 Ves. 236, 536, where there was an express clause of accruer in certain events, but not in all,

there was a difference of opinion between Sir R. P. Arden, M.R., and Lord Loughborough on the question whether the shares were vested or not. The M.R. adhered to his opinion in *Booth v. Booth*, 4 Ves. 402. Mr. Jarman appears to have disapproved of the decision in *Scott v. Bargeman*, and to have considered it inconsistent with *Schenck v. Legh*, 5 Ves. 452, 9 Ves. 300; *Bayard v. Smith*, 14 Ves. 470; and *Skey v. Barnes*, *supra*, but his views have not been adopted by the Courts. See *Vize v. Stoney*, 1 Dr. & W. 348; *Graves v. Waters*, *supra*.

(*l*) *Re Clark's Trusts*, 32 L. J. Ch. 525; *Re Ridge's Trusts*, L. R., 7 Ch. 665. As to the cases where a gift of income

But cross-limitations will not be implied so as to divest a vested interest (*m*). CHAPTER XIX.

In *Turner v. Frederick* (*n*) a testator gave two shares of his residuary real and personal estate upon trust for his two daughters A. and L. "respectively" for their lives, and after the decease of his said daughters "respectively" in trust for the maintenance of their "respective" children until such children should "respectively" attain the age of twenty-one, and then to divide the principal amongst such children "respectively" as should attain that age, but if all the children of his said daughters "respectively" or both of them, should die under the age of twenty-one, then "the said trust money" was to be held upon the trusts therein mentioned. A. survived the testator and died leaving children who attained twenty-one; then L. died without issue; it was held that cross limitations were not to be implied, and that as the ultimate trust failed for uncertainty, there was an intestacy as to L.'s share. In this case the repeated use of the words "respective" and "respectively" shewed that the testator intended the shares to devolve independently of one another, while the partial intestacy was not caused by any gap in the limitations, but by the failure of the testator to describe the ultimate legatees with sufficient clearness.

Vested
interest not
divested.
Separate gifts
over.

In *Sutton v. Sutton* (*o*) land held for a long term of years was appointed to three persons in severalty, with express cross-remainders in the event of any of them dying without leaving issue living at the time of his decease, and a gift over providing that if all of them should die without leaving issue living at the death of the survivor, then the lands appointed to them, and also the part or portions of the said lands which should come to the survivors or survivor by reason of any of them dying without leaving issue living at his death, should go to certain persons therein named. It was held that cross-remainders were not to be implied with reference to the accrued shares.

Accrued
shares.

In *Re Hudson* (*p*) the principle on which cross executory limitations are implied was fully considered. In that case a testator gave his real and personal estate to trustees upon certain trusts for the benefit of his wife, and, subject thereto, upon trust during the lives of his five children and the survivors to divide the income

Re Hudson.

to A. and B. in equal shares for their lives creates a joint tenancy, see Chap. XLIV.

(*m*) *Re Clark's Trusts*, supra.

(*n*) 5 Sim. 466.

(*o*) 30 L. R. Ir. 251.

(*p*) 20 Ch. D. 406. See also *Re Robbins*, 78 L. T. 218; 79 L. T. 313, referred to in Chaps. XLII., XLIV.

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into five equal parts, and to pay one-fifth to each, if living, or, if dead, to their respective children or issue, the latter taking equally between them in classes the fifth share which their parent if living would have taken ; and if any of the testator's children died without leaving children or issue, or such issue should fail during the period aforesaid, the share of such children or issue should belong to the others of the testator's children and their issue in the same way as their original shares, and this clause was to apply to accruing as well as original shares ; and upon the death of the last surviving child upon trust to divide the whole property among the testator's grandchildren per stirpes. The five children were living at the testator's death in 1862 ; one of them died in 1863, leaving seven children, one of whom died in 1871, leaving one child only, a daughter, who died unmarried during the period. Kay, J., after reviewing the cases, said :—

Rules as to
the implica-
tion of cross-
limitations.

“ I deduce from these authorities the following rules :—

“ 1. Cross executory limitations in the case of personal estate, like cross-remainders of real estate, are only implied to fill up a hiatus in the limitations, which seems from the context to have been unintentional.

“ 2. They cannot be implied—as of course cross-remainders could not—to divest an interest given by the will.

“ 3. The existence of other cross-limitations between different persons does not prevent the implication.

“ 4. But where such express cross-limitations are in favour of the very persons to whom the implied cross-limitations would convey the property, that circumstance is of weight in determining the intention.

“ Instances in which such a gap occurs are :—

“ (a.) Where there is a gift to several named persons for their respective lives as tenants in common, and a gift over after the death of the survivor (q) :

“ (b.) Where in a similar gift there are limitations over of the shares of the tenant for life to their respective children or issue for limited interests, as for life or in tail, and then a gift over on failure of issue of them all :

“ (c.) And generally where, there being such a gift over, the preceding limitations do not provide for every event except that contemplated by the gift over, but leave some gap which would occasion an intestacy as to part of the estate.

“ In this case there is a cross-limitation upon failure of any

(q) *Draycott v. Wood*, 8 L. T. N. S. 304.

stirps to the other stirpes, but there is no cross-limitation between the individuals of the same stirps, where the Court is asked to imply one. Therefore the difficulty which arose in *Clache's Case* and *Rabbeth v. Squire* does not exist here." And his Lordship, after observing that where there is an ambiguity it is proper to look at the consequences of either construction, and pointing out that it was hardly possible to believe that it was intended that any part of the income should go to the legal personal representatives of deceased grandchildren, held that the great granddaughter took only a life interest, and that the intention was, in the event which had happened of her death leaving no issue, that her share should go equally among her uncles and aunts, and the issue of deceased uncles and aunts per stirpes, and that the necessary cross-limitations to effect this must be implied.

VIII.—Implication of Gifts to Children and Issue.—Even under the old law, where land was devised to a person for life, with a devise over to take effect in the event of his dying without issue living at his death, this had no effect in enlarging his estate for life into an estate tail (*r*), because, as Mr. Jarman points out (*s*), "the event described is not that by which an estate tail is necessarily extinguished, for such an estate determines on the failure of issue at *any* time. The only question, in such a case, would be, whether the words would raise an estate by implication in the issue living at the death. Lord Hardwicke suggested a point of this nature in *Lethieullier v. Tracy* (*t*), but the case did not require its determination. It is clear that, where the estate previously devised is in fee, no such implication arises; but this is not quite conclusive, inasmuch as the motive to imply an estate tail in such cases is much less cogent, since the alternative construction gives the prior devisee an estate in fee simple in the event of his leaving issue; whereby he is enabled to make a provision for such issue, if he leaves any: so that the scheme of disposition which is thus imputed to the testator is reasonable, and wholly free from the inconvenience and objection which attach to a similar construction where the devise is for life only, in which the effect of rejecting the implication is, that, in the event of the first taker leaving issue, the property is undisposed of, as it cannot go to either himself, his issue, or the ulterior devisee."

Estate tail not implied from words referring to issue at death.

(*r*) See *Lethieullier v. Tracy*, 3 Atk. 774, 793; *Jenkins v. Hughes*, 8 H. L. C. at p. 593; *Coltsmann v. Coltsmann*,

L. R., 3 H. L. 121.

(*s*) First ed. vol. I. p. 490.

(*t*) 3 Atk. 796.

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Astoimplying
an estate in
the issue.

The effect of sect. 29 of the Wills Act, as already mentioned (*u*) is that if real estate is devised to A. for life and in case he should die without issue, to B., A. will take an estate for life only, with a contingent remainder to B., to take effect in the event of A.'s dying without leaving issue at his decease. "Whether in such case," says Mr. Jarman (*v*), "the issue, if any, living at the decease of A. would take the fee by implication, will remain to be decided. Such a construction would certainly be convenient, as avoiding the palpable absurdity of making the estate of the ulterior devisee depend on the contingency of there not being issue; and yet, in the alternative event, giving the property neither to A. himself, nor to such issue, but leaving it to devolve to the heir-at-law or residuary devisee (as the case may be) of the testator. There is, however, no authority for implying an estate in the issue living at the death (*vv*), and the contrary conclusion seems rather more consistent with principle." This view is supported by *Monypenny v. Dering* (*w*), where it was argued that a devise over in default of issue of A., a tenant for life, to some only of whose issue an estate was expressly given, shewed that the intention must have been that not some only but all the issue should take; but Sir J. Wigram, V.-C., said, that, admitting such to be the intention, it furnished no sufficient ground for supplying estates by purchase to the omitted issue. He had asked for but did not get any authority for such a proposition. It seems quite clear that no implication in favour of the issue would be made at the present day (*x*).

Personal
estate.

It has long been settled that "if a sum of money is bequeathed to A. B. for life, and if he dies leaving no issue, then to another, that not does raise any implication in favour of the issue of A. B.; though, if he dies leaving issue, the gift over does not take effect" (*a*). Accordingly in *Ranelagh v. Ranelagh* (*b*), where legacies were given to several persons during their lives, with a gift over in case of the demise of any of them without issue, it was held by Lord Langdale, M.R., that the issue took nothing by implication.

The same rule applies where an absolute interest, and not merely an estate for life, is given. Thus in *Dowling v. Dowling* (*c*) a testator

(*u*) Ante, p. 658.

(*v*) First ed. vol. I., p. 497.

(*vv*) Supra, p. 673.

(*w*) 7 Hare, 588.

(*x*) See *Scalé v. Rawlins*, post.

(*a*) Per Lord Gifford in *Greene v. Ward*, 1 Russ. 262.

(*b*) 12 Bea. 200; *Webster v. Parr*,

26 Bea. 236; *Neighbour v. Thurlow*, 28 Bea. 33; *Re Hayton's Trusts*, 4 N.R. 54; *Seymour v. Kilbee*, 3 L. R. Ir. 33.

(*c*) L. R., 1 Eq. 442; 1 Ch. 612. The interest of each son was held to be absolute, subject to being divested in the event of his dying without leaving issue.

gave his residuary personal estate upon trust for his four sons, "at the decease of either without lawful issue, such share to revert to the remainder then living, or their child or children": it was held by the Court of Appeal that there was no gift by implication to the children of any who might die leaving issue.

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The rule also applies even where the testator obviously intends to guard against lapse. Thus in *Cooper v. Pitcher* (d) a testator bequeathed a legacy to A., and by a codicil provided that if A. should die in his (the testator's) lifetime without issue, his legacy should go to other persons. A. died in the testator's lifetime leaving a child: it was held that the child was not entitled to the legacy. So in *Re Coleman and Jarrom* (e) a testator devised freehold property "to all and every the children of my late brother J. C., who shall be living at my decease or who shall have died in my lifetime leaving issue living at my death"; one child of J. C. died in the testator's lifetime leaving issue living at the testator's death; it was held by Jessel, M. R., that they took nothing by implication.

Lapse.

Mr. Jarman continues (f):—"As no implied estate [to the issue] arises (as we have seen) from a limitation over in case of the prior devisee or legatee dying without leaving issue at his decease, it should seem that there is the same absence of authorized ground for implying a gift to *children* from a similar limitation over in default of these objects.

As to implying gifts to children from devise over in default of them.

"Accordingly, in several cases (g), it has been considered that a bequest to a person, and if he shall die without having children, or without leaving children, (which means without having had a child born, or without leaving a child living at his decease) (h),

(d) 4 Ha. 485.

(e) 4 Ch. D. 165.

(f) First ed. vol. I., p. 499.

(g) *Weakley d. Knight v. Rugg*, 7 T. R. 322; *Doe d. Barnfield v. Wetton*, 2 B. & P. 324. "In *Weakley d. Knight v. Rugg*, leasehold property was bequeathed to A., and in case she died without having children, then over; and it was held that A., on the birth of a child, was absolutely entitled, the only question discussed being, whether the words meant 'without having a child born,' or 'without leaving a child living at the death.' In *Doe v. Wetton*, the devise was to A., her heirs and assigns for ever: but if she should die leaving no child, lawful issue of her body, living at the time of her death, then over. Here the only contested point was, whether the first taker had an estate

tail, or an estate in fee defeasible on her dying without issue living at her decease; and the Court decided in favour of the latter construction. Lord Eldon, C.J., observed, 'if she had any children living at the time of her death, the estate being given to her in fee, she would have abundant power to provide both for children and grandchildren. *Nothing, however, is given to them by this will: they are merely named in the description of the contingency on which the estate is to go over.*'" (Note by Mr. Jarman.) See also *Abram v. Ward*, 6 Hare, 165, and post, Chap. LI., as to gifts over on death without leaving issue.

(h) Some such words as "then over," seem to have been accidentally omitted by Mr. Jarman here.

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does not raise an implied gift in the children; but the parent takes an absolute interest, defeasible on his dying without having had, or without leaving a child, as the case may be. The rejection of the implication in such a case is not (as already pointed out) productive of any absurdity; for it supposes the testator, by making the interest of the legatee indefeasible on his having or leaving a child, to intend that if there are children, he shall have the means of providing for them.

Where the prior gift to the parent is expressly for life.

“ But it seems that where the language of the will necessarily confines the interest of the parent to his life, the Courts will lay hold of slight circumstances to raise a gift in the children, and thereby avoid imputing to the testator so extraordinary an intention as that the devisee or legatee over is to become entitled if the first taker have no child, but that the property is not to go to the child, if there be one, or its parent.

“ Thus, where (i) a testator having by his will bequeathed 1,000*l.* to his niece A., by a codicil, reciting that she had married indiscreetly, and that he intended to withdraw the legacy out of her power to dispose of it, and out of the power of her husband so to do, did therefore direct his executors to secure his said niece the interest of the said 1,000*l.* independently of her husband, by placing out that sum in trust for his niece, she to enjoy the interest or dividends during her life, *and at her decease, without child or children*, the principal and interest to be divided among such of her sisters as should be then living. Sir T. Plumer, M.R., was of opinion that by the combined effect of the will and codicil, he was justified in saying that the children took the legacy by necessary implication.

Remark on
Ex parte
Rogers.

“ Here, the implication was evidently aided by the testator’s prefatory expressions in the codicil, which showed that he did not intend to deprive his niece of the legacy bequeathed by the will, but merely to qualify it in a manner suited to her altered condition.”

Ex parte
Rogers
followed.

Again, in *Kinsella v. Caffrey* (j), where a testator gave 50*l.* a year each to L. and T. for their lives, and on the death of either leaving issue (construed children) his annuity to go to such issue; but if L. or T. should die leaving no issue at his death, his annuity was to go to the survivor for his life, and if both should die leaving

(i) *Ex parte Rogers*, 2 Mad. 449. “ Some of the positions advanced in the judgment in this case must be received with an implied qualification.” (Note by Mr. Jarman.) See the remarks on

Ex parte Rogers in *Lee v. Busk*, 2 D. M. & G. 810, and *Webster v. Parr*, 26 Bea. 236.

(j) 11 Ir. Ch. Rep. 164. See *Champ v. Champ*, 30 L. R. Ir. 72 (deed).

no issue, or leaving such and such issue should die under twenty-one, both annuities were to sink into the residue. T. died unmarried, and afterwards L. died, leaving children. It was held by C. Smith, M.R. Ir., that L.'s children were entitled by implication to T.'s annuity. He stated the general rule thus: "First, where there is an indefinite bequest to the parent, and if he die without having or leaving children, to B. In that case it is clear that the children do not take any interest by implication. Secondly, if there is a bequest to the parent for life, and if he die without having or leaving children, to B: if the parent dies leaving children, they are not entitled by implication (k). Thirdly, if, however, in a case such as I have last mentioned, there are matters on the face of the will to raise an inference in favour of the children, the Court is at liberty to consider these circumstances in connection with the bequest over, in the event of the parent dying without having or leaving children, although such bequest over, by itself, is not sufficient to justify the Court inferring a gift in favour of the children."

Accordingly, in *Scalé v. Rawlins* (l), where a testator gave freehold property upon trust for his niece for life, and after her decease, "she leaving no child or children," he gave it to other persons, it was held that there was no gift by implication to her two children who survived her.

It follows from the general rule as above stated, that if a testator bequeaths property to A., "but if he shall die in my lifetime without leaving children," then to B., and A. dies in the testator's lifetime leaving children, they take nothing by implication (m).

In *M'Clean v. Simpson* (n), there was a bequest to A., with a direction that if he died before the will took effect, "without leaving any children lawfully to inherit," his share should fall into residue; he died before the testator, leaving children, and it was held that they took the bequest by implication.

It was decided in one case, that a devise by a testator, "in case his wife should be enceinte with one or more children at the time of his death, to such child or children," implied a gift to any children born after the date of the will though before the testator's death, on the ground that it was impossible to suppose the father

Whether a gift to all after-born children is implied in a gift to posthumous children.

(k) See *Sparkes v. Restal*, 24 Bea. 218. In *Wetherell v. Wetherell*, 4 Giff. 51, 1 D. J. & S. 134, the grandchildren appear to have taken by express gift, and not by implication.

(l) [1892] A. C. 342, affirming the decision of the Court of Appeal in *Re*

Rawlins' Trusts, 45 Ch. D. 299. See also *Re Hayton's Trusts*, 4 N. R. 54.

(m) *Addison v. Busk*, *Lee v. Busk*, 14 Bea. 459; 2 D. M. & G. 810; *Cooper v. Pitcher*, 4 Ha. 483.

(n) 19 L. R. Ir. 528.

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would provide for a posthumous child, leaving children in esse unprovided for (o). But in *Doe v. Blakiston v. Haslewood* (p), the Court of C. P. unanimously overruled that decision, thinking that in such a case the testator never contemplated the birth of children in his lifetime, and never intended to provide for them by his will: the will was made in contemplation of a particular combination of circumstances, which not having happened, the will failed. However, in a subsequent case (q), Blackburne (L.C. Ir.); though not called upon to decide the point, expressed a preference for the elder authority.

Trust for infants during minority.

IX.—Miscellaneous Cases.—In *Newland v. Shephard* (r), an absolute gift of real and personal estate to the testator's grandchildren was implied from a direction to the trustees to apply the "produce" and interest for their maintenance and benefit during minority. But the decision has been questioned (s). In *Atkinson v. Paice* (t), *Peat v. Powell* (u), and *Hale v. Beck* (v), absolute interests were implied from gifts to trustees in trust for A. until he should attain twenty-one (w). But these cases seem to be of doubtful authority. In *Re Hedley's Trusts* (x) a testatrix gave her residue to a trustee upon trust for her daughter till she should attain the age of twenty-one or marry, and it was held by Hall, V.-C., that there was no implied gift of the capital to her.

Implication arising from a series of limitations.

Where a will contains a series of limitations, or trusts, in favour of a class of persons, such as the testator's own children (y), or the children of another person, or even in favour of persons who are strangers in blood to one another (z), from which it appears that the testator intended the limitations or trusts to be similar, words may be supplied to produce this result. The cases have been already considered (a).

Beneficial gift to executor.

The cases in which executors take the residue of their testator's estate for their own benefit, without any gift to them, are considered elsewhere (b).

If a testatrix gives her residue to her executors beneficially, and

(o) *White v. Barber*, 5 Burr. 2703.
 (p) 10 C. B. 544.
 (q) *Re Lindsay*, 5 Irish Jurist, 97; see also *Alleyne v. Alleyne*, 2 Jo. & Lat. 544; *Goodfellow v. Goodfellow*, 18 Bea. 356; *Browne v. Groombridge*, 4 Madd. 495. Post, Chap. XLII.
 (r) 2 P. W. 194.
 (s) Ante, p. 646.
 (t) 1 Br. C. C. 91.
 (u) 1 Ed. 479.

(v) 2 Ed. 229.
 (w) See also *Tumaley v. Roch*, 3 Dr. 720.
 (x) 25 W. R. 529.
 (y) As in *Sweeting v. Prideaux*, ante, p. 589.
 (z) As in *Mellor v. Daintree*, 33 Ch. D. 198.
 (a) Ante, pp. 588 seq. See also *Davies v. Hopkins*, 2 Bea. 276.
 (b) Chap. XXI., and ante, p. 498.

by codicil appoints an additional executor, this will not entitle him to share in the residue (*c*). CHAPTER XIX.

Before the Land Transfer Act, 1897, if a testator directed (expressly or impliedly) that his land should be sold, and appointed executors to act in carrying out the intentions of his will, this gave them the legal estate, and they could make a good title on a sale (*d*). Devise to executors implied from trust for sale.

Where a testator gives property upon trust for sale, and directs the proceeds of sale to be invested, and the proceeds to be paid to A. for life, with power to postpone conversion, the general rule is that, until conversion, A. is by implication entitled to the income of the unconverted property (*e*). Trust for conversion not executed.

A gift of property to A. absolutely, followed by a direction that on any sale of it A. shall pay B. 1,000*l.* out of the proceeds, does not create any implied trust or obligation to sell (*f*). Trust for sale not implied.

A testator devised land to his son A. contingently on his attaining twenty-six, the rents to be applied for his maintenance in the meantime; if A. died before attaining twenty-six, the land was to go to another son, B., and the testator appointed his daughter residuary devisee. By a codicil the testator revoked all gifts in favour of A., and in lieu thereof gave him a rent-charge: A. attained twenty-six: it was held that B. did not take any interest in the land, and that it went to the residuary devisee (*g*). Revocation.

Except in those cases in which a definite rule of construction has been established (*h*), a gift will not be implied from mere conjecture, however probable it may be that if the contingency had been brought to the testator's mind he would have provided for it (*i*). Conjecture not sufficient.

If a testator declares that his heir-at-law shall not take any part of his real estate, or that none of his next-of-kin shall take any part of his personal estate, this is nugatory and void (*k*), and cannot operate by implication so as to give the crown a right to the real or personal estate (*kk*). But a declaration excluding one or some only of the next-of-kin, if made in clear and appropriate language (*l*), is Implication of gift to next-of-kin, &c.

(*c*) *Hillarsdon v. Grove*, 21 Bea. 518, referred to ante, p. 178, n. (*l*), and post, p. 684.

(*d*) *Davies to Jones and Evans*, 24 Ch. D. 190, following principle laid down in *Oates v. Cook*, Burr. 1684; *Bush v. Allen*, 5 Mod. 63; *Doe v. Gillard*, 5 B. & Ald. 785; *Anthony v. Rees*, 2 Cr. & J. 75.

(*e*) See Chap. XXII.

(*f*) *Re Elliot*, 12 Times L. R. 497.

(*g*) *McKay v. McKay*, [1901] 1 Ir. R. 109.

(*h*) Such as the rules discussed in the earlier sections of this chapter.

(*i*) *Morrison v. Morrison*, 2 Y. & C. C. 652.

(*k*) The general principle is stated in *Pickering v. Lord Stamford*, 3 Ves. 492, ante, p. 550. See also Chap. XXI.

(*kk*) Per Stuart, V.-C., *Lett v. Randall*, 3 Sm. & G. at p. 89, citing *A. G. v. Henchman*, 3 Myl. & K. 485.

(*l*) In *Sykes v. Sykes*, L. R., 3 Ch. 301; *Ramsay v. Sheldermine*, L. R., 1 Eq. 129; *Gould v. Gould*, 32 Bea. 391; and *Re Holmes*, 62 L. T. 383, the respective testators did not express their intention with sufficient clearness.

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valid, and operates as a gift by implication to the rest of the share of those who are excluded (*m*). The question whether the widow of a testator is excluded from participation in undisposed-of personalty by a provision being made for her in satisfaction of all claims on the testator's estate, is discussed elsewhere (*n*).

Devise of
easement by
implication.

There may be an implied gift of an easement by a devise of land, corresponding to an implied grant by deed. Thus, if the owner of land devises part of it to A. and part to B., and B. can only reach his part by going over A.'s part, he is entitled, by implication, to use a way used by the testator for the purpose of access to the land during his lifetime (*o*). So where a testator being the owner of a house and an adjoining field devises the house to A. and the field to B., B. is not entitled to obstruct the light coming to the windows of the house over the field (*p*).

Exclusion by
implication.

Where there is a gift to persons as a class, the question sometimes arises whether a particular person is excluded from the class, by implication from the context. In *Hanna v. Bell* (*q*) an eldest son was held to be excluded from a gift of residue to "all my children who shall attain twenty-one," the gift over being supposed to shew that he was not included in the class: the wording of the will was special. In *Reay v. Rawlinson* (*r*) the testator made a very informal will, by which in effect he devised the D. estate to his sister's eldest son, and directed the rest of the estate to be sold and divided equally among his sister's family (meaning her children); it was held that the eldest son was not excluded.

(*m*) *Vachell v. Breton*, 5 Br. P. C. 51; *Lett v. Randall*, supra; *Bund v. Green*, 12 Ch. D. 819; *Re Taylor*, 52 L. T. 839. The case of *Johnson v. Johnson*, 4 Bea. 318 (if it decided the point) may be considered overruled. *Vachell v. Breton* was a strong decision and its principle would probably not be extended at the present day.

(*n*) Ante, p. 550.

(*o*) *Pearson v. Spencer*, 3 B. & S. 761. As to the rights of the parties where there are several ways, or no way, see *Bolton v. Bolton*, 11 Ch. D. 968.

(*p*) *Phillips v. Low*, [1892] 1 Ch. 47.

(*q*) 7 Ir. Ch. 208.

(*r*) 29 Bea. 88.

CHAPTER XX.

GIFTS BY REFERENCE.

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I. — Construction of Gifts by Reference.—The effect of referential expressions of certain kinds will be discussed in subsequent chapters of this treatise. Executory trusts are part of the subject of Chapters XXIV. and XL. Additional and substituted legacies (which sometimes take the form of gifts by reference) are discussed in Chapter XXX., and the effect of accruer clauses in Chapter LV.

Referential expressions

Leaseholds or chattels personal are sometimes bequeathed to or in trust for "such person or persons as shall be entitled to" certain real estate, either under the same will, or under some other settlement. The most important cases of this description occur where the real estate is limited by way of strict settlement, and in such cases the only question which usually arises is as to the time when and the person in whom the leaseholds or chattels absolutely vest. This question is discussed later (*a*). Cases also happen where the real estate is not devised in strict settlement, but is subject to simpler limitations, as where it is settled on a person for life, with remainder to his children absolutely. In such cases the question arises how far the rules governing the real estate apply to the leaseholds or chattels. Thus, in *Holmes v. Prescott* (*b*), a testator devised freeholds, as to one-fifth to J. H. for life, with remainder to all and every her child and children who, being a son or sons, should attain twenty-one, and bequeathed leaseholds upon trust for such person or persons as from time to time should be entitled to the freeholds, and to go in the same manner, or as near thereto as the rules of law and equity would permit. J. H. died,

Personal estate bequeathed so as to follow real estate.

(*a*) Post, p. 692.

(*b*) 33 L. J. Ch. 264.

CHAPTER XX. leaving one child, W. H., a son, who was then under twenty-one, but subsequently attained that age. The will having been made before the Contingent Remainders Act, 1877, the devise of the freeholds failed as to W. H., but two questions arose as to the leaseholds, namely: (1) Whether W. H. took a share of the corpus of the leaseholds, and (2) whether he took a share of the intermediate rents of the leaseholds. Wood, V.-C., answered the former question in the affirmative, and the latter in the negative. It was argued that as the leaseholds were given to the person entitled to the freeholds, it followed that if W. H. did not take the freeholds he could not take the leaseholds, but the V.-C. said that the freeholds and leaseholds were given to the same person, and although there was a rule of law which prevented the gift of the freeholds taking effect, there was no such rule as to the leaseholds. With regard to the intermediate rents, on the other hand, the V.-C. held that this reasoning did not apply: "it is one thing to say that when, by operation of law, limitations fail in taking their complete effect as to real estate, it is not necessary that they should so fail as to personal estate; and it is another thing to say that when the legal construction would give a certain interest in the real estate, you can, under a limitation like this, adopt a different construction as to the leaseholds, or hand them over to any other person than to him who, by construction, would take the real estate. It appears to me that there is a substantial difference between the two points as to whether or not the limitations would fail as to the corpus, and whether or not the interim income would be taken by the persons actually entitled to the real estates under these limitations, in the event of my considering that the gift of the freeholds is contingent." The V.-C. came to the conclusion that the gift of the freeholds was contingent, and it followed that W. H. was not entitled to any share of the interim rents of the leaseholds, although if the trusts of the leaseholds had been declared directly, and not by reference, he would have been entitled to his share of the rents (c).

Distinction
between
corpus and
income.

Interim
income of
leaseholds
bequeathed
so as to
follow real
estate.

Where leaseholds are bequeathed to follow real estate, and there is a gap in the limitations, so that the vesting of the real estate is suspended, the interim income of the leaseholds, in accordance with the general rule stated elsewhere (d), falls into residue. Thus, in *Hodgson v. Bective* (e), real estate was devised to the second son of A. for life, with remainder to his issue in tail male, and in default of such issue to B. the leaseholds were bequeathed upon trust to

(c) See Chap. XLII.

(d) Chaps. XXV., XXIX.

(e) 1 H. & M. 376. The report in 32 L. J. Ch. 489 is better.

correspond to the limitations of the real estate: A. having no second son, the vesting was suspended during A.'s lifetime: it was held by Wood, V.-C., that the interim income of the chattels real fell into the general residue of the testator's personal estate (*f*).

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Personal property is sometimes given by will to a person described by reference to the limitations of a settlement of land; if the limitations of the settlement are subsequently altered, the question who is entitled to the legacy may be a difficult one (*g*).

Legatee described by reference.

Personal property is sometimes given to a class of persons, with the exception of any member who becomes entitled to certain specified property. It seems that as a general rule such a clause will be construed in the same way as if it were a shifting clause, or clause of forfeiture; that is to say, the words will be construed according to their primary and natural meaning (*h*). Thus, if there is a gift to the children of the person who at the death of the testator shall be tenant for life of a certain estate, "other than an eldest or only son for the time being entitled in tail in remainder expectant on the death of his parent," this exception does not exclude an only son who, by reason of a forfeiture committed by his father, has never become tenant in tail in remainder (*i*). But a different principle of construction applies in the case of portions under a settlement, for if the portions are limited by a person in loco parentis, in favour of children, except an eldest son, becoming entitled to the estate under the settlement, the doctrine of *Chadwick v. Doleman* applies (*j*). It follows that if a younger son succeeds to the estate, not under the settlement, but by descent, the ordinary principle of construction applies (*k*).

Exception from gift of person "entitled" to other property.

"Entitled" *primâ facie* means "entitled in possession" (*l*). But in a case where the personalty was reversionary, the exception of a child "entitled on his father's decease" was held to exclude a son who became entitled in possession to the realty before the reversion fell in, although on his father's death he was only entitled in remainder (*m*).

Meaning of "entitled."

Residuary gifts are sometimes made by way of reference, as in *Re Lindo* (*n*). There a testatrix was entitled to a settled fund

Gifts of residue by reference.

(*f*) The decree is stated in 10 H. L. C. 659; this part of the decree was not appealed against.

(*g*) *Re Croker*, Ir. R., 2 Eq. 58.

(*h*) See Chap. XXXVIII, sec. i. *Shuttleworth v. Murray*, [1901] 1 Ch. 819; s.c., sub nom. *Law Union v. Hill*, [1902] A. C. 263.

(*i*) *Johnson v. Foulds*, L. R., 5 Eq. 268.

(*j*) This is discussed in Chap. XLII.

(*k*) *Sing v. Leslie*, 2 H. & M. 68.

(*l*) *Chorley v. Loveband*, 33 Bea. 189; *Umbers v. Jaggard*, L. R., 9 Eq. 200.

(*m*) *Re Grylls' Trusts*, L. R., 6 Eq. 589.

(*n*) 59 L. T. 462. See also *Re Donald*, 53 Sol. J. 673.

CHAPTER XX. subject to the life interest of A. ; by her will she bequeathed her reversionary interest upon certain trusts for A.'s issue, and declared that A. might, by deed or will, appoint the income of the fund to any future wife for life : by a codicil the testatrix gave her residue upon the like trusts in favour of A. and his issue as were contained in her will with reference to the settled fund. A. married, and by deed appointed the income to his wife. It was held (1) that A. did not take a life interest in the residue ; and (2) that the appointment of the income to his wife, being in the nature of a jointure, did not take effect until after his death.

In *Re Courtauld's Estate* (o), a testator gave various legacies, and then gave his residuary personal estate in trust for the legatees in proportion to the amounts of their legacies. By a codicil he revoked two of the legacies, and in substitution for them gave increased sums upon the same trusts as those declared concerning the revoked legacies : it was held that the residue was divisible among the legatees in the same way as if the substituted legacies had been given by the will.

Beneficial
gift to
executor.

In *Hillersdon v. Grove* (p), a testatrix appointed A. and B. her executors, and gave all the residue of her property "to my executors A. and B.": by a codicil she appointed C. an additional executor and trustee, and directed that her will should take effect in the same manner as if his name had originally been inserted therein as a third trustee and executor ; she bequeathed to him a legacy for his trouble : it was held that he took no interest in the residue.

Construction
of gift by
reference.

As a general rule, it seems that the Court must follow strictly the terms of a gift by reference, if they are explicit, although the result may be contrary to the testator's probable intention ; but if the gift is by way of executory trust, the Court may vary the limitations (q).

Gift by
reference
does not have
the effect of
duplicating
charges—

Testators frequently devise real property to the uses upon the trusts and subject to the powers and limitations of an existing settlement. Such a devise, when carefully drawn, will contain the words "but not so as to increase or multiply charges or powers of charging" ; but without these, or similar words, it is reasonably evident that this is the intention of the testator, and it may be laid down as a general rule (applicable not only to devises of realty, but also to gifts of personalty upon the trusts of an existing settlement) that such referential expressions will not in general be

(o) [1882] W. N. 185.

(p) 21 Bea. 518. On the question whether under such a gift executors take beneficially or as trustees, see Chap. XXI.

(q) See *Lord Kenlis v. Earl of Bective*, 34 Bea. 587, referred to in Chap. XXXVIII; *Miles v. Harford*, 12 Ch. D. 691, referred to ante, p. 309, and post, p. 696.

construed so as to give them the general effect of multiplying charges upon the trust estate or trusts in the nature of charges. "Of course, such may be the intention or effect of a particular will. But in the absence of anything in the will to shew such an intention, the rule is that the Court will not impute it to the testator. In the case of *Hindle v. Taylor* (r), Lord Cranworth held that in almost all cases it is not a reasonable way of reading a trust created by reference to other trusts to consider everything as there repeated and so to make a duplication, as it were, of trusts in the nature of charges. This opinion has been recognised as sound in subsequent cases" (s).

But it is clear that this rule does not apply where the charge or power of charging is not limited to a fixed amount, but is limited to a certain proportion of the value of the capital or income of the property. Thus, in *Cooper v. Macdonald* (t), where the original power was to appoint an annuity not exceeding one third part of the yearly income, Lord Selborne, L.C., said: "If the annuity which a tenant for life was empowered to charge upon the specifically devised estates had been one of (or not exceeding) a fixed annual amount, I should have been of opinion that the general rule stated by Lord Cranworth in *Hindle v. Taylor* (u), against multiplication of charges under a trust created by reference to other trusts, would have applied, and that it would not have been competent for any child of the testator to charge one annuity of that amount on the property specifically devised, and a further annuity on the share of the residuary estate, though both the residuary estate and the property specifically devised might have been made a security for a single annuity. I think, however, that the case is different when the power is to appoint an annuity not exceeding a certain proportion of the income of the property charged therewith. In such a case, by the addition of other property to be held on the same trusts, 'and subject to the same or like powers,' &c., so as to 'correspond with' those before expressed as to the property specifically devised as nearly as the difference in the nature of the property will admit, the testator has (in effect) increased the total amount of income, of which the maximum annual charge is not to exceed a certain aliquot part. The rule of proportion

—unless charge is proportional to value.

(r) 5 D. M. & G. 577.

(s) Per Lord Hobhouse in *Trew v. Perpetual Trustee Company*, [1895] A. C. 264; *Boyd v. Boyd*, 9 L. T. N. S. 166, 2 N. R. 486; *Basket v. Lodge*, 23 B. 138; *Sambourne v. Barry*, Ir. R., 11 Eq.

140. But see *Re Marquis of Bristol*, [1897] 1 Ch. 946 (settlement, hotchpot clause).

(t) L. R., 16 Eq. 258.

(u) 5 D. M. & G. 577, 594.

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“Capable
of taking
effect.”

still holds, but the intention is that the power limited by that rule shall be applicable to the added as much as to the original property” (v).

Where a testator devises or appoints property upon the uses of an existing settlement, or such of them as are “capable of taking effect,” and some of the uses or trusts of the existing settlement have failed by reason of their infringing the rule against perpetuities, or for some other reason founded in law and not in the actual facts which have happened, it is seen that the phrase “capable of taking effect” is *prima facie* open to two constructions: (1) as meaning what the law allows to take effect, or (2) as referring to the trust which by reason of the deaths of parties and other intervening circumstances are still, in fact, existing, or capable of coming into existence. Until recently, in spite of the fact that the phrase has been in use for generations, the only authority on the point was an interlocutory observation of Sir G. Jessel (w), but the question came before Kekewich, J., in the case of *Re Finch and Chew's Contract* (x), where the learned judge held that on a literal and grammatical construction the phrase was used not merely to comprehend what is existing or possible in fact, but also what is allowable in law, so that the question may now be treated as settled.

Where personalty is bequeathed to trustees upon trust to purchase lands to be settled to such of the uses, &c., of an existing settlement as “at the time of my decease shall be subsisting or capable of taking effect, but not so as to increase or multiply charges or powers of charging,” the purchased lands are not subject to charges created before the testator's death (y).

Power of
appointment.

Where personalty is given upon such trusts as will best correspond with the trusts declared of certain real estate, and there is a power of appointment over the real estate exercisable by A., this does not operate to give A. two powers of appointment, one over the personalty and one over the realty, but upon A. making an appointment of the real estate the personalty goes to the person who gets the real estate (z).

If personal property is given by reference to a gift of real estate which fails, the gift of personal estate is valid (a).

If realty is settled upon the same uses as some other real property,

(v) L. R., 16 Eq., at p. 266.

(w) In *Line v. Hall*, 43 L. J. Ch. 107.

(x) [1903] 2 Ch. 486.

(y) *Re Berners*, 67 L. T. 849. The question sometimes arises whether there is an accretion to the funds originally settled or a new settlement with similar

trusts. See *Re Walpole's Settlement*, [1903] 1 Ch. 928; *Re North*, 76 L. T. 186; *Eustace v. Robinson*, 7 L. R. Ir. 83.

(z) *Liddell v. Liddell*, 74 L. T. 105.

(a) Per Wood, V.-C., 10 Jurist N. S. 508. See *Holmes v. Prescott*, *supra*, p. 681.

the words "the same uses" will include powers to appoint uses (b). CHAPTER XX.

In *Whiteway v. Fisher* (bb) the testatrix bequeathed 200*l.* to trustees on trust to accumulate for twenty-one years, and then to lay out the accumulated fund in repairing certain property, and to pay the surplus to the same persons to whom the property was devised; and then devised the property in strict settlement. She afterwards sold it, and by a codicil bequeathed the purchase money to the original devisee for life absolutely. The codicil did not refer to the 200*l.*; it was held that the legacy of 200*l.* failed.

Failure of a gift by reference by ademption of primary gift.

As to revocation of gifts by reference, see Chap. VII., pp. 183 et seq.

Revocation of gift by reference.

II.—Meaning of "in the same manner," &c.—Where there is an absolute gift, coupled with referential expressions, such as "in the same manner," such expressions, in general, determine not *who* shall take a legacy, but *how* the legatee shall take. For instance, where a legacy is given to such of a class as are living at the death of the testator equally as tenants in common, and then follows a gift to the children of A. "in the same manner," all the children of A. take, whether living at that time or born afterwards (c); otherwise if the words be "at the same time and in the same manner" (d).

Gifts "in the same manner," &c.

In *Bessant v. Noble* (e), the testator bequeathed leaseholds after the failure of previous limitations in favour of A. and his issue in trust for such persons as at the time of such failure of issue should be his (the testator's) next of kin according to the statute, and as if the testator had survived A., and in the like shares as they would be entitled to the same under the same statute. He afterwards bequeathed a legacy in trust for M. for life, and after her decease without issue in trust for his own "next of kin in manner aforesaid." It was held that the persons entitled to the legacy would be the persons who would be the next of kin of the testator living at the death of M., and not the next of kin at his own death.

On the other hand, where the principal gift is to A. for life, with remainder, another gift to A. or to B. or to the remainder-man, "in

(b) *Minton v. Kirwood*, L. R., 3 Ch. 614 (settlement by deed).

(bb) 9 W. R. 433.

(c) *Yardley v. Yardley*, 26 B. 38; *Pigott v. Wilder*, 26 Bea. 90; *Re Wilder's Trusts*, 27 Bea. 418; *Archer v. Legg*, 31 Bea. 187 ("agreeably to the instructions

contained in my will"); *Milsom v. Awdry*, 5 Ves. 465 ("in manner aforesaid").

(d) *Swift v. Swift*, 32 L. J. Ch. 479, 11 W. R. 334.

(e) 26 L. J. Ch. 236.

CHAPTER XX. the same manner" (or the like), will generally import the same (or corresponding) limitations and remainders (*f*).

In *Doughty v. Saltwell* (*g*), the testator bequeathed certain houses in trust for M. for her life, and on her decease for her children, and in case M. should die without issue, "to divide the produce [of sale] among such of the testator's grandchildren, thereafter named, as should be living at her decease; and the testator bequeathed certain other houses in trust for his granddaughters C., S., and H., for their separate use for their lives, and "after her decease in trust for the issue of her body in the same manner and subject to the same conditions and limitations as hereinbefore expressed in the bequest to my granddaughter M.": Sir L. Shadwell, V.-C., held that "issue" meant "children," and "limitations" meant "limitations over."

"In like manner."

In *Emes v. Anstee* (*h*), a testatrix directed trustees to make an investment, and out of the dividends to pay annuities of 100*l.* each to her two nieces and her nephew for life, and the capital to their children respectively, and to apply 100*l.* a year in the maintenance of the children of Daniel, a deceased nephew, until twenty-one, when she gave them the capital fund producing this annuity, and then bequeathed her residue in trust for her two nieces and nephew and the children of Daniel "in equal shares in like manner as thereinbefore mentioned with respect to the annual sums of 100*l.* bequeathed to them respectively," and after the decease of the two nieces and nephew the testatrix gave the capital fund out of which their respective shares of dividends were derived equally amongst their children respectively. Romilly, M.R., held that the words "in equal shares" applied only to the children of Daniel, and that the expression "in like manner as is hereinbefore mentioned" merely referred to and repeated what the testatrix had previously said, so that on the death of one of the nieces without issue, the children of Daniel took one-fourth (and not four-sevenths) of her fund between them.

A gift of residue in trust for A. and B., "to be divided between

(*f*) *Ross v. Ross*, 2 Coll. 269 ("under the same conditions and restrictions"); *Davies v. Hopkins*, 2 Bea. 276 (implication); *Re Colshead's Will*, 2 De G. & J. 690; *Re Palmer*, 3 H. & N. 26; *Sweeting v. Prideaux*, 2 Ch. D. 413 (implication); *Heasman v. Pearse*, L. R., 11 Eq. 522; *Giles v. Melsom*, L. R., 6 C. P. 532, 6 H. L. 24 ("so specifically devised"); *Longdon v. Simpson*, 12 V. 295 (where "on the same conditions" was held to

mean "in the same manner"); *Milsom v. Awdry*, 5 V. 465 ("in manner aforesaid"); *Smith v. Greenhill*, 14 W. R. 912; *Re Smith*, 45 L. T. 246; and see *Re Shirley's Trusts*, 32 B. 394 (settlement, "child, children, or otherwise").

(*g*) 15 Sim. 640.

(*h*) 33 B. 264. See also *Tyndale v. Wilkinson*, 23 B. 74 ("to be settled in like manner").

them share and share alike, and to be paid and applied in like manner for their use and benefit as I have directed, the rents and profits of my leasehold premises hereinbefore settled upon them," was held not to settle the residue, but only to give the residue for the separate use of A. and B. (i).

And in *Lumley v. Robbins* (j), the words "in manner aforesaid" were referred to the mode of enjoyment of the interest, and to be satisfied by making them refer to a tenancy in common and a separate use. "In manner aforesaid."

In *Surtees v. Hopkinson* (k), the testator gave his real and personal estate to trustees as to one-fourth to A. for life, and after her decease in trust for her children, and in default of children in trust for B., C., and D. and their issue in the same manner as thereafter directed respecting their original shares; as to one other fourth to B. for life, and after his decease in trust for A., C., and D. and their issue in the same manner as directed respecting their original shares; as to one other fourth part upon trust for C. and her children "upon and for the trusts and purposes and with and subject to the powers and authorities and with the like remainder over in default of issue similar to and in all respects corresponding with the trusts, purposes, powers and authorities expressed and declared concerning the one-fourth share hereby bequeathed in trust for A. and her children as effectually as if the same trusts were here repeated," and as to the remaining fourth share in trust for D. and his children with the same referential expressions as are quoted above in the case of C.'s share. D. died unmarried. Sir R. Malins, V.-C., pointed out that the words were not "to go over with the same limitations," but "with the like remainder," and that the words "like" and "corresponding," but not the word "identical," were used, and consequently held that D.'s share went in equal thirds to A., B., and C. for life.

A devise to persons "upon the same conditions" as they hold property has been held to mean upon the trusts of their marriage settlement (l).

Where a testator directed a transfer of 3 per cent. Consols three months after his decease, and gave other legacies of stock "as aforesaid," it was held by Lord Eldon, L.C., that "as aforesaid" merely meant 3 per cent. Consols, and did not refer to the time of transfer (m). "As aforesaid."

(i) *Shanley v. Baker*, 4 Ves. 732.

(j) 10 H. 621.

(k) L. R., 4 Eq. 98.

(l) *Ord v. Ord*, L. R., 2 Eq. 393.

(m) *Sibley v. Perry*, 7 Ves. 522.

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In *Meredith v. Meredith* (n), there was a devise for the benefit of S. and A. and their children in a certain event, followed by a proviso that on the happening of a certain event the testator gave the said estates to S. and A. and to the issue of their bodies lawfully begotten or to be begotten, and their heirs as tenants in common "as aforesaid." It was held that the words "as aforesaid" implied that the limitations in the first case were to take effect in the second case.

"As stated above."

Where a testator used the words, "I declare again that I leave everything I die possessed of to my dearest mother, for her entire and sole use and benefit as stated above," the words "as stated above" were held not to limit the subject of the bequest, but to mean that the gift was for the sole use, so that the words were superfluous (o).

"So."

In *Dillon v. Harris* (p), the meaning of the word "so" in a provision to take effect "in case both my said sons should 'so' die unmarried and without leaving lawful issue," was held upon the context to refer to "marrying with the consent of the trustees or executors, or the majority of them."

"Such."

The word "such" is sometimes used as a referential expression meaning "as aforesaid," sometimes to refer to what follows after (q).

It frequently happens that the word "such" is inaccurately used, and must be either rejected or modified, in order to carry out the intention of the testator. Thus, in *Howgrave v. Cartier* (r), there was a limitation to children who attained twenty-one, with a gift over if there should be no "such" children or they should die before any of them attained twenty-one; the word "such" was rejected as senseless. So in *Dowglass v. Waddell* (s), the testator used the expression "such issue male or female," although no female issue had previously been mentioned. The word "such" was rejected on the authority of *Howgrave v. Cartier* (r). In *Re Hutchinson* (t), the testatrix, after giving life interests to her children, directed that in case of the death of any of her children, the issue of such child should take their parent's share in such shares and proportions as their parent should by will appoint, "in default of such appointment such issue to take equally as tenants in common": Kay, J., held

(n) 10 East, 503. See also *Davis v. Norton*, 2 P. W. 390 ("die without issue as aforesaid," i.e. in lifetime of testator's widow); *Walsh v. Peterson*, 3 Atk. 194 ("die before the age of twenty-one or without issue as aforesaid"); and *Weddell v. Mundy*, 6 Ves. 341 ("under age as aforesaid," i.e. without leaving a husband).

(o) *Re Kendall's Trusts*, 14 Bea. 608.

(p) *Dillon v. Harris*, 4 Bli. N. S. 321.

See also *Bell v. Phym*, 6 Ves. at p. 458.

(q) See the observations of Kindersley, V.-C., in *Stolworthy v. Sancroft*, 12 W. R. 635. As to the effect of the word "such" in a gift over in shewing the meaning of the primary gift, see *Idle v. Cook*, 1 P. W. 70, cited post, Chap. XLVII.

(r) 3 V. & B. 79.

(s) 17 L. R. Ir. 384.

(t) 55 L. J. Ch. 574.

that the expression "such issue" could not be limited to the grandchildren who could take under an appointment. CHAPTER XX.

In *Parker v. Tootal* (u) R., the testator's eldest son, was dead at the date of the will, leaving a son T.; the testator had a younger son J.; he devised land to T. for life with remainder to the first son of the body of the said T. in tail male, and for want of such issue "either by my said grandson T. or my said son J.," then over; there was no devise to the issue of J.; it was held that "such issue" meant "issue male." This construction, which is contrary to the referential principle of construction usually applied to gifts over in default of "such issue," is explained elsewhere (v).

In one case (in 1810) (w) a testator devised his estate at S. to various limitations in succession, concluding with one to the first and other sons of B. in tail male, and in default of such issue [of B.] "to such person and persons and for such estate and estates as should at that time and from time to time afterwards be entitled to the rest of his real estate by virtue of and under his said will." The devise of the other real estate included an ultimate remainder to the testator's own right heirs: it was held that the ultimate remainder in fee of the estate at S. vested by descent in the person who was the testator's heir at the time of his death, the ground being that the ultimate reversion was undisposed of by the will. But since stat. 3 & 4 Will. 4, c. 106, s. 3, the heir would take by purchase and not by descent, so that should a similar case arise on a modern will, it will be possible to argue that the words "at that time" operate to give a contingent remainder to the person who is heir at law at the time of the failure of issue. "At that time."

Where a testator devises specific realty to the uses of an existing settlement which contains an ultimate limitation to the testator and his heirs, the specific devise does not include this ultimate limitation; if the uses of the settlement fail, the real estate specifically devised by the testator reverts to him and passes under his residuary devise (x). Ultimate limitation.

If lands be devised to the same uses and trusts and with the same powers, &c., as other lands already settled, the powers will be exercisable by the trustees of the settlement, not by the trustees of the will (y). Powers.

(u) 11 H. L. C. 143.

(v) Chap. LII. The case is also referred to in Chap. L. on another point: ante, p. 588.

(w) *Doe d. Cholmondeley v. Masey*,

12 East, 589.

(x) *Jacob v. Jacob*, 78 L. T. 451; 82 L. T. 270.

(y) *Taylor v. Miles*, 28 Bea. 411.

CHAPTER XX.

Conversion,
investment,
&c.

Various
cases.

As to
annexing
personal
to real estate,
devised
in strict
settlement.

In *Auldjo v. Wallace* (z), a bequest of "200*l.* a year to be invested in the same manner as " a sum of Consols previously given, was held to mean a fund producing that income. In *Murton v. Markbey* (a), a bequest of leaseholds upon the same trusts, &c., as those declared of the moneys to arise by sale of property previously given upon trust for sale, was held to subject the leaseholds to the trust for sale.

Other cases in which the effect of referential expressions is considered are collected in the footnote (b).

A bequest to persons "hereinbefore named" does not necessarily refer to persons who have been described by their Christian name or surname (c).

A gift of residue to "all the beforementioned pecuniary legatees" is not a gift to them as a class (d).

III.—Effect of Limitations in strict Settlement upon Personal Property, &c.—Mr. Jarman thus states the practice which was usual in his time (e): "When it is intended that leasehold estates, or personal chattels in the nature of heir-looms, shall go with lands devised in strict settlement, they should not be simply subjected to the same limitations; the effect of that being to vest the personal property absolutely in the first tenant in tail, though he should happen to die within an hour after his birth (f); and as the freehold lands in that event pass over to the next remainder-man, a

(z) 31 Bea. 193.

(a) 18 Bea. 196.

(b) "As before," *Macnamara v. Lord Whitworth*, Cooper, 241. "In like manner," *Roe d. Aistrop v. Aistrop*, 2 Bl. 1228; *Lewis v. Puzley*, 16 M. & W. 733. "In manner aforesaid," *Doe d. Woodall v. Woodall*, 3 C. B. 349; *Mountain v. Young*, 18 Jur. 769, Co. Lit. 20 b. "Under the trusts aforesaid," *Re Bowles*, [1905] 1 Ch. 371. "On the same terms," *Goodtitle d. Cross v. Woodhull*, Willes, 592. "Subject to the same restrictions," *Barber v. Barber*, 1 Jur. 915. "Upon the like trusts and with the like powers," *Re Lindo*, 59 L. T. 462. "Conditions therein mentioned," *Stretton v. Fitzgerald*, 23 L. R. Ir. 310, 466 (will with subsequent codicil). "In as ample a manner," *Younge v. Coombe*, 4 Ves. 101; and see *Hare v. Hare*, 24 W. R. 575 (settlement). "As also," *Macnamara v. Dillon*, 11 L. R. Ir. 29. "Her part aforesaid," *Doe d. Gibson v. Gell*, 2 B. & Cr. 680; *Doe v. Stopford*, 5 East. 501, and other cases cited post, Chap. XXVII. s. vi. How much of what precedes shall be

held affected by referential expressions is a frequently recurring question. See e.g. *Baker v. Baker*, 6 Hare, 269; *Fisher v. Brierley*, 30 Beav. 265; *Makings v. Makings*, 1 D. F. & J. 355 (question whether charge affected life estate as well as remainder). See also *Re Cameron*, 26 Ch. D. 19, 26; *Leader v. Duffey*, 13 App. Ca. 294.

(c) *Seale Hayne v. Jodrell*, [1891] A. C. 304; *In re Holmes*, 1 Dr. 321 ("specially named"); *Bromley v. Wright*, 7 Ha. 334.

(d) *Re Gibson's Trusts*, 2 J. & H. 656; *Nicholson v. Patricksen*, 3 Giff. 209.

(e) First ed. vol. ii. p. 507.

(f) *Foley v. Burnell*, 1 Br. C. C. 274; 4 Br. P. C. 319; *Pelham v. Gregory*, 3 Br. P. C. 204; *Scarsdale v. Curzon*, 1 J. & H. 40. But where a junior branch, quoad the estate, has issue before the senior, the chattels do not vest indefeasibly in such issue; they will not so vest until the senior branches are extinct: *Pelham v. Gregory*, 3 Br. P. C. 204; *Re Cresswell*, 24 Ch. D. 102, where *Hogg v. Jones*, 32 Beav. 45, is distinguished.

separation between them and the chattels takes place; but the personal property should be limited over, in case any such tenants in tail (being the sons of persons in esse) should die under twenty-one and without inheritable issue, to the person upon whom the freehold lands will devolve in that event; or, which is the more usual mode, the personalty should be subjected to the same limitations as the freeholds, with a declaration that it shall not vest absolutely in the tenant in tail until twenty-one, or death under that age, leaving issue inheritable under the entail."

Notwithstanding these provisions, a separation of the chattels from the lands will nevertheless occur (whichever form is used), if the tenant in tail should die under twenty-one leaving inheritable issue; for in that case he would take the chattels absolutely, while the lands would descend to the issue. To prevent this separation, the declaration should be that the chattels shall not vest absolutely in any tenant in tail by purchase who may die under twenty-one, but shall at his death devolve as nearly as possible in the same manner as the lands (*g*). Under this (which is now the ordinary) declaration, the issue will take the whole of the chattels by purchase, instead of such share or interest only as he may be entitled to as of kin to the ancestor.

Modern form of trust for annexing chattels to settled realty.

That the words "by purchase" are necessary in this form of declaration, in order to avoid a breach of the Rule against Perpetuities, has already been noticed (*h*). But the trust may be so expressed as to be by implication confined to tenants in tail by purchase, as in *Christie v. Gosling* (*i*), where freeholds were devised in strict settlement, and chattels were then given on the same trusts and for the same estates as the freeholds, or as near thereto as the rules of law and equity would permit, with a proviso that the chattels should not vest absolutely in any tenant in tail unless he attained twenty-one (without more). These trusts were impugned as constituting in effect a gift to the first tenant in tail who should attain twenty-one,

When not void for remoteness.

(*g*) Davidson's Prec., vol. iii. pt. ii. p. 1180; vol. i. (5th edition), p. 379; Byth. & Jarm. Conv. (4th edition, by Robbins), vol. vii. p. 966; Key and Elphinstone, 8th ed. vol. ii. p. 666; (in the 9th ed. a more elaborate form is recommended); Wolstenholme, 5th ed. p. 148. The older forms are referred to in *Scarsdale v. Curzon*, supra, and *Harrington v. Harrington*, L. R., 5 H. L., at p. 93. In recent years some new forms have come into use, designed to

postpone vesting until the tenant in tail comes into possession, without preventing a resettlement. See also s. 24 (3) of the Settled Land Act, 1882; *Re Walker*, [1908] 2 Ch. 705.

(*h*) Ante, p. 347.

(*i*) L. R., 1 H. L. 279; 32 Beav. 58, 1 D. J. & S. 1 (*Gosling v. Gosling*). See also *Martelli v. Holloway*, L. R., 5 H. L. 532; *Wells v. Wells*, W. N., 1890, p. 29.

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and as therefore being too remote, as upon that construction they clearly were (j); and Sir J. Romilly, M.R., adopting that construction, held the gift void. But Lord Westbury differed on the point of construction and reversed the decision. Applying the limitations of the freeholds to the personal estate (as far as the difference of tenure would admit), the effect was (he said) to give the absolute interest to the first tenant in tail by purchase; then came the proviso, in which the words "tenant in tail" must mean tenant in tail by purchase, for it referred to one in whom the personalty would, but for the proviso, have vested absolutely instead of defeasibly. The L.C. therefore held that the gift vested in the infant tenant in tail liable to be divested on his death under twenty-one. And this decision was affirmed in the House of Lords (k).

Lord Westbury observed, "If the will had provided for the event of a tenant in tail by purchase dying under twenty-one leaving a son, by declaring an express trust for such son of the personal estate, the case would have existed of a tenant in tail of the real estates by descent taking the personal estate by purchase; and if in that case the proviso were held to apply to and include such tenant in tail, the whole disposition of the principal of the personal estate would be void for remoteness." In the case before him, he thought, no such trust was either expressed or implied (l). But this is, in effect, what the ordinary declaration does express. Hence the necessity for the words "by purchase." The trust in *Christie v. Gosling* was saved from remoteness only because it led to the very separation which the ordinary declaration is designed to prevent; it being considered by Lord Westbury (m) that if the infant tenant in tail should die under twenty-one leaving issue, the chattels would devolve under the prior trust to the next purchaser in the series of limitations, not to the issue.

Harrington v. Harrington.

In *Harrington v. Harrington* (n), personal chattels were bequeathed in trust for the person for the time being in the actual possession of settled lands, to the intent that they should be deemed heir-looms, to be enjoyed with the estates, so far as the rules of law or equity would permit, but so that they should not vest absolutely in any person who by virtue of any settlement

(j) See ante, p. 343.

(k) See the explanation of the decision given by Lord Cairns in *Harrington v. Harrington*, L. R., 3 Ch. p. 571, 5 H. L. 103.

(l) 1 D. J. & S. 16.

(m) *Ib.* This point was not noticed

in D. P.

(n) L. R., 5 H. L. 87. Lord Westbury's statement of the law is inaccurate. The head-note is also inaccurate in stating that the first tenant in tail was in by descent.

should become entitled to the estates for an estate of inheritance, unless he attained twenty-one, or, dying under that age, should leave issue inheritable under the settlement. The first tenant in tail by purchase died under twenty-one and without issue, and his successor (who was born within a life in being and twenty-one years after the death of the testator) was residuary legatee under the testator's will; consequently he became entitled to the chattels, whether the trust was void, or whether it was valid to the point of vesting them in the first tenant in tail and divesting them without carrying them over to his successor, or whether it was valid to the point of so carrying them over. The claim by the administratrix of the first tenant in tail therefore failed. Lord Cairns seems to have been of opinion that the chattels vested in the first tenant in tail, and were divested on his death under age, but were not carried over to his successor, so that they fell into the testator's residue.

As Mr. Jarman points out (o), the construction of a direction that chattels shall go with settled lands "so long as may be, or so long as the rules of law will permit, has been vexata quæstio." Lord Hardwicke, in *Gower v. Grosvenor* (p), expressed an opinion that such a direction made the trust executory, and that the Court might make a proper settlement of the chattels; but in *Foley v. Burnell* (q) and *Vaughan v. Burslem* (r), Lord Thurlow held that the property vested absolutely in the tenant in tail on his birth; in other words, that the direction did not make the trust executory; and this, though often regretted, is now the settled doctrine (s). It was much canvassed in the House of Lords in *Duke of Newcastle v. Countess of Lincoln* (t), which arose on marriage articles containing a covenant to assign leaseholds upon the same trusts as freeholds so far as the law would allow, and the trusts being executory, it was decided that the Court had power to modify the limitations so far as to suspend the absolute vesting until twenty-one. Lord Eldon did not concur in this decision, considering that the question was concluded by *Vaughan*

"So long as the rules of law will permit."

(o) First ed., vol. ii., p. 507.

(p) Barnard. 54. See also *Trafford v. Trafford*, 3 Atk. 347.

(q) 1 B. C. C. 274.

(r) 3 B. C. C. 101.

(s) *Fordyce v. Ford*, 2 Ves. jun. 536; *Carr v. Lord Errol*, 14 ib. 478; *Stratford v. Powell*, 1 Ba. & Be. 1; *Rowland v. Morgan*, 6 Hare, 463, 2 Phil. 764; *Doncaster v. Doncaster*, 3 K. & J. 26.

See the cases reviewed by Wood, V.-C., *Lord Scarsdale v. Curzon*, 1 J. & H. 40; per Lords Westbury and Cairns, L. R., 5 H. L. 101, 107. See also *Re Cresswell*, 24 Ch. D. 102; *Re Johnston*, 26 Ch. D. 538 ("to be enjoyed and go with the title"); *Miller v. Stanley*, 12 W. R. 780.

(t) 3 Ves. 387, (*Lincoln v. Newcastle*) 12 Ves. 218.

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v. *Burslem*. But in *Shelley v. Shelley* (u), where a testatrix, without reference to any real estate, bequeathed jewels to her nephew to be held as heir-looms by him and by his eldest son on his decease, and so on from eldest son to eldest son, as far as the rules of law would permit, and requested her nephew by his will or otherwise to give effect to her wishes, Sir W. P. Wood, V.-C., held this to be a good executory trust, and directed a settlement to be made of the jewels to the nephew for life, remainder to his eldest son E. (who was born in the testatrix's lifetime) for life, remainder to E.'s eldest son if living at E.'s death (v), to vest at twenty-one, with a gift over on death under twenty-one or in E.'s lifetime.

In a recent case (w), chattels were bequeathed to trustees upon trust to permit the same from time to time to go and be held and enjoyed with the mansion house (which was devised in strict settlement), so far as the rules of law and equity would permit, by the person or persons who for the time being should be entitled to the possession of the said mansion house by virtue of his will, "yet so that the said chattels shall not vest absolutely in a son or any person hereby made tenant for life of the said mansion house unless such son or other person shall attain the age of twenty-one years." The Court held that "or" must be read "of," so that the declaration was to the effect that "the said chattels shall not vest absolutely in a son of any person hereby made tenant for life of the said mansion house unless such son shall attain the age of twenty-one years"; the operation of the will therefore was to carry on the chattels to the next person entitled to the real estate under the limitations until a tenant in tail by purchase was reached who attained twenty-one.

How far remoteness obviated by words "so long as the law permits."

The words "so long as the rules of law will permit," though ineffectual to make the trust executory, or to correct a gift which in terms infringes the Rule against Perpetuities (x), may, it seems, fairly be referred to where the terms are ambiguous, in aid of a construction which will not be obnoxious to that rule (y). And even without these words, if the trust is on other grounds executory, it may be moulded to avoid remoteness. Thus, in *Miles v. Harford* (z), where freeholds were devised to A. for life, remainder to his first and other sons in tail male, with a shifting clause which provided that if

(u) L. R., 6 Eq. 540. The point does not appear to have been previously decided: See opinion of Sir L. Shadwell, *Boydell v. Golightly*, 14 Sim. 346.

(v) "Living at E.'s death" seems to be due to the words of the will "on his decease, and so on."

(w) *Re Dayrell*, [1904] 2 Ch. 496.

(x) See *Tollemache v. Earl of Coventry*, 2 Cl. & Fin. 611, 8 Bl. (N.S.) 547, ante, p. 343. See *Ker v. Dungannon*, 1 Dr. & W. at p. 536.

(y) See *Harrington v. Harrington*, L. R., 3 Ch. 574, 5 H. L. 102, 107.

(z) 12 Ch. D. 691.

A. or his issue male should become entitled to a certain other estate, the devised estate should go over; and leaseholds were given upon such trusts, &c., as, regard being had to the difference of tenure, would most nearly correspond with the uses, &c., of the freeholds. It was held by Sir G. Jessel, M.R., that this was an executory trust; for the testator "knew that something would not work, and has said you are to make them correspond having regard to the effect of the tenure on the limitations." If the shifting clause were repeated literally for the leaseholds, it would fail to a great extent for remoteness. It must therefore be modified so as to shift the leaseholds in every case (covered by the clause) in which it could lawfully be made to shift (a).

If chattels are bequeathed to or in trust for the persons for the time being entitled to the possession of settled real estate, they do not vest absolutely in the tenant for life, but in the first tenant in tail on his birth, although he may be only tenant in tail in remainder. And a direction that they shall be treated as heirlooms and annexed to the real estate, makes no difference (b).

Meaning of
"possession."

The same principle applies where the testator adds a proviso that the chattels shall not vest absolutely in a tenant in tail by purchase unless he attains twenty-one (c).

The Court of Appeal declined to apply this principle in *Re Lord Chesham's Settlement* (d). In that case a mansion house and lands were settled to the use of the third Baron Chesham during his life with remainder to his sons successively in tail male, and certain chattels were vested in trustees upon trust, so far as the rules of law and equity would allow, to permit the same to be used, held, and enjoyed by the person who for the time being should be entitled to the mansion house under the limitations of the settlement, "yet so that for the effect of transmission the same shall not vest absolutely in any person hereby made tenant in tail male or in tail by purchase who shall not attain the age of twenty-one years, but who nevertheless shall be entitled to the use and benefit thereof during minority."

(a) As it happened, A. himself had become entitled to the other estate, and the M.R. also held that, as this event was separately expressed from that of his issue becoming so entitled, the shifting clause was good in event, as to the leaseholds, without modification.

(b) *Foley v. Burnell*, 1 Br. C. C. 274: 4 Br. P. C. 319: *Re Fothergill's Estate*, [1903] 1 Ch. 149. By "first tenant in tail" is meant the first tenant in

tail whose estate is indefeasible, see ante, p. 692, n. (f). As to the effect of a direction that chattels shall devolve as heirlooms, see *Vaizey on Settlements*, 1333.

(c) *Martelli v. Holloway*, L. R., 5 H. L. 532 (where the proviso was implied under the doctrine of *Christie v. Gosling*, ante, p. 693); *Re Angerstein*, [1895] 2 Ch. 883: note (f), infra.

(d) [1909] 2 Ch. 329.

CHAPTER XX. The second Baron Chesham died in 1882; the third Baron had two sons, the elder of whom died, intestate and unmarried, in 1900, shortly after attaining his majority. The younger son was born in 1894, and on the death of his father, the third Baron, in 1907, became the fourth Baron Chesham and tenant in tail male in possession of the mansion house and estates. Eve, J., held that the chattels vested in the elder son of the third Baron. The Court of Appeal, following the construction placed upon the settlement by Chitty, J. (on a question of election) in *Re Lord Chesham (e)*, held that the testator had shewn an intention that the chattels should be annexed to the house and should not vest in a tenant in tail unless he became tenant in possession; the Court accordingly decided that the heirlooms belonged to the infant tenant in tail, subject to being divested in the event of his dying under age (*f*).

(e) 31 Ch. D. 466; ante, p. 535.

(f) The decision has caused some surprise, because it runs counter to a doctrine which has hitherto been regarded as clearly established. Where a settlement contains a declaration that chattels are to be held and enjoyed by the persons from time to time entitled to the possession of the settled real estate, they vest in the first tenant in tail on his birth: "otherwise the absurdity must happen of the personal estate being tied up longer than the real" (per Lord Comm. Ashurst in *Foley v. Burnell*, 1 Br. C. C. at p. 285). And where a proviso is added, that the chattels are not to vest in any tenant in tail by purchase unless he attains twenty-one, then if the tenant in tail attains twenty-one while his estate is in remainder, he becomes absolutely entitled to the chattels, subject to the interest of the tenant for life. If it is desired to postpone the vesting until the tenant in tail comes into possession, clear words to that effect must be used (*Potts v. Potts*, 3 J. & Lat. 353; 1 H. L. C. 671; *Cox v. Sutton*, 25 L. J. Ch. 845; *Scarsdale v. Curzon*, 1 J. & H. 40; *Re Fothergill's Estate*, [1903] 1 Ch. 149). Both rules are illustrated by *Re Angerstein*, [1895] 2 Ch. 883: in that case testator A. bequeathed chattels as heirlooms to be used and enjoyed by the person for the time being entitled to "the actual possession" of the settled estates: testator B. bequeathed chattels as heirlooms to be held and enjoyed by the person for the time being "entitled in possession" to a certain

mansion house: it was held by Kekewich, J., that a tenant in tail in remainder, who attained twenty-one and died in the lifetime of the tenant for life, became absolutely entitled to the chattels under the will of testator B., but that he did not become entitled to the chattels under the will of testator A. The question under the will of testator B. (not referred to in the headnote) was considered so clear that it was not seriously argued. The view of the Court of Appeal in *Re Lord Chesham's Settlement* was that the chattels were "in effect" annexed to the house, but there was no such declaration in the settlement, while in *Foley v. Burnell* the chattels were "to be held and enjoyed by the several persons who from time to time should respectively and successively be entitled to the use and possession of the same houses respectively, as and in the nature of heirlooms, to be annexed and go along with such houses respectively for ever"; yet it was held by the House of Lords that they vested absolutely in a tenant in tail in remainder who died fourteen days after his birth. And in *Martelli v. Holloway* (L. R., 5 H. L. 532), where no person was to be entitled to the personal estate unless he became entitled to an estate tail in possession in the real estate, all the learned lords thought (though the point had become immaterial, owing to the death of the tenant for life) that the case fell within the doctrine of *Foley v. Burnell*, and that the personal estate had vested absolutely in the tenant in tail in

Where chattels are bequeathed to trustees upon trust to permit the same to be enjoyed by the person for the time being in the "actual" possession of real estates settled by the will, a tenant in tail who predeceases the tenant for life does not become entitled to the chattels (g); but unless the intention is plain that no person shall take the chattels absolutely who does not live to become entitled to the possession of the real estate, "the Court will not introduce in such cases the restrictions which conveyancers know how to introduce with apt words" (h). Even the words "entitled to an estate tail in possession" are insufficient to displace the rule in *Foley v. Burnell* (i). Where the entail has been barred by a tenant for life and remainder-man in tail, the words "who shall be in the actual possession" have been held to mean the person who would have come into possession if the original limitations were subsisting (j).

remainder. In the face of these authorities it is difficult to support the decision in *Re Lord Chesham's Settlement*. In that case, it is true, the settlement was by deed, but this clearly makes no difference (see *Scarsdale v. Curzon*, supra).

The decision will, it is feared, cause considerable practical inconvenience. The object of the forms in ordinary use for settling chattels as heirlooms is to provide for the case of most frequent occurrence, namely that of the first tenant in tail attaining majority during his father's lifetime, and joining with him in a resettlement of the estate and the chattels. This would be impossible if the chattels were not to vest in the tenant in tail until he came into possession. One of the forms frequently used was approved by the late Mr. Key: it requires the trustees to permit the chattels "to devolve and be enjoyed as heirlooms with the freehold hereditaments hereby settled," and provides in the usual way for the case of a tenant in tail by purchase dying under twenty-one (Key and Elphins. Conv., 4th ed. vol. ii. p. 696). In *Re Lord Chesham's Settlement* the trust was to permit the chattels "to be used held and enjoyed with the mansion house called L. by the person or persons who for the time being shall be entitled to the said mansion house under the limitations thereof herein contained." Now the chattels which are the subject of a trust of this kind are almost invariably articles of furniture, plate,

works of art, &c., which can only be "enjoyed" with a dwelling house, and it is therefore practically impossible to draw any distinction between the form used by Mr. Key, and the form used by the draftsman of Lord Chesham's settlement. If the reasoning of the Court of Appeal is correct, it follows that under a trust in Mr. Key's form the chattels do not vest in a tenant in tail in remainder on his attaining twenty-one. Yet Mr. Key's form was deliberately framed, in reliance on the doctrine of *Foley v. Burnell*, in order that the chattels might so vest (see Davidson's Prec. vol. iii. pt. i. pp. 600, 626; Mr. Key was one of the editors of this volume), and the form has been largely used. See Addenda.

(g) *Re Fothergill's Estate*, [1903] 1 Ch. 149; *Re Angerstein*, [1895] 2 Ch. 883, 44 W. R. 152; *Lord Scarsdale v. Curzon*, 1 J. & H. 40.

(h) Per Sugden, L.C., in *Potts v. Potts*, 3 J. & Lat. at p. 368; *Re Fothergill's Estate*, supra.

(i) Supra, p. 697; *Martelli v. Holloway*, L. R., 5 H. L. 532; *Potts v. Potts*, 3 J. & Lat. 353, 1 H. L. C. 671 ("become seised"); *Re Johnson's Trusts*, L. R., 2 Eq. 716. See also *Cox v. Sutton*, 25 L. J. Ch. 845, 2 Jur. N. S. 733 (repairing fund to be applied at request of person in possession). As to the meaning of "entitled in possession" in a shifting clause, see *Leslie v. Earl of Rothes*, [1894] 2 Ch. 499.

(j) *Hogg v. Jones*, 32 B. 45. See *Re Cornwallis*, 32 Ch. D. 388.

CHAPTER XX.

In *Re Marquess of Bute* (*k*), the testator bequeathed certain chattels “upon trust to hold the same as heirlooms from time to time so long as the rules of law and equity will allow, and to permit and suffer the same from time to time to be used and enjoyed by the person or persons who for the time being under the limitations and dispositions made by a certain deed of entail bearing date the day of shall be entitled to the possession or to the receipt of the rents and profits of my capital messuage or mansion house called Mount Stuart House.” The deed of entail could not be found, and the plaintiff became entitled to Mount Stuart House as heir at law of the testator: it was held that these chattels belonged to the plaintiff.

Settlement
of chattels
to go with
a title.

Testators sometimes wish to settle chattels to go with a title, but their intention is frequently frustrated, unless they create an executory trust. The following rules may be deduced from the cases:

(1) A gift of chattels to the Earl of E. and his successors, and to be enjoyed with and go with the title, is an absolute gift to the Earl of E., since the words “to be enjoyed with, &c.” are not sufficient to create an executory trust, nor any executed trust sufficient to cut down the Earl’s interest to a life estate (*l*).

(2) A gift of chattels to trustees for the Earl of E. and his successors, to be held and settled as heirlooms, and to go with the title, create an executory trust (*m*); in making the settlement, the Court will give the first taker an estate for life only, and will so frame and mould the limitations as not to infringe the law against perpetuities, whether or no the testator has added the words “so far as the rules of law and equity will permit.”

(3) A mere gift of a chattel to Lord S. and his heirs, “for an heirloom,” is not enough to create an executory trust, so that if the person who was Lord S. at the date of the will dies before the testator, the gift lapses (*n*).

(*k*) 27 Ch. D. 196.

(*l*) *Re Johnston*, 26 Ch. D. 538, following *Rowland v. Morgan*, 6 Ha. 463, 2 Ph. 764 (where the bequest was to the testator’s son “and his heirs, Earls of A., to be held as heirlooms”); *In re Viscount Exmouth*, 23 Ch. D. 158, (where the clause intended to postpone the vesting was held void for uncertainty); *Re Hill*, [1902] 1 Ch. 537, 807 (where the words “so far as the rules of law and equity will permit” were added).

(*m*) *Sackville-West v. Holmesdale*,

L. R., 4 H. L. 543; *Re Johnston*, *supra*; and see *Harrington v. Harrington*, L. R., 5 H. L. 87, and Chap. XXXVIII. As to the decision in *Re Gerard*, [1901] W. N. 21, *quære*.

(*n*) *Re Whorwood*, 34 Ch. D. 446. In *Montagu v. Lord Inchiquin*, 23 W. R. 592, where chattels were bequeathed to A., who was then the holder of the title, to be deemed heirlooms and held and enjoyed by the person for the time bearing the title, it was held that the gift did not lapse by the death of A. before the testator.

CHAPTER XXI.

PARTIAL INTESTACY AND RESULTING TRUSTS.

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I.—Partial Intestacy.—Total intestacy is generally the result of a person dying without leaving a valid will, but it may also occur if a person makes a will which is properly executed but becomes wholly inoperative ; as where the sole legatee and executor predeceases the testator (*a*). If all the persons to whom beneficial interests are given by the will die in the testator's lifetime, but the executor survives and proves the will, there is no intestacy as to the legal estate, but there is a total intestacy as to the beneficial interest (*b*). Where a will effectually disposes of the beneficial interest in part of the testator's property, but contains no express or implied gift of the residue (*c*), or where the testator excepts certain property from the residuary gift (*d*), or the residuary gift fails to take effect, wholly or partially, by revocation, lapse (*e*), or otherwise (*f*), there is a partial intestacy. Intestacy,
how caused.

As will be pointed out later, there is a difference between real and personal estate as regards the operation of a residuary Intermediate
income.

(*a*) *Re Ford*, [1902] 1 Ch. 218; [1902] 2 Ch. 605; *Re Cuffe*, [1908] 2 Ch. 500.

(*b*) *Ibid*.

(*c*) As in *Re Cameron*, 26 Ch. D. 19; post, p. 707, note (*g*). As to implied gifts of residue by the appointment of an heir or executor, see ante, p. 82, post, p. 715.

(*d*) Post, Chap. XXIX.

(*e*) *Oresswell v. Cheslyn*, 2 Ed. 123; *Bagwell v. Dry*, 1 P. W. 700; *Page v. Page*, 2 P. W. 489; *Re Mary Wood's*

Will, 29 Bea. 236; *Skrymsher v. Northcote*, 1 Sw. 566; *Sykes v. Sykes*, L. R., 4 Eq. 200. In *Great v. Great*, 26 Bea. 621, there was a double lapse or failure, see post. As to the effect of a direction that a certain share of residue shall sink or fall into the residue, see Chap. XXIX.

(*f*) As where a trust for accumulation is void under the Thellusson Act: *Talbot v. Jevors*, L. R., 20 Eq. 255; *Re Travis*, [1900] 2 Ch. 541

CHAPTER XXI.

Intestacy
resulting
from nuga-
tory disposi-
tion :

—from cross
bequests.

Effect of de-
claration
without dis-
position.

gift, for if a residuary devise is contingent or future, the intermediate rents do not pass by the devise, but go to the heir. But a contingent or future gift of residuary personalty, or of a mixed residue of realty and personalty, carries the intermediate income (g).

In *Brown v. Burdett* (h) a testatrix devised a freehold house to trustees upon trust to block up the windows, doors, &c., and keep them blocked up for twenty years, after which she devised the property to B. It was held that these trusts were ineffectual, and that there was an intestacy for twenty years from the testatrix's death.

In *Re Valdez's Trusts* (i) a testator gave his residuary estate to M. and J., and in case of their decease bequeathed what he had bequeathed to them to their executors or administrators. M. and J., both predeceased the testator, J. having by her will bequeathed to the testator the residue of her property. It was held that the personal representatives of M. and J. took as tenants in common in equal shares, and that J.'s share came back to the estate of the testator, but was undisposed of by his will and devolved as if he had died intestate.

The general rule is that a testator cannot by a mere declaration alter the mode of devolution prescribed by law in case of intestacy (j) : "You cannot exclude an heir at law or next of kin but by giving to somebody else" (k). As in *Re Holmes* (l), where a testator declared that all his relatives except two nieces should be excluded from all advantages and benefit under his will : it was held that the undisposed of residue went to the statutory next of kin. So in *Fitch v. Weber* (m) a testatrix devised her real estate, upon trust for sale, and declared that the proceeds of sale should be held as personal and not real estate, and that they should not in any event lapse or result for the benefit of her heir at law ; she made no further disposition of them, or of her residuary personal estate, and it was held that the heir at law was entitled to the proceeds of sale by way of resulting trust (n). Of course if

(g) Post, Chap. XXIX.

(h) 21 Ch. D. 667. Compare *Re Cameron*, 26 Ch. D. 19.

(i) 40 Ch. D. 159.

(j) See the principle stated ante, p. 425.

(k) *Pickering v. Stamford*, 3 Ves. 492, ante, p. 550 ; *Johnson v. Johnson*, 4 Bea. 318.

(l) 62 L. T. 383.

(m) 6 Ha. 145.

(n) In *Countess of Bristol v. Hungerford* (2 Vern. 645) there was a devise of real estate to be sold for payment of debts, the surplus, if any, to be deemed personal estate and to go to the testator's executors, to whom he gave 20*l.* apiece : it seems to have been held that the executors took as trustees for the next of kin ; see 3 P. W. 194 n. ; *Fitch v. Weber*, supra ; *Gordon v. Atkinson*, 1 De G. & S. p. 482 ; post, Chap. XXII.

the testatrix had made a disposition of her residuary personal estate, it might have been held that she intended it to include the proceeds of sale of the real estate, without any express direction to that effect (o). CHAPTER XXI.

A declaration by a testator that A. shall not take any share of the testator's property, may operate as a gift by implication of the share which A. would otherwise have taken, to the other persons entitled to the testator's undisposed of property, if the intention is clear (p). Exclusion of individual.

The Statute of Distribution, 1670 (sect. 5) does not apply to a partial intestacy arising from a failure of the trusts declared concerning part of a testator's residuary estate (q). Statute of Distribution.

The Intestates' Estates Act, 1890, does not apply to cases of partial intestacy (r), but it applies to cases where a man leaves a valid will which becomes wholly inoperative owing to the death of the executors and legatees, &c., during the testator's lifetime (s). Intestates' Estates Act, 1890.

The Dower Act, 1833, provides by sect. 4, that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will, and by sect. 9, that where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, she shall not be entitled to dower out of any land of her husband unless a contrary intention shall be declared by his will. Dower Act.

As to the effect of testamentary dispositions in barring the widow's right to dower under these sections, the following points have been decided. In *Rowland v. Cuthbertson* (t), a testator in 1864 devised his real and personal estate, subject to payment of his debts, upon trust as to one-sixth share for his wife for life; it was held by Romilly, M.R., that the land was so devised "for the benefit of" the widow within the meaning of sect. 9 of the act, as to deprive her of her right to dower. And in *Lacey v. Hill* (u), where a testator by his will made in 1861, devised and bequeathed all his real and personal estate upon trust for sale and conversion, and directed his trustees to invest the proceeds, and out of the income of such investments to pay an annuity to his widow, and Operation of the Dower Act.

(o) As in *Court v. Buckland*, 1 Ch. D. 579.
605.

(p) *Ante*, p. 679.

(q) *Re Roby*, [1907] 2 Ch. 84.

(r) *Re Twigg's Estate*, [1892] 1 Ch.

(s) *Re Cuffe*, [1908] 2 Ch. 500.

(t) L. R., 8 Eq. 466.

(u) L. R., 19 Eq. 346.

CHAPTER XXI. subject thereto to hold the investments for the benefit of his children: it was held by Jessel, M.R., that the widow's right to dower out of the freehold realty was barred because the devise on trust for sale was a disposition of the land within the meaning of sect. 4 of the act, and also amounted to a gift of an estate or interest in the land for the benefit of the widow within the meaning of sect. 9. So in *Re Thomas (v)*, Sir E. Kay, J., held that a gift to a widow of the income of part of the proceeds of sale of real estate is a gift to her of an interest in land within sect. 9 of the act, so as to bar her claim to dower out of any part of her husband's estate.

Effect when will leaves property partially undisposed of.

Trust results to the heir, when.

II.—Resulting Trust for the Heir.—Mr. Jarman states the general rule thus (*w*): “If a will fails to make an effectual and complete disposition of the whole of the testator's real and personal estate, of course the undisposed-of interest, whether legal or equitable, devolves to the person or persons on whom the law, in the absence of disposition, casts that species of property (*x*). It is clear, therefore, that where real estate is devised in fee, upon trust for a person incapable of taking, or who is not sufficiently defined, or who dies in the testator's lifetime, or who disclaims the estate, the beneficial interest in the estate so devised results to the heir at law (*y*).”

“So, in a case (*z*) where the Earl of Harborough devised his manors, advowsons, &c., to trustees, in trust, to pay his son 1,000*l.* a year for his life, and the rest of the profits to be laid out in land, to be settled to certain uses; Lord Hardwicke held, that the right of presentation arising from the advowsons during the son's life was a fruit undisposed of, and devolved to the heir; no other profits being given than such as might be accumulated; though, he said, if the testator had devised all the surplus rents and profits, it would have carried the right of presentation” (*a*).

(*v*) 34 Ch. D. 166.

(*w*) First ed. p. 502.

(*x*) As to apportionment between heir and next of kin, see *Re Cameron*, *infra*, p. 705, note (*g*).

(*y*) *Hartop's Case*, 1 Leon. 253, Cro. El. 243; and other cases *infra*. In cases where land is devised upon trust, and the devise of the legal estate fails, the lands formerly descended to the heir charged with the trust. In the case of a testator dying since 1897, the effect of the Land Transfer Act, 1897, is that his real estate devised upon trust passes, in the first instance, to his personal representatives as trustees for

the persons by law beneficially entitled thereto, but the ultimate result is the same.

(*z*) *Sherrard v. Lord Harborough*, Amb. 165; see also *Kellett v. Kellett*, 3 Dow, 248. The paragraph to which this note belongs has been transferred from p. 505 of Mr. Jarman's text, where it seems to be out of place.

(*a*) “With this dictum agrees *Earl of Albemarle v. Rogers*, 2 Ves. jun. 477, 7 Br. P. C. Toml. 522, where a testator devised all his manors, messuages, lands, and hereditaments to A. for eleven years from his death; and from the end, expiration, or sooner determination of

If land is devised to A. subject to a charge or a term of years, and the charge or term fails, A. takes the benefit of the failure (*b*). But if land is devised to A., subject to an exception out of it of some interest in favour of B., and the gift to B. fails, then the excepted interest goes by way of resulting trust to the heir or residuary devisee (*c*). If it is a chattel interest, the heir takes it as personalty (*d*).

The doctrine established by the case of *Ackroyd v. Smithson* (*e*)—namely, that where land has been converted into money in accordance with the provisions of a will, and part of the proceeds remains undisposed of, it goes to the heir—is an illustration of the general rule stated by Mr. Jarman. This subject is discussed in the next chapter.

Doctrine of
Ackroyd v.
Smithson.

Mr. Jarman continues (*f*), “On the same principle, where lands are devised upon trust for particular purposes, as for payment of debts, or with a direction to pay the rents to A. for life, and no further trust is declared, all the unexhausted beneficial interest results to the heir, as real estate undisposed of (*g*).

the said term, and in the meantime subject thereto, to B. and his issue in strict settlement. The term was declared to be bequeathed to A., upon trust, to receive the rents, issues, and profits of the premises, and thereout to pay certain charges therein mentioned, *paying the overplus of such monies to the testator's daughter E.* During the eleven years an avoidance occurred in an advowson forming part of the property, and the next presentation was claimed by B., as the devisee of the estates subject to the term, the trusts of which, it was said, did not comprise an interest of this description; and also as E., either as the cestui que trust of the residuary rents, issues, and profits, during the term, or as heir at law; and it was held to belong to her in the former character, the entire beneficial interest during the term, not absorbed by the charges, being given to her.” (Note by Mr. Jarman.) See also *Johnstone v. Baber*, 6 D. M. & G. 439; but see *Martin v. Martin*, 12 Sim. 579.

(*b*) Where a testator is entitled to a sum of money charged on land and raisable for his benefit in any event, a different rule applies; see *Simmons v. Pitt*, L. R., 8 Ch. 978: ante, p. 389, n. (*s*).

(*c*) The cases as to charges have been already considered (ante, p. 441), with reference to the distinction between an

exception and a charge. The cases in which land is devised to one person charged with a legacy, or the like, for the benefit of another, and the legacy fails by lapse or otherwise, are not generally treated as cases of resulting trusts; the legacy is said to sink for the benefit of the devisee. As to devises subject to terms, see *infra*, p. 724.

(*d*) *Infra*, p. 708.

(*e*) 1 Br. C. C. 503, stated post, Chap. XXII.

(*f*) First ed. p. 502.

(*g*) *Culpepper v. Aston*, 2 Ch. Ca. 115, 223; *Roper v. Ratcliffe*, 9 Mod. 171, 2 Eq. Ca. Ab. 508; *Re Sanderson's Trust*, 3 K. & J. 497. In both the above propositions, however, it is assumed that the subject of disposition is the testator's general or residuary real estate, or that the will does not contain a residuary devise, the effect of which to pass the undisposed-of interest in particular lands is considered in Chap. XXV.

It is not, of course, necessary that there should be an express devise: thus in *Re Cameron* (26 Ch. D. 19) a testator gave some legacies and authorized his executors to realize any part of his estate to pay them; he also directed his business to be carried on until his son attained the age of thirty, but did not dispose of the profits or make any other disposition of his property, except by devising a particular house: it was

CHAPTER XXI.

Question
whether
devisees take
beneficially,
or not.

Lord Eldon's
statement of
the principle.

" This doctrine is so well settled, that if the character of trustee be plainly and unequivocally affixed to the devisee, no question can at this day be raised respecting its application ; but the difficulty in these cases generally is, to determine whether it is intended that the interest in the land, ultra the purpose to which it is devoted, shall belong to the devisees in a fiduciary character, or for their own benefit.

" The distinction between the two classes of cases was, in *King v. Denison (h)*, thus stated by Lord Eldon :— ' If I give to A. and his heirs all my real estate, charged with my debts, that is a devise for a particular purpose, but not for that purpose only ; if the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more. And the effect of these two modes admits just this difference : the former is a devise of an estate of inheritance, for the purpose of giving the devisee the beneficial interest, *subject* to a particular purpose ; the latter is a devise *for* a particular purpose, with no intention to give him any beneficial interest. Where, therefore, the whole legal estate is given for the purpose of satisfying trusts expressed, and those trusts do not, in their execution, exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir. But where the whole legal interest is given for a particular purpose, with an intention to give to the devisee the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee, as it is intended to be given to him.'

" In illustration of this subject, it is proposed to state a few of the leading cases, showing, first, where a trust has been held to result ; and, secondly, where not.

Cases of re-
sulting trusts.

" In *Wyeh v. Packington (i)*, a testator, after appointing his wife S. sole executrix of his will, devised to his said dear wife, his executrix, a rent-charge of 200*l.* per annum, out of certain lands, upon trust that she, her executors, &c., should be supplied with monies out of the rents and profits for the discharging his debts, legacies, and payments ; to which end, he gave and bequeathed to her a lease for thirteen years of the said rent-charge, to commence six months after his decease. And the testator devised to his

held that the executors might continue to carry on the business with the real and personal estate which the testator had employed in it until the legacies were paid out of the profits, and that any surplus profits must be apportioned between the heir at law and next of kin.

(*h*) 1 V. & B. 272. This " classical " statement of the rule was cited with approval by the Court of Appeal in *Croome v. Croome*, 59 L. T. 582, post, p. 712.

(*i*) 3 Br. P. C. Toml. 44. See also *Barrs v. Fewkes*, 2 H. & M. 60.

wife certain lands for life, in augmentation of her jointure ; and the residue of his lands to his daughter (who was his heir-at-law) in tail. The personal estate being found sufficient to satisfy the debts and legacies, it was not necessary to resort to this fund. The House of Lords, in affirmance of a decree of the Court of Exchequer, held that the rent-charge resulted to the heir.

“ So, in a case which arose on the will of Serjeant Maynard (*j*), who devised his lands to three persons, to the use of them and their heirs, upon the trusts after mentioned ; and then directed the trustees, upon the death of the countess, his wife, to convey the estate to certain persons for life ; but without disposing of the remainder in fee. It was contended that the devise, being to them and their heirs, upon the trusts after mentioned, imported that they should be trustees only for those purposes ; and when those estates were spent, the land was to remain to them to their own use. But the L.C. held, that the remainder in fee resulted to the heir, his Lordship adverting to the circumstance that the devise was to three persons, and one of them no relation to the testator.

“ It is clear that where lands are devised upon trust for sale, the resulting trust in favour of the heir is not repelled by a mere bequest to him of a sum of money payable out of the proceeds.

“ Thus (*k*), where a testator devised lands to his executors and their heirs, in trust, to be sold by them, and the survivor of them, for the best price, and with the money to pay his debts, legacies, and funeral, and among the legacies were two to his co-heirs : it was contended, on the authority of *North v. Crompton* (*l*), that, there being legacies to the heirs, and none to the executors, the latter must take for their own benefit ; but Lord Cowper, C., held, that the trust resulted to the co-heirs, adverting to the direction to the executors to sell for the best price, which need not have been inserted if they were intended to be owners (*m*) ; and also the devising the estate to the survivor, which, he observed, was a further argument of its being rather a trust than an ownership.

“ Indeed, where the property is devised in trust to be sold, the point is so clear against the trustees, that a claim by them is seldom

Legacy to the heir does not exclude him.

Resulting trust in lands devised to be sold.

(*j*) *Hobart v. Countess of Suffolk*, 2 Vern. 644, 1 Eq. Ca. Ab. 272, pl. 7 ; see also *Collis v. Robins*, 1 De G. & S. 131 ; *Wills v. Wills*, 1 D. & War. 439 ; *Bird v. Harris*, L. R., 9 Eq. 204.

(*k*) *Starkey v. Brooks*, 1 P. W. 390 ; see *Randall v. Bookey*, 2 Vern. 425.

(*l*) “ 1 Ch. Ca. 196 ; see also *Halliday*

v. Hudson, 3 Ves. 210 ; and *Countess of Bristol v. Hungerford*, 2 Vern. 645, 1 Eq. Ca. Ab. 272, pl. 7, stated post.” As to Mr. Jarman’s statement of this case, see post, Chap. XXII.

(*m*) “ Why not, as there was a trust for creditors, which might have absorbed all ? ” (Note by Mr. Jarman.)

CHAPTER XXI. advanced (n); but the contest in such cases generally lies between the heir-at-law and the residuary legatee, or next of kin, whose respective claims are discussed in the next chapter."

But the fact that there is a trust for sale is not conclusive. In *Re West (o)* a testatrix gave all her real and personal property to four persons upon trust for sale, and upon trust out of the proceeds of sale to pay debts and legacies, &c.; the will contained clauses for the indemnity and reimbursement of the "said trustees," and appointed the same four persons executors, but it contained no residuary gift; Kekewich, J., said: "There is a general devise and bequest to certain persons on trust for sale. Those words alone do not settle the question, as I might still find the trustees were entitled to take beneficially. . . . But I cannot look on that trust as mere machinery. It affords a strong indication that they are to hold the proceeds as trustees generally"; and the learned judge held that the frame of the whole will shewed that the donees were not intended to take the surplus beneficially, and that there was a resulting trust.

In *Barrs v. Fewkes (p)* a testator appointed A. to be his executor, and after making various bequests gave the rest and residue of all his real and personal estates to A. "to enable him to carry into effect the purposes of" the will: it was held that there was a resulting trust for the heir of the real estate.

As to chattel interest devolving upon the heir.

"And here it may be observed," continues Mr. Jarman (q), "that where the portion of real estate left undisposed of is a chattel interest, it devolves upon the heir as personalty, and is transmissible to his personal representative (r).

Cases in which devisees held to take beneficially.

Effect of direction to sell to certain persons.

"We now proceed to the cases in which a trust has been held not to result, there being an apparent intention to give the devisee as well the beneficial interest as the legal estate.

"In *Hill v. Bishop of London (s)* a testator devised his perpetual advowson of B., in the county of H., to his honoured mother-in-law G. S., willing and desiring her to sell and dispose thereof to certain colleges. Upon the refusal of one, the offer was to be made to another, in a prescribed order. Item, he gave to his said mother-in-law his freehold lands in the parish of

(n) See for example *Watson v. Hayes*, 5 My. & Cr. 125.

(o) [1900] 1 Ch. 84.

(p) 2 H. & M. 60.

(q) First ed. p. 506.

(r) *Levet v. Needham*, 2 Vern. 138; see also *Wych v. Packington*, 3 Br. P. C.

Toml. 44, stated ante, p. 706; *Hewitt v. Wright*, 1 Br. C. C. 86; *Sewell v. Denny*, 10 Beav. 315; *Burley v. Evelyn*, 16 Sim. 290; *Whitehead v. Bennett*, 18 Jur. 140.

(s) 1 Atk. 618.

O., and to her heirs and assigns for ever. It was held, that the beneficial interest in the lands (ss) included in the first devise did not result to the heir. 'The general rule,' said Lord Hardwicke, 'that, where lands are devised for a particular purpose, what remains after that purpose is satisfied, results, admits of several exceptions. If J. S. devise lands to H., to sell them to B. for the particular advantage of B., that advantage is the only purpose to be served, according to the intent of the testator, and to be satisfied by the mere act of selling, let the money go where it will; yet there is no precedent for a resulting trust in such a case. Nor is there any warrant, from the words or intent of the testator, to say that this devise severs the beneficial interest: it is only an injunction on the devisee to enjoy the thing devised in a particular manner. If A. devises lands to J. S., to sell for the best price to B., or to lease for three years at such a fine, there is no resulting trust.' There were in this case, his Lordship observed, two objects of the testator's benevolence, G. S. and the colleges.

"Lord Hardwicke adverted also to the circumstance that the word *trust* was not made use of; but this, though not immaterial, is by no means conclusive; for a trust may be created without that word, if such an intention can be collected from the whole will (t).

Word "trust" not necessary in creating one.

"His Lordship's statement of the general rule may seem to clash with Lord Eldon's, before cited. He appears to have confounded the distinction, so clearly marked by Lord Eldon, between a devise *for* (u), and a devise *subject to*, a particular purpose; but, as the case before Lord Hardwicke seems to belong to the latter class, it is in accordance with that distinction. The frame of the devise and the context (for it was immediately followed by a devise, clearly beneficial, to the same person) certainly favoured the construction adopted. The case suggested by his Lordship, of a devise to A. to sell, for the best price, to B., perhaps, is more open to doubt. He admitted, however, that, under a devise of lands to be sold for payment of debts, there was a clear resulting trust.

Distinction between a devise *for*, and *subject to*, a particular purpose.

(ss) Thus in Mr. Jarman's text; but "lands" is clearly a misprint for "advowson."

(t) *Halliday v. Hudson*, 3 Ves. 210; and see *King v. Denison*, 1 Ves. & B. 273; *Saltmarsh v. Barrett*, 29 Beav. 474, 3 D. F. & J. 279 (on the word "charged"); *Barrs v. Fewkes*, 2 H. & M. 60 ("to enable"); *Bird v. Harris*, L. R., 9 Eq. 204 ("in consideration").

And a trust will not be created by the word "trust," if an intention not to do so appears by the whole will: *Hughes v. Evans*, *Williams v. Roberts*, and *Clarke v. Hilton*, all referred to post, pp. 710-1, 716-7.

(u) See *Abrams v. Winshup*, 3 Russ. 350, where the word "for" was read as "charged with."

CHAPTER XXI.

Effect of
expressions
importing
benefit to the
devisee.

"The resulting trust for the heir, in lands devised for a particular purpose, is excluded, where the devise contains expressions importing an intention to confer on the devisee a benefit.

Of expressions
of kindness.

"Thus (*v*), where a testator, having given 5*l.* to his brother, (who was his heir,) made and constituted his dearly-beloved wife his sole executrix and *heiress of all his lands* and real and personal estate, to sell and dispose thereof at pleasure, and to pay his debts and legacies, L. C. King held, she was not, after payment of debts, a trustee for the heir. He said that the devise that the wife should be sole heiress of the real estate, did, in every respect, place her in the stead of the heir, and not as a trustee for him. His Lordship observed, that it was plainer by reason of the language of tenderness, his 'dearly-beloved wife,' which must have intended something beneficial to her, and not what would be a trouble only; and what made it still stronger was, that the heir had a legacy.

"That these two circumstances alone are not sufficient, is quite clear. The former occurred in *Wyeh v. Packington* (*w*), where the expression was 'my dear wife,' and yet the trust was held to result; and the latter, in *Randall v. Bookey* (*x*), where a legacy to the heir was decided not to rebut the inference of a resulting trust.

Of describing
devisee by
relationship.

"Where the devisee is merely described by the relationship, as 'my cousin,' 'my brother,' unaccompanied by any particular expression of kindness, the argument is still less strong, the designation being merely part of his description; though certainly, in *Cunningham v. Mellish* (*y*), the fact of the devisee being described as 'my cousin,' and that of his being as nearly related to the testator as the heir, seem to have formed the grounds of the determination. In the cases of that period, however, the doctrine of resulting trusts was not so invariably and steadily maintained as it now is; and many positions to be found in them are inconsistent with the rules at present established. Such a description of the devisee is certainly a circumstance to be attended to, and was so referred to in a case by Lord Eldon, in reference to *Cunningham v. Mellish* (*z*); but that it would now be allowed the weight which was given it in that case, is not probable."

(*v*) *Rogers v. Rogers*, 3 P. W. 193, Cas. t. Talb. 268.

(*w*) Stated *supra*, p. 706.

(*x*) 2 Vern. 425, 1 Eq. Ca. Ab. 272, pl. 4; and see *Hughes v. Evans*, 13 Sim. 504.

(*y*) Pre. Ch. 31, 1 Eq. Ca. Ab. 273, pl. 8, 2 Vern. 247 (*Cunningham v. Mellish*).

(*z*) See *King v. Denison*, 1 V. & B. 274. See also per Wood, V.-C., *Barrs v. Fewkes*, 2 H. & M. 67.

CHAPTER XXI.

No trust, though word "trust" used.

As to the expressed purpose of the devise being beneficial or not to the devisee.

Lord Langdale's remark on *Dawson v. Clarke*.

A devise subject to certain annuities.

Where the gift to the devisee was in the first instance expressly upon trust, and the trust afterwards declared did not absorb the whole property, yet, on the whole, the testator having described the devisee as his most dutiful and respectful nephew, and having expressly declared that the heir should take nothing except a provision made for him by the will, it was held that the devisee took beneficially subject to the trusts declared (a).

"In *Rogers v. Rogers*," continues Mr. Jarman (b), "the purpose expressed, namely, the payment of debts and legacies, was not beneficial to the devisee; and, therefore, unless she had taken the surplus, she would have derived no benefit from the devise. It has been truly said 'that where the purpose expressed is something in favour of the party to whom the bequest is made, the presumption is rather stronger that the benefit specified is the only benefit which he is intended to derive from the bequest' (c).

"In *Dawson v. Clarke* (d), a testator gave to his friends A. and B. all his real and personal estate, to hold to them, their heirs, executors, administrators, and assigns, upon trust in the first place to pay, and charged and chargeable with all his just debts and funeral expenses and the legacies thereafter bequeathed. The testator, after bequeathing several legacies, appointed A. and B. executors. Lord Eldon, C.:—"The question is, whether, upon the whole will, this is to be taken as a devise and bequest to these executors, with reference to their office, upon a trust to pay; or as giving them the absolute property, subject only to a charge; and I think the latter was the intention."

"Of this case Lord Langdale, M.R. (e), has observed that Lord Eldon gave effect to the words 'charged and chargeable' (which he had placed in opposition to the words 'upon trust'), on some ground which does not appear in the report. It might be that he considered the last words in the will as explanatory of the first.

"The general doctrine was much discussed in *King v. Denison* (f), where a testatrix devised her real estate to her cousin Mary A., wife of R. A., and to her cousin Arabella J., and their heirs and assigns for ever; *subject, nevertheless, to, and chargeable with*, the payment of the annuities thereafter mentioned; and she bequeathed her personal estate to three other persons, subject to, and chargeable with, her debts and legacies; and gave such three

(a) *Hughes v. Evans*, 13 Sim. 496.

(b) First ed. p. 509.

(c) Per Sir W. Grant, in *Walton v. Walton*, 14 Ves. 322.

(d) 15 Ves. 409, 18 Ves. 247. This

case was decided at the Rolls, in reference exclusively to the personal estate.

(e) 1 Kee. 324.

(f) 1 V. & B. 260.

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persons equal legacies. Lord Eldon held, that the devisees of the real estate were not trustees, after paying the annuities, for the heir at law; his Lordship considering the intention to be (according to the distinction stated by him, already quoted), that they should not take merely *for the purpose of paying* those annuities, but beneficially, *subject to* them.

“The Court of King’s Bench had made a similar decision upon the same will (g).

Circumstance of devisees being a married woman and an infant;

—and not testator’s nearest relatives.

Of their being trustees of the personal estate.

“It happened in this case that one of the devisees was a married woman, and the other an infant of fifteen: persons, therefore, ill adapted to be trustees. But, though Lord Eldon admitted these were circumstances to be attended to (h), yet, he observed, that, if they were trustees upon the whole context, he could not say that they were not so on that ground; and upon the singularity that the testatrix had given to these cousins in preference to nearer relations, a sister and aunt, his Lordship observed, that the answer was, she had made the disposition.

“Another circumstance in the case was, that the testatrix had used the same expression, ‘subject and chargeable,’ in the bequest of the personal estate [to her executors], of which it was contended they were trustees, in consequence of having equal legacies given them; but Lord Eldon observed, that, admitting this construction as to the personalty, which he thought doubtful upon the cases, it did not follow that the same words, in different parts of the will, applied to a different subject, were to receive the same construction. It was only the same as if she had said that the executors should not take the personalty beneficially, but had made no such declaration as to the real estate (i).

Croome v. Croome.

The rule laid down by Lord Eldon in *King v. Denison* was approved and applied by the Court of Appeal in *Croome v. Croome* (j). There a testator gave to E. all his real estate, “upon trust nevertheless to pay thereout” certain specified sums; the will contained a bequest of the personal estate to E. and other persons, and appointed E. executor: it was held that E. took the real estate beneficially, subject to the payment of the specified sums.

As to resulting trust in lands given to charity.

“It should be noticed,” says Mr. Jarman (jj), “that an exception to the doctrine of resulting trusts exists in regard to gifts to charity;

(g) *Smith d. Dennison v. King*, 16 East, 283. See also the cases as to personalty, discussed in the next section.

(h) See *Blinkhorn v. Feast*, 2 Ves. sen. 27.

(i) As to the case of *Countess of*

Bristol v. Hungerford, 2 Vern. 645; see ante, p. 702, n. (n).

(j) 59 L. T. 582; affirmed in D. P., 61 L. T. 814, as a matter of the construction of the particular will.

(jj) First ed. p. 512.

the rule being, that where lands, or the rents of lands, are given to charitable purposes, which at the time exhaust, or are represented to exhaust, the whole rents, and those rents increase in amount, the excess arising from such augmentation shall be appropriated to charity, and not go, by way of resulting trust, to the heir-at-law (*k*).

"It has been observed by Lord Hardwicke (*l*) and Lord Eldon (*m*), that, at the time this doctrine was established, the right of the heir-at-law under a resulting trust was not sufficiently understood, or it never could have been adopted. Both these great Judges, however, acknowledged it to be a principle not now to be shaken.

"But, if a man give an estate to trustees, and take notice that the payments are less than the amount of the rents, no case has gone so far as to say that the cestui que trust, even in the case of a charity, is entitled to the surplus. There would either be a resulting trust, or it would belong to the person who takes the estate" (*n*).

If the original rents were divisible among several objects, the general principle is that any increase will be apportioned among them, but this is a matter for the discretion of the Court (*o*).

Apportionment.

And if a testator gives property to a corporation, as to a specific part of the income upon charitable trusts, and as to the residue of the income (specifying the amount) for the benefit of the corporation, and the income afterwards increases, the increase will be apportioned (*p*). But the gift may be so expressed that the corporation takes the whole income, subject to the payment thereof of certain definite sums for charity, and in that case any increase in the income goes to the corporation (*q*).

(*k*) *Thetford School Case*, 8 Co. 130; *Duke's Ch. Uses*, 71; *Sutton Colefield's Case*, 10 Rep. 31; *Duke*, 68; *Att.-Gen. v. Johnson*, Amb. 190; *Att.-Gen. v. Sparks*, Amb. 201; *Att.-Gen. v. Haberdashers' Company*, 4 Br. C. C. 103; s. c. nom. *Att.-Gen. v. Tonna*, 2 Ves. jun. 1; *Att.-Gen. v. Coventry*, 2 Vern. 397, 713; 3 Madd. 353; 2 J. & W. 305 n.; see also *Re Jortin*, 7 Ves. 340; *Att.-Gen. v. Wansay*, 15 ib. 231; *Re Ashton's Charity*, 27 Bea. 115; *Att.-Gen. v. Wax Chandlers' Company*, L. R., 6 H. L. 1; *Merchant Taylor's Co. v. Att.-Gen.*, L. R., 6 Ch. 512; *Aberdeen University v. Irvine*, L. R., 1 H. L. Sc. 289, and the cases on charitable trusts of personality, post, p. 718.

(*l*) Amb. 190.

(*m*) 2 J. & W. 307.

(*n*) Lord Eldon, in *Att.-Gen. v. Mayor of Bristol*, 2 J. & W. 307; and *Att.-Gen. v. Skinners' Company*, 2 Russ. 443;

Att.-Gen. v. Cordwainers' Co., 3 My. & K. 534. See also *Mayor of Beverley v. Att.-Gen.* 6 H. L. Ca. 310. "But as charitable dispositions of lands by will are prohibited by the statute of 9 Geo. 2, c. 36 (ante, p. 247), unless in favour of certain objects, this question rarely occurs, except under wills which are prior to the statute." (Note by Mr. Jarman.)

(*o*) *Att.-Gen. v. Jesus College*, 29 Bea. 163; *Att.-Gen. v. Marchant*, L. R., 3 Eq. 424; *Re Campden Charities*, 18 Ch. D. 310.

(*p*) *Att.-Gen. v. Coopers' Co.*, 3 Bea. 29; *Att.-Gen. v. Drapers' Co.*, 4 Bea. 67.

(*q*) *Mercers' Company v. Att.-Gen.*, 2 Bli. N. S. 165; *Att.-Gen. v. Smythies*, 2 R. & M. 717; *Att.-Gen. v. Bristol Corp.*, 2 J. & W. 294; *Att.-Gen. v. Brazen Nose Coll.*, 2 Cl. & F. 295; *Att.-Gen. v. Cordwainers' Co.*, 3 My. & K. 534; *Att.-Gen. v. Grocers' Co.*, 6 Bea.

CHAPTER XXI.

Two sets of trustees.

Where there are two sets of trustees and all the beneficial trusts fail, the question may arise which set of trustees is entitled to the legal estate, and the advantages accruing from it. In *Onslow v. Wallis* (r) land was held under a deed in trust for L. S. in fee. L. S. by her will devised the land to trustees upon trust for sale and out of the proceeds to pay debts and legacies, the legacies being specified in a certain paper marked A. This paper was not forthcoming. The trustee under the deed claimed to be entitled to retain the land for his own benefit, subject to the testatrix's debts, which he offered to pay, but it was held that he was bound to convey the land to the trustees of the will. In *Re Lashmar* (s), however, B. was entitled, subject to certain life interests, to an equitable reversion in fee, in land vested in the trustees of A.'s will; B. devised his real estate to trustees upon trusts which failed before the reversion fell into possession: it was held that the trustees of B.'s will were not entitled to call for a conveyance from the trustees of A.'s will. The Court of Appeal said that the decision in *Onslow v. Wallis* turned on the fact that in that case the trustee had duties to perform. In neither case did the Intestates Estates Act, 1884, apply.

III.—Resulting Trust for Next of Kin.—The general principle has been already stated by Mr. Jarman, that “if a will fails to make an effectual and complete disposition of the whole of the testator's real and personal estate, of course the undisposed-of interest, whether legal or equitable, devolves to the person or persons on whom the law, in the absence of disposition, casts that species of property” (t). Thus where a testator gives his real and personal estate upon trust for conversion, and only partially disposes of the beneficial interest, there is a resulting trust for the next of kin of the undisposed of residue, so far as it arises from the personal estate (u). The same rule applies where there is a trust for the conversion of money into land, and the objects for which conversion is directed partly fail (v).

Charge on real estate.

Where a testator is entitled to a sum of money charged on real estate, and raisable for his benefit in any event, it is personal estate, and if part of it is undisposed of, it goes to his next of kin and does not sink for the benefit of the estate (w). But if the testator is

526; *Att.-Gen. v. Trinity Coll.*, 24 Bea. 383; *Southmolton Corp. v. Att.-Gen.*, 5 H. L. C. 1; *Beverley Corp. v. Att.-Gen.*, 6 H. L. C. 310; *Att.-Gen. v. Dean, &c., of Windsor*, 8 H. L. C. 369.

(r) 1 Mac. & G. 506.

(s) [1891] 1 Ch. 258.

(t) Ante, p. 704.

(u) *Robinson v. Taylor*, 2 Br. C.C. 589.

(v) Post, Chap. XXII.

(w) *Simmons v. Pitt*, L. R., 8 Ch. 978, ante, p. 389, n. (s).

entitled both to the estate and to the charge, and makes a disposition of the estate, it is a question of intention whether the charge merges in the estate, or is kept alive for the benefit of the testator's personal estate (*x*).

When executor trustee of undisposed of residue for next of kin.

Before the passing of the Executors Act, 1830, the presumption was that if a testator appointed an executor, he meant him to take beneficially all personal property not disposed of by the will. Since the act, an executor is a trustee for the next of kin of any residue not expressly disposed of by the will (*y*), unless it appears by the will that he was intended to take the residue beneficially (*z*). If, however, there are no next of kin, the presumption in favour of the executor arises as under the old law, but it may be rebutted, in which case the executor is trustee for the crown (*a*). *Primâ facie*, therefore, an executor is not beneficially entitled to any property not expressly disposed of by the will, even if the terms of the will shew that the testator considered that it disposed of all his property (*b*). But an intention that the executor shall take beneficially may appear from the general scheme of the will (*c*).

Where residue expressly bequeathed.

If a testator expressly bequeaths the residue of his personal estate, the question whether the residuary legatee is to take beneficially or not is a question of construction, to be decided on the language of the testator. The question generally arises where the residuary legatee is also appointed executor (*d*). In the case of *Dawson v. Clarke* (*e*), referred to above by Mr. Jarman, the personal estate was bequeathed to two persons upon certain trusts,

(*x*) *Johnson v. Webster*, 4 D. M. & G. 474 (dced); *Re Duke of Somerset*, 55 L. T. 753; *Price v. John*, [1905] 1 Ch. 744. See also *Re Hole*, [1906] 1 Ch. 673; *Re Gibbon*, [1909] 1 Ch. 367. These cases are also referred to post, Chap. XXVI.

(*y*) The executor does not, under this doctrine, take the whole of what is commonly called "residue," for he does not take lapsed legacies or property ineffectually disposed of; see the cases cited ante, p. 498.

(*z*) Sometimes an apportionment between heir and next of kin is necessary, as in *Re Cameron*, 26 Ch. D. 19, ante, p. 705, n. (*g*).

(*a*) *Middleton v. Spicer*, 1 Br. C. C. 201; *Johnstone v. Hamilton*, 11 Jur. N. S. 777; *Cradock v. Owen*, 2 Sm. & G. 241; *Taylor v. Haygarth*, 14 Sim. 8; *Re Knowles*, 28 W. R. 975 and other cases cited ante, pp. 498 seq. *Primâ facie*

the presumption is rebutted if the testator bequeaths a legacy to a sole executor or equal legacies to several executors; and this counter presumption may in its turn be rebutted by parol evidence. The cases are referred to in Chap. XV., ante, pp. 498 seq.

(*b*) *Juler v. Juler*, 29 Bea. 34; *Travers v. Travers*, L. R., 14 Eq. 275.

(*c*) *Harrison v. Harrison*, 2 H. & M. 237; *Hillersdon v. Grove*, 21 Bea. 518; *Fuge v. Fuge*, 27 L. R. Ir. 59; *Williams v. Arkle*, L. R., 7 H. L. 606.

(*d*) In *Hillersdon v. Grove*, 21 Bea. 518, the residue was given "to my executors, A. and B."; their right to take beneficially does not appear to have been questioned. In *Parsons v. Saffery*, 9 Fr. 578, where a similar construction prevailed, the wording of the will was very special.

(*e*) 18 Ves. 247.

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which did not exhaust the beneficial interest, and they were afterwards appointed executors: it was held that they took the residue beneficially (*f*). *Wood v. Cox* (*g*), *Romans v. Mitchell* (*h*), *Re Henshaw* (*i*), and *Williams v. Roberts* (*j*), were similarly decided. So in *Williams v. Arkle* (*k*), a testator appointed his friend G. A. executor and trustee, and bequeathed to him a legacy of 1,000*l.*; he also bequeathed various legacies and annuities to his wife and near relatives and other persons, and gave all his real estate and the residue of his personal estate to G. A.: it was held from the general scheme of the will that an intention appeared that G. A. should take the real and residuary personal estate beneficially. But in *Mapp v. Elcock* (*l*) the House of Lords, while approving the reasoning of Lord Eldon in *Dawson v. Clarke*, held, on the construction of the will in the case before them, that the executors were trustees for the next of kin. A similar construction prevailed in *Mullen v. Bowman* (*m*).

“Use and benefit.”

In *Wood v. Cox* (*supra*), the construction was aided by the fact that the gift was to the residuary legatees “for their own use and benefit” (*n*). But in the case of a gift to a married woman “for her sole use and benefit, independent of her husband,” these words may be held to indicate that she is to take as if she were a feme sole, and not necessarily for her own benefit (*o*).

Provisions inconsistent with executors taking beneficially.

Although the fact that a testator has bequeathed legacies to his executors is generally sufficient to prevent them from taking the residue beneficially by virtue of their office, this rule does not, it seems, apply where the residue is expressly bequeathed to them (*p*). In *Saltmarsh v. Barrett* (*q*), however, Turner, L.J., in deciding against the executors, laid considerable stress on the bequest of the legacies, and also on a provision contained in the will for the trustees' indemnity (*r*).

(*f*) See further as to gifts to executors beneficially, Chap. XLI.

(*g*) 2 My. & Cr. 684.

(*h*) 15 W. R. 552.

(*i*) 34 L. J. Ch. 98.

(*j*) 27 L. J. Ch. 177; followed in *Morrison v. M'Ferran*, [1901] 1 Ir. 360. As to the effect of expressions of kindness, see *ante*, p. 710.

(*k*) 1 L. R., 7 H. L. 606.

(*l*) 2 Ph. 793, (*Ellcock v. Mapp*); 3 H. L. C. 492.

(*m*) 1 Coll. 197. See also *Southouse v. Bate*, 2 V. & B. 396; *Andrew v. Andrew*, 1 Coll. 686; *Barrs v. Fewkes*, 2 H. & M. 60, *ante*, p. 708; *Briggs v. Penny*, 3 Mac. & G. 546; *Read v. Stedman*, 26 Bea. 495; and *Dacre v.*

Patrickson, 1 Dr. & Sm. 182, where the Crown took in default of next of kin. *Re Roby*, [1907] 2 Ch. 84; [1908] 1 Ch. 71, was a clear case.

(*n*) Compare *Irvine v. Sullivan*, and *Gray v. Gray*, *post*, p. 717.

(*o*) *Stubbs v. Sargon*, 3 My. & Cr. 507; *Re Haly's Trusts*, 23 L. R. Ir. 130. This construction may be affected by the Married Women's Property Acts in cases falling within them.

(*p*) *Re Henshaw*, 34 L. J. Ch. 98; *Hillerson v. Grove*, 21 Bea. 518. As to *Gibbs v. Rumsey*, 2 V. & B. 294, see *ante*, p. 482.

(*q*) 3 D. F. & J. 279.

(*r*) Compare *Romans v. Mitchell*, 15 W. R. 552.

If a testator gives the residue to his executors for such purposes as they think fit, they hold it as trustees for the next of kin (s). CHAPTER XXI.

After the passing of the Executors Act, 1830, a doubt existed for some time, whether the act had introduced any new principle of construction in cases where residuary personal estate is bequeathed to executors for purposes which do not exhaust the beneficial interest (t); but it has been settled that the act has no application in such cases (u). An executor who is a trustee for the next of kin by virtue of the act is not an express trustee (v). Executors Act, 1830.

Where a testator bequeaths his residuary personal estate to a person who is not an executor, or is only one of two or more executors, for specified purposes, which do not exhaust the beneficial interest, the question may arise whether the legatee is intended to take the surplus for his own benefit, or whether he holds it subject to a resulting trust for the next of kin. The principle above stated as applicable to devises of real estate (w), seems to apply to bequests of personalty (x). In *Clarke v. Hilton* (y) a testator gave all his personal estate to his grandson, J. C. H., his executors, administrators and assigns, "subject to the payment of debts, legacies, and personal expenses, and to the trusts hereinafter contained," upon trust to convert and "to stand possessed of the said trust moneys," upon trusts which did not exhaust the funds; it was held that the grandson took the residue beneficially (z). Again, in *Irvine v. Sullivan* (a), the residue was given to the executors upon trust to convert and after payment of debts, &c., to pay the net residue to D. "to whom I give and bequeath the same absolutely, trusting that she will carry out my wishes": subject to the payments directed by the testator, it was held that D. took the residue beneficially. Much stress was laid on the word "absolutely." So in *Morrison v. M'Ferran* (b), where the residuary legatee was one of two executors. On the other hand, in *Re West* (c), the Where residuary legatee is not executor, or not sole executor.

(s) *Vezev v. Jamson*, 1 S. & St. 69; *Fowler v. Garlike*, 1 R. & My. 232; *Buckle v. Bristow*, 10 Jur. N. S. 1095; *Yeap Cheah Neo v. Ong Cheng Neo*, L. R., 6 P.C. 381; *Fenton v. Nevin*, 31 L. R. Ir. 478; *Balfe v. Halpenny*, [1904] 1 Ir. R. 486. As to *Gibbs v. Rumsey*, 2 V. & B. 294, see *Ellis v. Selby*, 1 M. & Cr. 286; *Buckle v. Bristow*, supra.

(t) *Love v. Gaze*, 8 Bea. 472; *Saltmarsh v. Barrett*, 3 D. F. & J. 279; *Andrew v. Andrew*, 1 Coll. 686.

(u) *Williams v. Arkle*, L. R., 7 H. L. 606; *Re Roby*, [1907] 2 Ch. 84, [1908] 1 Ch. 71.

(v) *Re Lacy*, [1899] 2 Ch. 149; *Re*

M'Causland's Trusts, [1908] 1 Ir. R. 327.

(w) Ante, pp. 706 seq.

(x) *Fenton v. Hawkins*, 9 W. R. 300; *Cary v. Cary*, 2 Sch. & L. 173

(y) L. R., 2 Eq. 810.

(z) The testator appointed four persons, including the grandson, to be his executors, but this fact does not appear to have affected the construction.

(a) L. R., 8 Eq. 673. Compare *Gray v. Gray*, 11 Ir. Ch. R. 218.

(b) [1901] 1 Ir. R. 360.

(c) [1900] 1 Ch. 84, stated ante, p. 708. Compare *Stubbs v. Sargon*, 3 My. & Cr. 507, ante, p. 481.

CHAPTER XXI. residuary legatees were held to be trustees of the surplus personal estate for the testator's next of kin. In this case, however, the property was given to them upon trust for sale, and they were also executors.

The distinction is between a gift for a particular purpose only, and a gift subject to the performance of a particular purpose.

Charity. The general principle stated above with reference to real estate devised for charitable purposes (*d*), applies also to personalty. Accordingly, where a testator bequeathed a sum of money for charitable purposes to be applied in a manner which did not exhaust the whole fund, it was held that the surplus was nevertheless dedicated to the general purposes indicated by the testator (*e*).

Where whole trust is indefinite. In addition to the cases above mentioned, reference may here be made to that class of cases in which the question arises whether the testator intends to create a trust at all; if he does, a further question may arise whether he has indicated the objects of the trust with sufficient clearness, or whether they are so indefinite that the trust fails to take effect, and there is a resulting trust for the residuary legatee or next of kin. These questions are discussed in Chapter XXIV., in connection with the doctrine of precatory trusts.

Destination of particular estates void in their creation.

IV.—Acceleration of Future Interests.—(1) *As to Realty.*—“Another question,” continues Mr. Jarman (*f*), “which has been agitated between the heir and devisee is, whether if, in a series of consecutive limitations, a particular estate be void in its creation from being limited to a person incapable by law or refusing to take, the remainders immediately expectant on such estate are accelerated, or the interest in question descends to the testator's heir at law as real estate undisposed of.

Ulterior estate held to be accelerated.

“The early authorities are clearly in favour of the acceleration. Thus, it is laid down in Perkins (*g*), that, ‘if a man, seised of land devisable in fee, devise it to a monk for life, the remainder to a stranger in fee, and the devisor dies, the monk being alive, in this case the remainder shall take effect presently.’

(*d*) Ante, p. 712.

(*e*) *Att.-Gen. v. Drapers' Co.*, 2 Bea. 508; *Bishop of Hereford v. Adams*, 7 Ves. 324; *Att.-Gen. v. Earl of Winchel-*

sea, 3 Br. C. C. 374.

(*f*) First ed. p. 513.

(*g*) Sec. 567. See also ss. 567, 569; and Shepp. Touchst. 435, 451.

“So it was held by Gawdy, in *Fuller v. Fuller* (*h*), (though the case did not raise the point,) that if the devisee of an estate tail refuse, the devisee in remainder shall take immediately. And the same point, in regard to a devisee for life, was maintained arguendo in *Archbishop Cranmer's Case*” (*i*).

And if land be devised to A. for life with remainder over, and the devise to A. is void under sect. 15 of the Wills Act, the remainder takes effect at once (*j*). The same rule applies if a devise of a life estate is revoked by the testator (*k*).

Where devise of life estate is void or revoked.

“The doctrine,” as Mr. Jarman points out (*l*), “evidently proceeds upon the supposition that, though the ulterior devise is in terms not to take effect in possession until the decease of the prior devisee, if tenant for life, or his decease without issue, if tenant in tail, yet that, in point of fact, it is to be read as a limitation of a remainder, to take effect in every event which removes the prior estate out of the way. Such a principle is familiar in its application to the case of an estate for life being determined by forfeiture.” In *Craven v. Brady* (*m*) real estate was devised to A. for life, with a proviso that if she made any voluntary or involuntary alienation of the income, her life estate should determine as if she were dead; she forfeited her estate, and it was held that the remainder was accelerated.

Forfeiture.

Where, however, the particular estate which fails is followed by a contingent interest, and that by a vested interest, the ultimate interest will not be accelerated by the failure of the particular estate, but there will be an intestacy until it is ascertained whether the contingent interest will take effect or not (*n*). Thus in *Re Townsend's Estate* (*o*) real estate was devised upon trust to convert and pay the income of the proceeds to A. for life and after his death upon trust for his children in equal shares, with a gift over in case A. should die without leaving issue; the will had been attested by A.'s wife, so that the gift of his life interest was void; A. had no children; it was held that until A. had a child, the

Particular estate followed by contingent interest.

(*h*) Cro. El. 422. So where the devisee in tail died, though he left issue, *Hutton v. Simpson*, 2 Vern. 723; but see now 1 Vict. c. 26, s. 32.

(*i*) Dy. 310 a.

(*j*) *Jull v. Jacobs*, 3 Ch. D. 703.

(*k*) *Lainson v. Lainson*, 18 Bea. 1; 5 D. M. & G. 754; *Re Johnson*, 68 L. T. 20.

(*l*) First ed. p. 513.

(*m*) L. R., 4 Eq. 209; 4 Ch. 296. Part of the property belonged to the

testator, and as to the rest he had a power of appointment. As regards the part which belonged to him, it seems that the remainder would have been accelerated irrespectively of the special terms of the proviso. See post, p. 725.

(*n*) *Carrick v. Errington*, 5 Br. P. C. 391. In this case the settlement was of an equitable fee simple by deed; see *Hopkins v. Hopkins*, 1 Atk. 597.

(*o*) 34 Ch. D. 357.

CHAPTER XXI. interests subsequent to A.'s life estate could not be accelerated, and during the life of A., so long as he had no children, the income belonged to the heir at law of the testatrix (p).

In *Lomas v. Wright* (q) land was limited to an after-born illegitimate son in fee, and if he should die before he attained twenty-one, then to A. an infant, in fee; A. died under age and without issue; the after-born illegitimate son attained twenty-one: it was held by Leach, M.R., that the contingent limitation to A. failed to take effect, the event on which it was limited not having happened, and that there could consequently be no acceleration by reason of the limitation to the after-born illegitimate son being void; the land therefore resulted to the heir of the grantor.

Where the remainder is limited to a class, the effect of acceleration may be to alter the period at which the class is to be ascertained (r).

Whether
same rules
apply to per-
sonalty.

(2) *As to Personalty.*—It seems to be now settled that the same principles are applicable to quasi-remainders of personalty. In *Eavestaff v. Austin* (s) Romilly, M.R., expressed an opinion that the rules which relate to real estate do not apply to personalty, though in the case before him he held that there were special circumstances strong enough to create an exception. In *Lainson v. Lainson* (t), where a remainder in freeholds was held to be accelerated by the revocation of the life estate, the remainder in leaseholds bequeathed on corresponding trusts was held by the same judge to be also accelerated. And a similar decision was made by Sir R. Malins, V.-C., in *Jull v. Jacobs* (u). In *Re Clark* (v) a testator gave his real and personal estate to his wife for life and after her death to

(p) See also *Chambers v. Brailsford*, 18 Ves. 375; *Andrew v. Andrew*, 1 Ch. D. 410. Lord Westbury's decision in *Sidney v. Wilmer* (4 D. J. & S. 84), must be considered as overruled by *Hodgson v. Earl of Bective* (1 H. & M. 376); see *Wade-Gery v. Handley*, 3 Ch. D. 374. Shifting clauses usually provide expressly or by implication for the destination of the rents in the meantime. *Turton v. Lambarde*, 1 D. F. & J. 516; *D'Eyncourt v. Gregory*, 34 Beav. 36.

(q) 2 Myl. & K. 769. In this case the settlement was by deed, but the rule as laid down by the M.R. applies to devises.

(r) *Re Johnson*, 68 L. T. 20. Compare *Re Clark*, stated in the text, *infra*.

(s) 19 Beav. 591.

(t) 23 L. J. Ch. 170; *Alt v. Gregory* 8 D. M. & G. 221; *Re Love*, 47 L. J. Ch. 783 (referred to ante, p. 182, s. n. *Green v. Tribe*); *Stephenson v. Stephenson*, 52 L. T. 576; *Re Whitehorne*, [1906] 2 Ch. 121. Compare *David v. Rees*, 1 R. & My. 687, where stock was bequeathed in trust for A. for life, remainder to B. for life: by codicil an annuity to A. was substituted for his life estate, and B.'s interest was held not accelerated. And see *Re Colson's Trusts*, Kay, 133, where the enjoyment of an accumulation fund was accelerated, the devisees in tail of the estate for whose benefit it was created having barred the entail.

(u) 3 Ch. D. 703.

(v) 31 Ch. D. 72.

be equally divided between such of his children as should be living at her death, and in case of any of his children dying before his wife leaving children, such children were to take their parent's share. At the death of the testator's widow one of the testator's daughters was living and had several children, but her husband was an attesting witness to the will, and the gift to her was therefore void; it was held by Bacon, V.-C., that the children of the daughter were entitled to her share. This construction was no doubt benignant, but it seems contrary to the principle laid down in *Lomas v. Wright (w)*.

In *Re Vernon (x)*, where a legatee elected to give up her life interest in a settled share of residue, it was held by Kekewich, J., that the interests of her husband and children were not accelerated.

There can of course be no acceleration if the persons to take in remainder are not in existence (*y*).

It may, apparently, be laid down as a general rule that where personal property is given to A. absolutely with remainder to B. absolutely, and A. dies in the testator's lifetime, the gift to B. is accelerated, and takes effect (*yy*).

Successive absolute interests in personalty.

It may here be noted that where a fund is given to A. contingently on a certain woman not having children, and the woman has passed the age of child-bearing without having had any children, the Court has jurisdiction to direct the fund to be paid over to A. (*z*). But if B. is entitled to property contingently on a certain woman having a child, the Court will not enter into the question of her being past child-bearing for the purpose of depriving B. of the chance of becoming entitled to the property (*a*).

Woman past child-bearing.

In *Re Travis (b)*, a testator directed the surplus income of his property to be accumulated until the death of A., and subject thereto he gave his property upon trusts which, stated shortly, were for the issue of A. who should attain twenty-one or be living at her death, and in default of issue for certain named beneficiaries; when the period of twenty-one years from the testator's death expired, and the trust for accumulation was stopped by the Thellusson Act, A. was past the age of child-bearing and had never had any children, but it was held that as to the surplus income from that time to the death of A. there was an intestacy.

(w) Ante, p. 720.

(x) 95 L. T. 48.

(y) *Re Townsend's Estate*, 34 Ch. D. 357.

(yy) *Re Lowman*, [1895] 2 Ch. 348; ante, p. 452.

(z) Ibid. In *Re White*, [1901] 1 Ch.

570, the rule was extended to the case of a widow over fifty-six, who had had only one child, then thirty-four years of age.

(a) *Re Hocking*, [1898] 2 Ch. 567.

(b) [1900] 2 Ch. 541.

CHAPTER XXI.

Tregonwell v. Sydenham.

(3) *Devises after Trusts which fail.*—The doctrine of acceleration underwent much discussion in *Tregonwell v. Sydenham* (c), where a testator devised certain estates at S. and D. in strict settlement, and devised certain estates at E. in like manner as the D. estates, except that there was interposed between the limitations of the E. estates a devise to trustees for a term of sixty years, upon trust to receive the rents until the trustees should have received certain sums which they were from time to time to lay out in the purchase of land, to be settled upon the persons for the time being in the possession of the S. estates. On a bill filed by the persons entitled to the estate for life in possession and the immediate estate in remainder in the S. estates, to have the trusts of the term declared void as tending to a perpetuity, and that the residue should be assigned for their benefit, the Court of Exchequer declared the trusts to be void, and the term to attend the inheritance. But the House of Lords, on appeal, reversed the decree; declaring, first, that the trusts of the term were not void in their creation, but became so in event, the trusts for raising the money being valid; but that of settling the lands to uses being void as too remote, in consequence of its happening that the person then in possession, and to whom, therefore, an estate for life was to be limited with remainder to his issue, was one who was not in existence at the testator's death (d). Secondly, (and this is the point material to the present discussion,) that the trusts of the term resulted for the benefit of the heir at law of the testator (e).

The argument of Lord Redesdale and Lord Eldon, upon which this part of their decision turned, was, that the land, not being given over until "from and after" the raising of the money, the intermediate interest was evidently not included in the devise, and, therefore, went to the heir. The interest given to the devisee was exclusive of, and with a deduction of, that sum. "The testator, then," observed Lord Eldon, "has said that the devisees shall not take it. The policy of the law will not permit the uses for which the testator intended it to take effect; and in such a case, in the absence of any expression of intention on the part of a testator with respect to a purpose which the law will allow, the doctrine of law is, that he shall take the interest who takes independently of all

(c) 3 Dow, 194. Only the short effect of the limitations is stated above: the provisions of the will are given in detail in the previous editions of this work. See the remarks on the case ("a case of extraordinary difficulty")

in Gray on Perpetuities, §§ 419, seq.

(d) On this point, vide ante, pp. 284, seq.

(e) Lord St. Leonards in *Law of Prop.* p. 362, says, "I prefer the decision of the Exchequer."

intention, and on whom the law casts it. On these grounds, I agree that the money must be raised and applied for the benefit of the heir, and not of the devisees" (f).

"It is evident," says Mr. Jarman (g), "that the two points adjudicated by the House of Lords had no necessary connection; or, in other words, that the deciding the heir to be entitled was not a consequence of holding the trusts of the term to be void in event only, and not in their creation; for Lord Eldon expressly laid it down, that, if the trusts had been to raise 20,000*l.* for charities, (in which case they would have been clearly void ab initio,) and after the sum had been raised, then to the devisees, as the intention would not have been in their favour, the heir would have been let in" (h).

CHAPTER XXI.

Remark on
Tregonwell v.
Sydenham.

Term for
years, trust
being satis-
fied, or not
arising, at-
tends inheri-
tance for the
benefit of
devisee.

(4) *Devises subject to Trusts which fail.*—Mr. Jarman continues (i): "It is clear, however, that where a term of years is created for particular purposes, and the land *subject thereto* is devised over, the term, after the purposes of its creation are satisfied, or immediately, if those purposes do not arise, attends the inheritance for the benefit of the devisee. And such was the decision in one case, where the nature of the trust and the expressions of the testator afforded an argument in favour of a contrary construction.

"The case here alluded to is *Davidson v. Foley* (j), where a testator devised lands to trustees, their executors, &c., for ninety-nine years, upon the trusts after mentioned, and, after the expiration or other determination thereof, and subject thereto, to A., testator's son, for life, remainder to his first and other sons in tail male. Another term was created, in the same manner, of property similarly given to B., another son, and his sons in tail male. The trusts of the respective terms were for the trustees, in their discretion, to pay testator's two sons an annual allowance, not exceeding a given sum, but so as that *they should have no estate or interest in the rents of the property for their lives*, other than the trustees, in their discretion, should think proper; and then to pay off a certain mortgage; and then to pay certain

(f) "And with this doctrine the cases on the statute restraining accumulation of income (ante, p. [389]) seem to agree." (Note by Mr. Jarman.)

(g) First ed. p. 517.

(h) "His Lordship seems to have forgotten that in the case put by him, not only the gift of the 20,000*l.*, but also the term would have been void ab initio (ante, p. [255]), and the reversioner,

and not the heir, would then have become entitled in possession. See *Williams v. Goodtitle*, 5 M. & Ry. 757, post, p. [725]." (Note by Messrs. Wolstenholme and Vincent in the 3rd edition of this work.)

(i) First ed. p. 517.

(j) 2 Br. C. C. 203. See Lord Eldon's judgment in *Sidney v. Shelley*, 19 Ves. 364.

CHAPTER XXI. debts of his sons, but so that the testator's sons' creditors should have no lien upon the land; and, *after the decease of his sons*, and the payment of the mortgage-money and debts before mentioned, and the costs, the terms were to attend the inheritance. Lord Thurlow was of opinion, that, as the purposes for which the terms were created were exhausted, the terms attended the inheritance for the benefit of the tenants for life. It had been ingeniously argued, he said, that these were trusts extending beyond the lives of the sons, and that, if those trusts were sufficient, the sons were to have no interest for their lives. But the nature of a resulting trust was, that it was such as had escaped the attention of the testator, and that here the intention of raising a trust beyond the payment of debts was totally unexpressed. No trust could be raised upon the terms used.

“ Lord Thurlow's reasoning evidently assumes that the devise, subject to the term, comprised all the interest not actually absorbed by the trusts of such term; and this may serve to reconcile some expressions in his judgment, which might otherwise seem to warrant a conclusion more favourable to the heir than to the devisees.

Case in which term was created, but no trusts were declared.

“ The same principle has been applied to a case in which a term for years was devised, upon trusts to be thereafter declared, (but which were not declared,) with devise over on the ‘ expiration or sooner determination ’ of the term, the words ‘ subject thereto,’ though not actually occurring in the will, being by force of the intention appearing upon the general context, supplied.

“ As in the case of *Sidney v. Shelley* (*k*), where A. devised lands to trustees and their heirs, to the use of them, their executors, &c., for ninety-nine years, ‘ upon the trusts hereinafter expressed and declared concerning the same, and from and after the expiration or other sooner determination of the said term of ninety-nine years,’ he gave the said lands to several persons for life and in tail; and the will contained no declaration of the trusts of the term. It was strongly contended that the trusts resulted to the heir, chiefly on the authority of a dictum of Lord Hardwicke (*l*), in a case wherein a term of ninety-nine years having been created by settlement, without any declaration of trust, his Lordship is made to say, upon the question whether there was a resulting trust for the settlor, ‘ It has been determined so in the case of voluntary settlements and wills ’; his Lordship distinguishing a settlement

(*k*) 19 Ves. 352.

(*l*) In *Brown v. Jones*, 1 Atk. 191.

A note of this dictum, found among Lord Northington's papers, coincided.

for valuable consideration. But Lord Eldon, in the principal case, decided that the testator, having created a term for ninety-nine years, upon trusts to be afterwards declared, and, at the expiration or sooner determination of that term, having devised those estates in such a manner as that the actual enjoyment of them was clearly intended; the termors having nothing for their own use, and he not having declared any trust, the result was exactly the same as if some trust had been declared, which it became unnecessary to satisfy, or which was satisfied after his death. His Lordship considered that the will was to be read as if the words 'subject to the trusts thereof' were in it.

"Lord Eldon observed, that, if the limitation had been simply to the trustees, without reference to any trusts, however monstrous the supposition with reference to the intention, the subsequent devisees must have taken subject to the term."

As to terms
not upon
trusts.

If the limitation of the term itself is void, as where (under the old law) trusts are declared in favour of a charity, the devisee of the freehold is, of course, immediately entitled in possession (*m*).

Reversion
accelerated
where term is
void.

(5) *As to Appointments under Powers*.—The doctrine of acceleration does not extend to estates limited under powers of appointment; where, if the particular estate fails, the remainder continues such, and the estate, during the life of the intended taker, goes as in default of appointment (*n*).

The foregoing paragraph, with the note, is taken from the 3rd edition of this work, by Messrs. Wolstenholme and Vincent. It is to be observed that the case in which Sugden, C., laid down this doctrine was the case of a special power, and in his work on Powers he states the rule as if it applied only to special powers (*o*). If, however, the reason of the rule is that where the donor of a power has designated persons to take in default of appointment, he means them to take whatever is not validly appointed, then there seems no reason why it should not apply to general powers.

In any case it is clear that whether the appointment is general or special, the testator may shew an intention that if the particular interest fails, or is determined, the interests in remainder shall be accelerated (*p*).

(*m*) *Williams v. Goodtitle*, 5 M. & Ry. 757.

(*n*) Per Sugden, C., *Crozier v. Crozier*, 3 D. & War. 365, 366; 2 Sugd. Pow. 67, 7th ed. And distinguish the cases there cited, and *Reid v. Reid*, 25 Beav. 469, in which the remainder as

well as the particular estate fails.

(*o*) Eighth ed. p. 515.

(*p*) *Craven v. Brady*, L. R., 4 Eq. 209, 4 Ch. 296; *Line v. Hall*, 43 L. J. Ch. 107; *Re Finch and Chew's Contract*, [1903] 2 Ch. 486. In *Craven v. Brady*, Romilly, M.R., cites as applicable to

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Whether,
under devise
to A. during
minority of B.,
A.'s estate
determines on
B.'s decease
during
minority.

(6) *Devises during Minority where the Minor dies.*—Mr. Jarman continues (q) : “ Sometimes an estate is made to determine at the majority of a minor ; and it happens that he dies under age : whence arises the question, whether the devisee is entitled to hold the estate until the minor would, if living, have attained the prescribed age ; or whether the devise over (for it has generally, though not necessarily, happened that there is such a devise) is accelerated. The authorities upon this point are not to be reconciled (if at all) without resorting to some very fine-spun distinctions, as will be seen by the following brief statement.

“ In *Carter v. Church* (r), A. devised lands to his daughter in fee, and declared that his executors should receive the profits until she attained twenty-one, towards payment of his debts and legacies. The daughter died when five years old. The Lord Keeper was of opinion that the charging the profits until the daughter attained twenty-one, amounted to a term until she would, if living, have attained that age.

“ So, in [*Coates*] v. *Needham* (s), where A. devised lands to C. and D. and their heirs, upon trust, to receive the rents until his son W. should attain the age of twenty-one years ; and pay one-third to the testator's wife in lieu of dower ; and out of the other two-thirds to raise portions for his daughters ; and devised all to W., when twenty-one, in tail ; and, in default of such issue, then over. W. died under the age of twenty-one, without issue ; the widow afterwards died before W. would, if living, have attained that age ; and it was held, [according to the first report of the case (t), which is probably the correct one (u), that the wife's administrator was entitled during the term for which the minority would have lasted ; but in a subsequent case on the same will, it was held] that the wife's third for such period was an interest undisposed of, and went to the testator's heir, on the ground that nothing was given to the devisees until W. attained

the general question of accelerating an appointed remainder some observations of Sir E. Sugden in *Crozier v. Crozier*, which appear to refer only to the question whether under an appointment the failure of the particular estate involved also the failure of the remainder ; and stops just short of the passage cited above in the text.

(q) First ed. p. 520.

(r) 1 Ch. Ca. 115.

(s) 2 Vern. 65, *Levet v. Needham*, ib. 138, which states the decision in *Coates v. Needham* wrongly.

(t) 2 Vern. 65.

(u) The decree is given in Mr. Raithby's edition from Reg. Lib., but he states that he could not find any decree in *Levet v. Needham*. Mr. Jarman adds : “ The most singular feature in this case is, the holding the interest of the wife to have ceased at her death. If, as the Court assumed, a term was absolutely carved out of the inheritance, clearly words of limitation were not necessary to vest it in the wife with the transmissible quality of personal estate.”

(or, rather, would have attained) his majority, and died without issue.

“ On the other hand, in the case of *Manfield v. Dugard* (*v*), where A. devised lands to his wife until B., his eldest son, should attain twenty-one; and, when he should attain that age, to him in fee. B. died at the age of thirteen; whereupon his heir-at-law claimed the rents from his death. The L.C. held, that the heir was entitled, for that the wife’s estate determined at the death of the son, whose estate in fee, which was vested at the testator’s death, took effect in possession on that event.”

One of the reasons assigned for this adjudication was, that the land was not devised to the wife for the payment of debts; and this agrees with *Boraston’s Case* (*w*), where a testator devised lands to his executors until such time as his grandson, Hugh, should accomplish his full age of twenty-one years, and the mean profits to be employed by his executors towards the performance of his will. Hugh died at the age of nine years; and it was argued by Coke, that the term of the executors did not thereby cease, because it was to be intended that the testator had computed that the profits to be taken of his lands by his executors, during the minority of his grandson, would suffice to pay his debts and perform his will, and that he did not intend that it should determine by the death of his grandson, for then his debts would remain unsatisfied and his will unperformed, which was granted by the whole court (*x*).

This argument was adopted by Sir J. Jekyll, M.R., in *Lomax v. Holmedon* (*y*), in which he distinguished the cases where such an interest was created for a particular purpose, as for a fund for payment of debts (which he said was *Boraston’s Case*), from the cases where no such intention appeared: in these latter he said the interest would absolutely determine by the death of the party under the age specified in the will. It is plain that here the existence of the minority supplies the sole occasion and motive for the creation of the estate in question (*z*). The principle of

(*v*) 1 Eq. Ca. Ab. 195, pl. 4.

(*w*) 3 Co. 19 a. See further as to this case, Chap. XXXVII.

(*x*) 3 Co. 21 a.

(*y*) 3 P. W. 176. See also *Sweet v. Beal*, Lane, 56, where the term was held to endure beyond the death of the minor under age, for the termor’s own benefit, which was therefore the “particular purpose” in that case. In *Goodright d. Revell v. Parker*, 1 M. & S.

692, the property was leasehold.

(*z*) See *Castle v. Eate*, 7 Beav. 296. If the person to whom the intermediate interest is given should die during the minority, the same reasons (i.e., “the existence of the minority”) will give the interest to his representatives during the remainder of the term: see *Laxton v. Eedle*, 19 Beav. 321. Where it is a class during whose minority the income of property is given, the estate will

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these authorities is clearly unaffected by the circumstance of the specified purpose being insufficient to exhaust the whole proceeds of the term. The construction is that the testator has made his own computation, so that the estate must endure until the regular expiration of the term, and if any part of the beneficial interest is undisposed of, it must result to the heir-at-law.

Postpone-
ment during
minority, not
extended to
devisees over.

"Sometimes it happens," as Mr. Jarman points out (*a*), "that real estate is devised to a minor contingently on his attaining twenty-one, with a devise over in the event of his dying under that age; in which case, though, under the original devise, if construed to be contingent, the property would, during the minority, have devolved to the heir-at-law of the testator as real estate undisposed of; yet, on the minor dying under age, the devise over, not being subject to the postponement affecting the original devise, takes effect in possession immediately" (*b*).

continue while there is a chance of any persons becoming members of the class, though none may for the time being be actually in existence, e.g., during the life of a parent whose children's minority is contemplated, *semb. Conduitt*

v. Soane, 4 Jur. N. S. 502. (Note by Messrs. Wolstenholme and Vincent in the 3rd edition of this work.)

(*a*) First ed. p. 522.

(*b*) *Chambers v. Brailsford*, 18 Ves. 368.

CHAPTER XXII.

CONVERSION (a).

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I.—Effect of Conversion dehors the Will.—A. As to Conversion of Land into Money.—It has been already pointed out, that if a testator devises land to A., and afterwards sells it, or contracts to sell it (b), to B., this operates as a revocation or ademption of the devise and a conversion of the land into money. Consequently A. has no claim to the purchase money, which forms part of the testator's personal estate (c). In order that a contract of sale may have this effect, it seems that the contract must be enforceable by the

Revocation
or ademption
by conver-
sion.

(a) This chapter has been re-arranged and to a considerable extent re-written. A portion of the first section originally formed part of Chap. IV., while the sections dealing with the rights of tenant for life and remainderman have been transferred to Chap. XXXIV.

(b) *Watts v. Watts*, L. R., 17 Eq. 217. Compare *Townley v. Bedwell*, post.

(c) Ante, pp. 162 seq. But A. is entitled to the rents between the testator's death and the completion of the purchase: *Watts v. Watts*, L. R., 17 Eq. 217. In *Re Bago's Settlement*, 31

L. J. Ch. 772, the proceeds of sale were subject to re-investment in land, but the only effect of this was that they passed as realty not specifically devised. See also *Manton v. Tabois*, 30 Ch. D. 92. A contract by a railway company, in the event of its requiring part of A.'s land, to pay a certain price per acre for it, does not operate as a conversion: *Ex parte Walker*, 1 Dr. 508, post, p. 734. As to ademption in the case of powers of appointment, see Chap. XXIII.

CHAP. XXII.

Rescission of contract.

testator: if it is not enforceable against the purchaser by reason of its not complying with the Statute of Frauds, or because the title shewn is not in accordance with the contract, and has not been accepted by the purchaser, the contract does not operate as a conversion (*d*). If, however, there is a binding contract at the testator's death, and it is afterwards rescinded for non-payment of the purchase money, or for any cause other than a defect in the title, the land is still treated as having been converted (*e*).

Adoption of verbal contract by devisee.

If a testator enters into a verbal contract of sale, which is not enforceable against him, and after his death the devisee sells the land to the same purchaser for the same price, this does not operate as a retrospective conversion, unless the devisee expressly adopts the testator's contract (*f*).

Option of purchase.

An anomalous rule (known as the rule in *Lawes v. Bennett* (*g*)) applies to cases where the testator has entered into a contract under which a person has an option of purchasing land belonging to the testator, and exercises the option after the testator's death (*gg*). In such a case, although constructive conversion only takes place as from the exercise of the option (*h*), yet the proceeds of sale devolve as part of the testator's personalty. The rule applies although the purchase money is payable to the testator "his heirs or assigns" (*i*).

(*d*) *Lacon v. Mertins*, 3 Atk. 1; *Re Thomas*, 34 Ch. D. 166. There are dicta to the effect that a contract of sale does not operate as a conversion unless, at the death of the testator, it is enforceable by both parties: per Jessel, M.R., in *Lysaght v. Edwards*, 2 Ch. D. 506 seq., per Fry, J., in *Edwards v. West*, 7 Ch. D. 862. The subject is discussed in *Crowe v. Menton*, 28 L. R. Ir. 519. Where at the death of a person there is a contract for sale of the fee or other freehold interest in land enforceable against the heir or devisee, the personal representatives of the deceased can now convey the land; see the Conveyancing and Law of Property Act, 1881, s. 4.

(*e*) *Bennett v. Earl of Tankerville*, 19 Ves. 170; *Curre v. Bowyer*, 5 Bea. 6, n.; *Lysaght v. Edwards*; *Crowe v. Menton*; *Re Thomas*, supra. In *Ryder v. Ryder*, Ir. R., 8 Eq. 86, the sale was set aside in proceedings by the heir on the terms of the purchase money being repaid; it was held that the heir must repay the money himself: see *Stump v.*

Gaby, 2 D. M. & G. 623.

(*f*) *Re Harrison*, 34 Ch. D. 214. If an heir voluntarily adopts a contract of sale which is not enforceable, this operates as a retrospective conversion: *Frayne v. Taylor*, 33 L. J. Ch. 228.

(*g*) 1 Cox, 167. See *Townley v. Bedwell*, 14 Ves. 591; *Collingwood v. Row*, 26 L. J. Ch. 649. It applies to cases of intestacy: *Re Isaacs*, [1894] 3 Ch. 506. The rule applies only as between the real and personal representatives of the testator and will not be extended: *Edwards v. West*, 7 Ch. D. 858, and see *Re Adams and Kensington Vestry*, 27 Ch. D. 394, as to the devolution of an option contained in a lease on the death of the lessee.

(*gg*) As to the effect of an option of purchase given by will, see ante, p. 79.

(*h*) So that the heir or devisee is entitled to the intermediate rents, but the interest on the purchase money is part of the testator's personal estate: *Townley v. Bedwell*, supra.

(*i*) *Townley v. Bedwell*, supra; *Weeding v. Weeding*, 1 J. & H. 424.

It also applies where the option does not arise until after the testator's death (ii). CHAP. XXII.

If the devise is general, it is immaterial whether the will is executed before or after the contract giving the option (j); and if the devise is specific, the rule applies in all cases where the contract giving the option is entered into after the date of the will (k), unless of course the testator has contemplated the possibility of his entering into such a contract and has provided for it by his will.

But a testator who has entered into a contract of sale, or given an option of purchase, in respect of land, and afterwards or simultaneously makes a will specifically devising it, may shew that he wishes the devisee of the land to have the benefit of the sale. In *Knollys v. Shepherd* (l) (a case of contract), a specific devise to the testator's "dear wife" of the estate "which he had lately contracted to sell," was held not to shew such an intention, but to give the wife only the legal estate, the purchase-money passing by the residuary bequest. But in the case of an option, a will made or re-published after the date of or simultaneously with the creation of the option, and specifically devising the property in strict settlement, has been held to take the case out of the rule in *Lawes v. Bennett*, and, upon the option being exercised after the testator's death, to carry the purchase-money to the devisees (m).

How contrary intention may appear.

Where a testator specifically bequeaths leaseholds, and after his death the term is put an end to under a condition contained in the lease, the legatee is entitled to the compensation payable under the condition (n).

If mortgaged land is sold by the mortgagee under his power of sale, the destination of the surplus proceeds of sale is, as a general rule, governed by the condition of the property at the mortgagor's death. Consequently if the sale takes place after the mortgagor's death, the surplus proceeds devolve as realty, while if it takes place during his lifetime, they devolve as personalty: and the fact that the mortgage deed provides that they are to be paid to the

Sale by mortgagee.

(ii) *Re Isaacs*, supra.

(j) *Lawes v. Bennett*, supra; *Goold v. Teague*, 5 Jur. N. S. 116 (leaseholds).

(k) *Weeding v. Weeding*, supra.

(l) 1 J. & W. 499, cit., affirmed in D. P., Sug. Law of Prop. 223. As to whether a devise includes land which the testator has contracted to sell,

see post, Chap. XXXV.

(m) *Drant v. Vause*, 1 Y. & C. C. C. 580; *Emuss v. Smith*, 2 De G. & S. 722; *Re Pyle*, [1895] 1 Ch. 724; *Duffield v. M'Master*, [1896] 1 Ir. R. 370. See *Re Isaacs*, [1894] 3 Ch. 506 (intestacy).

(n) *Coyne v. Coyne*, Ir. R., 10 Eq. 496; post, p. 739.

CHAP. XXII.

Trustee in
bankruptcy.

Sale by
Court.

Whether
order effects
conversion
out and out.

Excessive
sale; so-
called
"equity of
reconver-
sion."

mortgagor "his heirs or assigns" makes no difference, these words not being sufficient to effect a constructive re-conversion (*o*).

A similar rule seems to prevail in the case of a sale by a trustee in bankruptcy (*p*).

Where land is sold under an absolute order, made within the jurisdiction of the Court, the proceeds are personalty; in fact the order itself operates as a conversion from its date, and before any sale has taken place (*q*). But where a conditional order is first made, and is afterwards made absolute, it only takes effect from the latter date (*r*).

If the order for sale is made in an administration action, for payment of debts and legacies, it would seem, on principle, that it operates as a conversion for all purposes, so that any surplus is personal estate. The contrary was indeed decided by Romilly, M.R. (*s*), but the decision has been disapproved (*t*). And it is clear that if the order is made by consent, for the convenience or benefit of the parties, it operates as a conversion out and out, whatever the nature of the action may be (*u*).

It was until recently supposed that the general principle did not apply if the order directed a sale to be made for raising a specific sum; and that in such a case, if more land was sold than was required, the surplus proceeds of sale retained the character of realty (*v*). Accordingly, where a sale was directed in a mortgagee's suit, and the surplus was invested by the Court at his request, it was held to devolve as realty on his death (*w*). And in a recent case (*x*), where land belonging to an infant was sold for the purpose of paying costs, and the infant died intestate after attaining twenty-one, it was held by Eve, J., that the surplus proceeds of sale (which had been invested in consols) devolved as realty. But this decision

(*o*) *Wheldale v. Partridge*, 8 Ves. 227; *Bourne v. Bourne*, 2 Ha. 35; *Wright v. Rose*, 2 S. & S. 323; *Re Smith*, 7 Jur. N. S. 903; *Re Grange*, [1907] 1 Ch. 313, referred to in *Burgess v. Booth*, [1908] 2 Ch. 648.

(*p*) *Banks v. Scott*, 5 Madd. 493.

(*q*) *Arnold v. Dixon*, L. R., 19 Eq. 113. *Hyett v. Meekin*, 25 Ch. D. 735 (following dictum of Jessel, M.R., in *Wallace v. Greenwood*, 16 Ch. D. 362); *Hartley v. Pendarves*, [1901] 2 Ch. 498 (disapproving *Field v. Brown*, 27 Bea. 90); *Re Dodson*, [1908] 2 Ch. 638.

(*r*) *Re Beamish's Estate*, 27 L. R. Ir. 326; *Re Henry's Estate*, 31 L. R. Ir. 158.

(*s*) *Cooke v. Dealey*, 22 Bea. 196.

(*t*) By Jessel, M.R., in *Steed v. Preece*, L. R., 18 Eq. 197. See also *Hartley v. Pendarves*, supra; *Ferguson v. Benyon*, 17 L. R. Ir. 212. In *Fellow v. Jermyn*, [1877] Week. N. 95, Jessel, M.R., held that the Court has jurisdiction to direct that if there is a surplus it shall be re-invested in land, so as to preserve its character as realty.

(*u*) *Steed v. Preece*, supra; *Ferguson v. Benyon*, 17 L. R. Ir. 212.

(*v*) *Jermyn v. Preston*, 13 Sim. 356. But see the criticisms of Jessel, M.R., in *Steed v. Preece*, supra.

(*w*) *Scott v. Scott*, 9 L. R. Ir. 367.

(*x*) *Burgess v. Booth*, [1908] 1 Ch. 880.

was reversed by the Court of Appeal (*y*), and the general principle laid down in *Steed v. Preece* now applies in all cases.

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If land is sold in a partition action under the Partition Act, 1868, s. 8, the proceeds of sale are to be treated as realty (*z*), unless the person entitled is sui juris and elects to take them as personalty (*a*), or unless they are paid out to trustees who had a power of sale (*b*). If the person entitled is a married woman, she may elect by examination in Court to take the fund as personal estate (*c*). In *Wallace v. Greenwood* (*d*), Jessel, M.R., seems to have thought that an order for sale made with the consent or at the request of a married woman under sect. 6 of the Partition Act, 1876, operates as a conversion of her share, but the accuracy of this view was doubted by Byrne, J., who held in *Re Norton* (*e*) that a consent or request on behalf of an infant does not operate as a conversion of his share.

Sale in partition action.

Where purchase money is paid into Court by a railway company under sect. 69 of the Lands Clauses Consolidation Act, 1845 (*f*), the general rule is that it remains impressed with the character of real estate (*g*). In a case before Lord Cranworth, V.-C. (*h*), an owner of land had made a will containing a residuary devise and afterwards became a lunatic not so found; part of the land was taken by a railway company, and the purchase money was paid into Court under the 76th section of the Lands Clauses Act: it was held that this operated as a conversion. But this decision is generally considered erroneous (*i*).

Lands Clauses Act.

In any case, however, where land is vested in trustees subject to a trust for sale, or a power of sale, and it is sold by order of the Court or under the Lands Clauses Act, this operates as a conversion (*j*).

Where trustees can sell.

(*y*) [1908] 2 Ch. 648.

(*z*) The order itself operates a conversion: *Re Dodson*, [1908] 2 Ch. 638, *supra*, p. 732.

(*a*) *Foster v. Foster*, 1 Ch. D. 588; *Mildmay v. Quicke*, 6 Ch. D. 553; *Re Barker*, 17 Ch. D. 241. See *Mordaunt v. Bennell*, 19 Ch. D. 302, where the beneficiaries died intestate before the fund was paid out, so that it descended to their heir at law; it was held that on his death it formed part of his personal estate.

(*b*) *Re Morgan*, [1900] 2 Ch. 474.

(*c*) *Standering v. Hall*, 11 Ch. D. 652. The examination may be dispensed with if the fund is under 200*l.*; 16 Ch. D. 362.

(*d*) 16 Ch. D. 362.

(*e*) [1900] 1 Ch. 101, approving.

Howard v. Jalland, [1891] Week. N. 210.

(*f*) Or under the Union and Parish Property Act, 1835: *Re Horner*, 5 De G. & S. 483.

(*g*) *Ex parte Walker*, 1 Drew. 508; *Kelland v. Fulford*, 6 Ch. D. 491. Compare *Re Harrop*, 3 Drew. 726; *Midland Railway v. Oswin*, 1 Coll. 74; *Re Taylor*, 9 Ha. 596; *Re Stewart*, 1 Sm. & G. 32.

(*h*) *Re East Lincolnshire Railway*, *Ex parte Flamank*, 1 Sim. N. S. 260.

(*i*) *Re Tugwell*, 27 Ch. D. 309. Compare *Re Bagot's Settlement*, 31 L. J. Ch. 772, *ante*, p. 729.

(*j*) *Re Hobson's Trusts*, 7 Ch. D. 708; *Re Smith*, 40 Ch. D. 386; *Re Morgan*, [1900] 2 Ch. 474; *Re Sheffield Corporation*, [1903] 1 Ch. 208.

CHAP. XXII.

Notice to
treat.

A notice to treat under the Lands Clauses Act does not effect a conversion (*k*), even if it is followed by an offer by the landowner to accept a certain price for the land (*l*); but if the price is agreed upon this constitutes a valid contract, and operates as a conversion (*m*). An agreement as to the price per acre, without defining the land, does not effect a conversion (*n*).

Compulsory
sale after
testator's
death.

In *Ex parte Hardy* (*o*), a testator gave to his children in succession the option of purchasing his real estate. Before the option had been exercised, and while some of the children were still infants, part of the property was purchased under compulsory powers: it was held that this did not effect a conversion.

Sale in
lunacy.

It has been already mentioned that a sale, by proper authority, of land belonging to a lunatic does not, as a general rule, affect the rights of his devisees, &c., in the proceeds of sale (*p*).

Conversion
directly by
statute.

Conversion may also be produced by act of parliament: as where a statute abolishes a particular kind of real property, and substitutes for it a right to compensation, or other personal property (*q*).

Contract of
purchase by
testator.

B. *As to Conversion of Money into Land.*—In the case of a person entering into a contract for the purchase of land, the rule formerly was, that if the contract was binding on the purchaser at the time of his death, his heir or devisee was entitled to the benefit of it: in other words, was entitled to consider the contract as having converted the personal estate, quoad the purchase-money, into real estate (*r*). But as regards the estates of persons dying after 1877, the Real Estates Charges Act, 1877, enacts that where a testator or intestate dies entitled to land of whatever tenure, which is at his death charged by way of lien for unpaid purchase-money, the devisee or legatee or heir shall not be entitled to have the money discharged out of any other estate of the testator or intestate, unless, in the case of a testator, a contrary intention appears from the will (*s*).

(*k*) *Haynes v. Haynes*, 1 Dr. & Sm. 426.

(*l*) *Re Battersea Park Acts, Ex parte Arnold*, 32 Bea. 591.

(*m*) *Ex parte Hawkins*, 13 Sim. 569; *Re Manchester & Southport Railway*, 19 Bea. 365; *Harding v. Metropolitan Railway*, L. R., 7 Ch. 154; *Watts v. Watts*, L. R., 17 Eq. 217.

(*n*) *Ex parte Walker*, 1 Dr. 508.

(*o*) 30 Bea. 206.

(*p*) Ante, p. 163. As to a purchase of land in lunacy, see post, p.

737.

(*q*) *Frewen v. Frewen*, L. R., 10 Ch. 610; *Richards v. Att.-Gen. for Jamaica*, 6 Moo. P. C. C. 381; *Cadman v. Cadman*, L. R., 13 Eq. 470.

(*r*) *Garnett v. Acton*, 28 Bea. 333. As to the effect of a voidable contract of purchase entered into by a trustee for his own benefit, see *Ingle v. Richards*, 28 Bea. 361.

(*s*) See further on this subject, post, Chap. LIV.

In such a case, therefore, all that the devisee or heir is entitled to is the land charged with the purchase-money (*t*).

In cases not within the act, the old rule above stated applies even if the contract is rescinded, by or at the suit of the vendor, after the testator's death (*u*), for as Mr. Jarman points out (*v*): "The true principle is, that where the contract is such as could have been enforced against the purchaser at the time of his decease, the estate which is the subject matter of the contract, or, failing that, the purchase-money, belongs to his heir or devisee; but if, from a defect of title or any other cause, the contract was not obligatory on the purchaser at his death, his heir or devisee is not entitled to say he will take the estate with its defects, or have the purchase-money laid out in the purchase of another. Such is the doctrine of the case of *Broome v. Monk*" (*w*). In that case Lord Eldon observed of *Whittaker v. Whittaker* (*x*) that it was very difficult to maintain the doctrine in it, which went beyond what was necessary for the decision. His Lordship said: "As between the heir and the personal representatives, *Lacon v. Mertins* (*xx*), *Buckmaster v. Harrop* (*y*) and other cases, establish the general principle, that whatever is the state of liability of the party himself to take at his death, must be the state of liability to be considered upon questions between those representing him after his death (*z*); and if at his death he could not be compelled to take, clearly the heir could not say to the executor, 'I will have the estate; and you shall pay for it.' I have not met with any case that has induced me to suppose, that if this were between the heir and the personal representative, it would be possible for the heir to say, though the title was doubtful, yet being the real representative, he is entitled to take it, as it is; though the ancestor never meant so to take it; or intimated any purpose of retiring from that situation, in which he had a right either to insist upon a good title, or to refuse the estate; and though there is no proof that the ancestor would have paid for the estate with a bad title, yet the heir can insist that the personal estate shall pay for it out of the assets. None of the cases

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Contract enforceable at death, subsequently rendered incapable of completion.

State of liability of the party himself at his death, governs the question between those claiming under him

(*t*) *Re Cockroft*, 24 Ch. D. 94; *Re Kidd*, [1894] 3 Ch. 558. In *Re Cockroft* there had been a compromise which would in any case have defeated the plaintiff's claim.

(*u*) *Whittaker v. Whittaker*, 4 Br. C. C. 31; *Hudson v. Cook*, L. R., 13 Eq. 417.

(*v*) First ed. p. 46.

(*w*) 10 Ves. 597. See also 1 Ves. sen.

218.

(*x*) Ante, p. 77.

(*xx*) 3 Atk. 1.

(*y*) 7 Ves. 341.

(*z*) See acc. *Curre v. Bowyer*, 5 Bea. 6, n.; *Ingle v. Richards*, 28 Bea. 365; *Haynes v. Haynes*, 1 Dr. & Sm. 451, 452; *Hudson v. Cook*, L. R., 13 Eq. 417; *Lysaght v. Edwards*, 2 Ch. D. 516.

CHAP. XXII.

What evidence of intention by devisee to accept title necessary.

Question where the deceased purchaser was bound, but the vendor was not.

give any colour for that; *Green v. Smith* (a), indeed, seems to state a doctrine quite inconsistent with that." He therefore held that, as no title could be made, the devisees were not entitled to take this estate, or to have another estate bought for them.

"It will be observed," says Mr. Jarman (b), "that Lord Eldon adverted to the circumstance of the purchasing deviser not having himself shewn an intention to take the estate with a bad title. It is conceived his Lordship here alluded to such evidence of intention as would have amounted to an acceptance of the title. Nothing short of this, it is presumed, could have any effect; for, to admit parol evidence of intention *as such* would be liable to the objection attaching to the reception of extrinsic evidence in aid of, or in opposition to, a written will (c). It is true that, under the doctrine in question, the devise is incidentally affected by this evidence, since, as already observed, the inquiry whether the contract was obligatory on the testator at his decease, lets in any evidence which would be admissible, in a suit between the vendor and vendee, of circumstances discharging the vendee, as a difference in the estate from that contracted for, not capable of being the subject of compensation, or the like. Of course the vendor could not take advantage of the waiver by the heir or devisee of objections to the title which his ancestor or deviser might have advanced, he (i.e. the heir or devisee) having in that event no interest in the estate.

"In the cases of *Whittaker v. Whittaker*, and *Broome v. Monck*, the contract seems to have been binding on the vendor, and therefore, those cases do not decide what would be the effect, where the deceased purchaser was bound at his decease, but the vendor was not, a case which clearly may and often does arise; as where a written contract has been entered into, which is duly signed by one party and not by the other, and the signing party dies before there has been any act of part performance, which would render the contract obligatory on the other. It is clear, that in such a case, the surviving (d) party may choose or not to enforce the performance of the contract against the representatives of the deceased: should he decline, of course the contract is at an end, and the property remains unconverted as between the real and personal representatives of the deceased party. If, on the other hand, the surviving

(a) 1 Atk. 572.

(b) First ed. p. 48.

(c) See *Rose v. Cunynghame*, 11 Ves. 550.

(d) "The fact of survivorship is in-

troduced merely for the convenience of distinction; it would, of course, be immaterial whether the party represented as the survivor were living or not." (Note by Mr. Jarman.)

party choose to compel performance, the question arises between the respective representatives of the deceased, whether such conversion has taken place. For instance, suppose the deceased party to be the vendor; if the surviving party, i.e. the purchaser, should (as he may) call upon the heir or devisee of the deceased vendor, to convey to him the property in pursuance of his ancestor's or testator's contract—upon the doctrine in question would depend the destination of the purchase-money, which, if the contract is to be considered as effecting an absolute conversion of the property, would belong to the personal representatives (e); if not, to the heir or devisee of the deceased vendor. The writer is not aware of any direct authority on the point; but, perhaps it would be considered as governed by the cases (which seem to be analogous in principle), in which, there being in a lease of a freehold estate a clause entitling the lessee pending the term to purchase the demised property, and the lessor having died before the option of the lessee has been declared, the latter has *subsequently* elected to purchase the property. Under such circumstances, it was held by Lord Eldon, in the case of *Townley v. Bedwell* (f), on the authority of a previous decision of Sir William Grant (g), (but without, it should seem, approving the principle), that the rents, until an election to purchase be made, belong to the heir or devisee; but that when it is made, the purchase-money goes to the personal representative of the vendor."

Cases where there is an option to purchase.

If a person of unsound mind enters into a contract to purchase real estate, and the purchase is afterwards completed by direction of the lunacy authorities, this operates as a conversion of the purchase moneys into realty (h).

Voidable purchase by lunatic.

In *Att.-Gen. v. Marquis of Ailesbury* (i), the money of a lunatic was invested by his committees in the purchase of lands which, pursuant to orders made in the lunacy proceedings, were conveyed upon trust for the lunatic "his executors administrators and assigns," and directed to be considered as part of his personal estate: it was held that on his death the value of the lands was part of his personal estate. But if money is expended by leave of the judge in lunacy for the permanent improvement of the lunatic's real estate, in the course of the ordinary management of the property, it will

Investment of lunatic's money in real estate.

(e) See ante p. 162.

(f) 14 Ves. 591. See also *Collingwood v. Row*, 26 L. J. Ch. 649.

(g) *Lawes v. Bennett*, 1 Cox, 167. The case was decided by Lord Kenyon. Compare *Wright v. Rose*, 2 S. &

St. 323, and the observations of Wood, V.-C., 1 J. & H. 429.

(h) *Baldwyn v. Smith*, [1900] 1 Ch. 588.

(i) 12 App. Cas. 672.

[CHAP. XXII.] not, as a general rule, be ordered to be charged upon the real estate in favour of the personalty (*j*).

When money is a "hereditament." Where land has been sold, and the proceeds are subject to a trust for re-investment in land, they will generally come within the description of "hereditaments" (*k*).

Contract for building. Conversion may also be effected by a testator entering into a contract with a builder for the erection of buildings on the testator's land, and dying before they are completed or paid for: in such a case the devisee is entitled to have the contract performed out of the personal estate (*l*).

But this rule does not apply where the contract relates to land not belonging to the testator (*m*).

Operation of law. Conversion may be produced by operation of law. In *Re Loveridge* (*n*) a mortgagee, who since 1861 had been in possession of the mortgaged land, died in 1864, having by his will given his residuary real and personal estate to his wife during widowhood, but made no other disposition of his property, so that subject to the widow's interest during widowhood, his widow and brother were entitled to his personal estate under the Statutes of Distribution; after his death his widow entered into possession of the mortgaged land and remained in possession until 1879, when the equity of redemption was barred under the Statute of Limitations; the brother died intestate in 1880, and it was held that his moiety of the mortgage debt was converted into real estate in 1879; consequently on his death one moiety of the land descended to his co-heiresses.

Redemption of rent-charge and conversion of renewable leases. Several cases have been decided in Ireland on the question how money paid for the redemption of a rent-charge ought to devolve (*o*), and how the rights of parties are affected by Irish statutes relating to renewable leases (*p*), but they do not seem to lay down any principle of general application.

Conversion of one kind of personal property into another. In the case of personal property, the operation of a will may be affected by the nature of the property being changed by some act

(*j*) *Re Gist*, [1904] 1 Ch. 398.

(*k*) *Re Gosselin*, [1906] 1 Ch. 120.

(*l*) *Holt v. Holt*, 2 Vern. 322; *Cooper v. Jarman*, L. R., 3 Eq. 98; *Re Day*, [1898] 2 Ch. 510.

(*m*) *Re Day*, *supra*.

(*n*) 73 L. J. Ch. 15.

(*o*) *Re Graves*, 15 Ir. Ch. 357; *Re Crofton*, 1 Ir. Eq. 204.

(*p*) *Morris v. Morris*, Ir. R., 6 C. L. 73, 7 C. L. 295; *Re Dane's Estate*, Ir. R., 10 Eq. 207; *Batteste v. Maunsell*, ib. 314.

dehors the will. Where the testator himself sells property which he has specifically bequeathed, this operates as an ademption of the bequest (*q*). And the principle of *Larves v. Bennett* (*r*) applies to leaseholds (*s*).

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In *Coyne v. Coyne* (*t*) the testator was entitled to a lease which was determinable by the lessors on giving notice and on payment of compensation; notice was given during the testator's lifetime, but the compensation was not ascertained until after his death; he had specifically bequeathed the lease: it was held that the legatee was entitled to the compensation. The question seems to have been whether the lease was still subsisting at the testator's death; if it had been determined by the notice, the legatee would not have been entitled to the compensation.

In *Browne v. Groombridge* (*u*), a testator gave his wife all his ready money which he should have about his person or at his residence at his death, and he bequeathed to others his exchequer bills, stock, &c.: he became insane two years before his death, and during that time large sums of ready money belonging to the testator were invested on his behalf in stock and exchequer bills: it was held that this was a due conversion of the money, and that the specific legatees of the stock and exchequer bills were entitled to the investments. But some doubt is thrown on the correctness of this conclusion by the decision of Wood, V.-C., in *Taylor v. Taylor* (*v*). In that case a testator made a specific bequest of leaseholds and chattels, and afterwards became insane; no commission in lunacy was taken out, but the persons who managed the testator's affairs entered into an agreement for the sale of the leaseholds and chattels, and after his death the agreement was approved by the Court: nevertheless it was held that this did not alter the rights of the specific legatees (*w*).

Unauthorised conversion.

The question whether a bequest of stock or shares is adeemed by the property being converted by act of parliament, or under the powers of a company, is discussed elsewhere (*x*).

Conversion of stock, &c., by act of parliament.

In *Jones v. Green* (*y*), a testator specifically bequeathed certain

Conversion in lunacy.

(*q*) The cases are referred to in Chap. XXX.

(*r*) 1 Cox, 167, ante, p. 730.

(*s*) *Goold v. Teague*, 5 Jur. N. S. 116.

(*t*) Ir. R., 10 Eq. 496.

(*u*) 4 Madd. 495.

(*v*) 10 Hare, 475.

(*w*) Compare *Domville v. Taylor*, 32 Bea. 604; *Re Larking*, 37 Ch. D. 310; *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296. The decisions in *Drink-*

water v. Falconer, 2 Ves. sen. 623, and *Basan v. Brandon*, 8 Sim. 171, also seem inconsistent with *Browne v. Groombridge*. The difficulty is that ademption is not a question of intention but of fact: *Ashburner v. Maguire*, cited in Chap. XXX.

(*x*) Chap. XXX.

(*y*) L. R., 5 Eq. 555; *Re Freer*, 22 Ch. D. 622.

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shares, and was afterwards found a lunatic: the shares were sold by order of the Court and the proceeds invested in consols: it was held that the bequest was adeemed. But this result would probably not follow if the sale took place under the Lunacy Act, 1890 (z).

II.—Rights of Beneficiaries affected by Trustees' Option to Convert.—Where trustees have a discretionary power to convert, they ought not to exercise it in such a way as unnecessarily to alter the rights of the parties. Thus, if wasting securities are bequeathed by a testator upon trust for A. for life, with a discretionary power of conversion, the trustees ought not to convert unless the investment become hazardous (a).

Result of
actual
conversion
under will.

Where property is given to trustees with power to convert it into realty or personalty at their option (b), the general rule is that it devolves according to the state of investment in which it happens to be. Thus in *Rich v. Whitfield* (c) a testator directed his trustees to sell land and to invest the proceeds in the purchase of other lands or in government securities; they invested them in government securities, and it was held that these devolved as personal estate.

An investment in personalty under a power of interim investment does not affect the devolution of the property (d).

Trustees'
option to sell
may affect
destination of
property.

Where trustees have a power or discretion to convert land into money, or vice versâ, it may happen, as Mr. Jarman points out (e), that "the exercise of [the] trustees' option to convert, regulates not merely the devolution of property as between the real and personal representatives respectively of the beneficial objects, but also determines its destination under the will itself; i.e. until conversion, it belongs to one, and when actually converted, to another. Large and inconvenient as such a discretion is, yet, if the intention to confer it be clearly manifested, the construction must prevail,

(z) Section 123. See Chap. XXX.

(a) *Lord v. Godfrey*, 4 Madd. 455. The case of *Baud v. Fardell*, 7 D. M. & G. 628, in which it was seriously argued that a trustee with power to invest in government securities ought to sell out a government security bearing interest at 5 per cent., and invest in 3 per cent. securities, savours of Lord Eldon's days.

(b) As to the cases in which an option is given in form but not in substance; *Grievson v. Kirsopp*, 2 Kee. 653;

Minors v. Battison, 1 App. Cas. 428, and other cases cited post, p. 755.

(c) L. R., 2 Eq. 583; *Polley v. Seymour*, 2 Y. & C. 708, post, p. 755. Compare *Re Bird*, [1892] 1 Ch. 279; *Walker v. Denne*, 2 Ves. jun. 170; *Van v. Barnett*, 19 Ves. 102.

(d) *Re Bird*, supra.

(e) First ed. p. 538. The effect of the exercise of an option of purchase given to a stranger has been already considered, ante, p. 730.

in spite of any suspicion that the testator misapprehended the effect of the terms he has employed.

"As in *Brown v. Bigg* (f), where a testator ordered and empowered his wife (in case she chose so to do) with the advice of W. G., to sell all his G. estates, stating that she would probably not choose to live there, with the crop, stock, and effects, with all convenient speed; and the money arising from such sale, to be placed out on security, the yearly interest of which, as well as the interest due to the testator on notes, bonds, mortgages or otherwise (except what was in the public funds), he gave to his wife for life, determinable as to one moiety on marriage again. And the testator gave the whole of his personal estate, principal and interest, of every kind, both on public and private security, before undisposed of, to several persons. The wife sold part of the G. estate, and died; and Sir W. Grant, M.R., held, that the proceeds of such part belonged to the residuary legatees, and that the unsold part of the estate remained the property of the testator's heir.

"So, if the fund arising from the sale be disposed of in such terms as unequivocally and explicitly to make the vesting depend on the period of actual sale, the vesting will be postponed accordingly.

Vesting of
fund post-
poned until
actual sale.

"Thus, where (g) a testator devised certain real estates to his wife for life, and directed that A. should, as soon after her decease, or her refusing to release her dower, as conveniently might be, sell the estate; and as to the monies arising from the sale, together with the rents till sold, he gave the same to be equally divided between his five nephews (naming them), at such time as the sale should be completed, *in case they should be then living*; but, in case any of them should die in his lifetime, or before the sale of his said estate should be completed, leaving issue, his part should be paid to his children; but in case any of them should die in his lifetime, or before the sale should be completed, without leaving issue, to the survivors. Sir W. Grant held, that the share of a nephew surviving the testator, but dying before the sale, did not vest; observing, that to adopt the contrary construction would deny to the testator the power, by any express form of words, or clear manifestation of intention, to make the vesting depend on the actual sale.

(f) 7 Ves. 279; and see *Walter v. Maunde*, 19 Ves. 424; *Harding v. Trotter*, 21 L. T. 279, V.-C. S.; and *Re Perkins*, [1909] 53 Sol. J. 698.

(g) *Elwin v. Elwin*, 8 Ves. 547. See also *Faulkener v. Hollingsworth*, cit. 8 Ves. 558.

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Doctrine as to enjoyment of property which is subject to a trust for conversion.

"In all such cases, however, the courts, ever anxious to avoid imputing to a testator a mode of disposition at variance with what is usual and convenient, will diligently seek in the context of the will for means of escape; and in one class of cases, of very frequent occurrence, the literal force of the language of the will has, even without any such aid from the context, been moulded into conformity with probable intention. The cases here alluded to are those in which a will, creating a trust for conversion, is so framed as that the enjoyment of the cestui que trust is apparently made to wait until actual conversion. The inconvenience of such a postponement is obvious; it seems hardly supposable that the testator could mean that the actual enjoyment by the object of his bounty should be liable to be deferred for an indefinite period, by difficulties attending the execution of the trust, or the want of activity in the trustees in effecting a conversion. To prevent such consequence, a liberal construction has obtained in these cases, and the legatee, until the execution of the trust, takes an interest in the unconverted property, corresponding to that which he would have been entitled to in the proceeds, if the conversion had taken place (*h*). Thus, where (*i*) lands were devised (*j*) to be sold, and out of the money arising from the sale other lands were to be purchased, to be settled to certain uses, and a person, who would have been tenant in tail under those uses with reversion in fee to himself, levied a fine of the estate devised to be sold; Sir W. Grant held, that though no estate was in terms limited to him in that property, yet he was tenant in tail in equity; and, by the fine, acquired an equitable fee." It follows from this principle, that where land is devised in trust for sale, and the proceeds of sale are to be held in trust for a person for life, with remainder over, the tenant for life is, as a general rule, entitled to the rents of the land until it is sold (*k*). And the same rule applies where the real and personal estates are devised and bequeathed together (*l*).

So, where by will trustees were directed to sell an advowson

(*h*) This statement of the law by Mr. Jarman was cited with approval in *Re Searle*, [1900] 2 Ch. 829. As to the rights of the tenant for life in such a case, see post, Chap. XXXIV.

(*i*) *Pearson v. Lane*, 17 Ves. 101; *Waddington v. Yates*, 15 L. J. Ch. 223, seems to have been decided on the same principle. In that case the power of sale was exercisable with the consent of the tenant for life.

(*j*) It was really a conveyance by

deed upon trust for sale.

(*k*) *Casamajor v. Strobe*, 19 Ves. 390 n.; *Re Laing's Trusts*, L. R., 1 Eq. 416; *Re Carter*, 41 W. R. 140; *Hope v. D'Hédouville*, [1893] 2 Ch. 361.

(*l*) *Re Searle*, [1900] 2 Ch. 829; *Re Earl of Darnley*, [1907] 1 Ch. 159; *Re Oliver*, [1908] 2 Ch. 74, referred to in Chap. XXXIV. (*Life Estates, &c.*) In *Yates v. Yates*, 28 Bea. 637, there was no trust for sale.

when full, and invest the proceeds for the benefit of A. during her life, and afterwards for other persons, a sale of the advowson not having been effected while the advowson was full, it was held that the right to nominate a clerk was in A. (*m*).

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And in *Prendergast v. Prendergast* (*n*), where trustees were empowered in their uncontrolled discretion to set aside sufficient investments to produce 1,500*l.* a year, and to pay that sum to A., the Court refused to exercise their discretion, but directed an adequate sum in consols to be purchased to meet the annuity.

The doctrine above stated must not, of course, be confused with the rules governing the rights of tenant for life and remainder-man in respect of a residuary personal estate, whether there is a trust for conversion or not; these are discussed in Chapter XXXIV.

Residuary
personalty.

III.—Doctrine of Constructive Conversion.—The general rule is thus stated by Mr. Jarman (*o*): “On the principle that equity considers that as done which ought to have been done, it is well established that ‘money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given: whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed. The owner of the fund, or the contracting parties, may make land money, or money land’ (*p*). It follows, therefore, that every person claiming property under a will or settlement directing its conversion, must take it in the character which such instrument has impressed upon it; and its subsequent devolution and disposition will be governed by the rules applicable to property of this character. This doctrine is founded in justice and good sense: since it would be obviously unreasonable that the condition of the property, as between the representatives of the parties beneficially interested, should depend on the acts of persons through whom, instrumentally, the conversion

Money to be
laid out in
land con-
sidered as
land and
vice versa.

(*m*) *Briggs v. Sharp*, L. R., 20 Eq. 317. And see *Hawkins v. Chappel*, 1 Atk. 621; *Johnstone v. Baber*, 6 D. M. & G. 439; *O’Shea v. Howley*, 1 J. & Lat. 391.

(*n*) 3 H. L. C. 195.

(*o*) First ed. p. 523. As to trusts for conversion, see Chap. XXIV.

(*p*) “Vide Sir Thomas Sewell’s judgment in *Fletcher v. Ashburner*, 1 Br. C. C.

499, whose statement of the doctrine in these terms was commended for its accuracy by Lord Alvanley, in *Wheldale v. Partridge*, 5 Ves. 396.” (Note by Mr. Jarman. His citation of the judgment is not quite accurate: for “the owner of the fund,” he substitutes “the owner of the land [qu. property ?].” No doubt “fund” is a misprint for “land.”)

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Cases illustrative of the doctrine.

is to be effected, and in whom no such discretion is expressed to be reposed. The principle is, besides, too well supported by numerous authorities (*q*) to be called in question at this day."

Thus, money directed to be laid out in land, and settled on A. in fee, is, though not actually laid out, descendible as real estate to the heir: is subject to tenancy by the curtesy (*r*): is not liable (otherwise than real estate is liable) to simple contract debts (*s*): and will not pass under a general bequest purporting to include personal estate only (*t*), unless the testator had power to change its character, and shewed an intention to do so (*u*).

As a general rule, money so constructively converted into land passes under a devise of lands, tenements, and hereditaments (*v*). But if a testator devises all his lands in Staffordshire to A., this will not pass moneys arising from the sale of lands in Staffordshire, and subject to a trust for re-investment in lands in any part of England; being, however, in the nature of realty, they would pass under a residuary devise of real estate (*w*).

So, in the case of real estate, whether freehold or copyhold, being directed to be sold, and the proceeds bequeathed to A., who, after surviving the testator, happens to die before the sale, the property devolves to his personal representative, with all the incidental qualities of personal estate, or passes by a residuary bequest contained in his will (*x*). The question whether it is subject to the *lex loci* is discussed in the next chapter.

(*q*) 2 Keb. 841; 2 Vern. 55; Pre. Ch. 543, cited 2 Vern. 58; 1 Vern. 345; 2 Vern. 20; 1 Eq. Ab. 273, pl. 5; 1 Eq. Ab. 274, pl. 6; 2 Vern. 101; ib. 295; ib. 506; 1 P. W. 172; Pre. Ch. 400; 1 Eq. Ab. 175, pl. 5; 3 P. W. 212; Ca. t. Talb. 80; 1 P. W. 204; ib. 483; 1 B. P. C. Toml. 207; 3 ib. 1; ib. 148; 2 Atk. 452; 3 Atk. 111; 3 ib. 254; 1 B. C. C. 224; 7 B. P. C. Toml. 530; 1 B. C. C. 497; ib. 505; 2 Kee. 653.

(*r*) *Sweetapple v. Bindon*, 2 Vern. 536; *Cunningham v. Moody*, 1 Ves. sen. 174; *Dodson v. Hay*, 3 B. C. C. 404.

(*s*) *Laurence v. Beverly*, 2 Keb. 841; see Chaps. LII., LIV.

(*t*) *Gillies v. Longlands*, 4 De G. & S. 372; and see *Richards v. Att.-Gen. for Jamaica*, 13 Jur. 197; *Re Pedder's Settlement*, 5 D. M. & G. 890; *Re Skeggs*, 2 D. J. & S. 533; *Re Greaves*, 23 Ch. D. 313.

(*u*) *Chandler v. Pocock*, 16 Ch. D. 648; *Re Harman*, [1894] 3 Ch. 607. Compare *Re Greaves*, *supra*.

(*v*) *Lingay v. Sowray*, 1 P. W. 172;

Shorer v. Shorer, 10 Mod. 39; *Harvey v. Aston*, 1 Atk. 364; *Guidot v. Guidot*, 3 ib. 254; *Rashleigh v. Master*, 1 Ves. jun. 201, 3 B. C. C. 99; *Hickman v. Bacon*, 4 B. C. C. 333; *Green v. Stephens*, 12 Ves. 419, 17 ib. 64.

(*w*) *Re Duke of Cleveland*, [1893] 3 Ch. 244; *Basset v. St. Levan*, 43 W. R. 165.

(*x*) *Elliott v. Fisher*, 12 Sim. 505. See, as to a devise under the old law of lands contracted to be purchased but not conveyed at the date of the will, Lord Cowper's judgment in *Lingen v. Sowray*, as reported 1 Eq. Ca. Ab. 175, pl. 5; *Wheldale v. Partridge*, 5 Ves. 388, 8 Ves. 227; *Thornton v. Hawley*, 10 Ves. 129; *Biddulph v. Biddulph*, 12 Ves. 161; *Green v. Stephens*, ib. 419, 17 Ves. 64; *Kirkman v. Miles*, 13 Ves. 338; *Triquet v. Thornton*, ib. 345; *Van v. Barnett*, 19 Ves. 102; *Ashby v. Palmer*, 1 Mer. 296, and stated post; *Stead v. Newdigate*, 2 Mer. 521. The dictum contra of Lord Loughborough, *Walker v. Denne*, 2 Ves. jun. 170, is completely overruled.

The doctrine, of course, applies where the ultimate destination of the property is to be reached by several gradations. Thus, land directed to be sold, and the proceeds to be invested in land, will, though neither conversion has been actually effected, be regarded as real estate (*y*). But where the first conversion is out and out, and the second qualified only, the property will be impressed with the character which the first conversion stamps upon it, namely, that of personalty (*z*).

It is hardly necessary to add that in order to effect a constructive conversion, the trust for sale must be valid; if it is void (e.g., by reason of its transgressing the Rule against Perpetuities) no conversion is effected (*a*).

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Double conversion.

Where trust for sale is invalid.

IV.—What Words will work a Constructive Conversion.—

In order to work a constructive conversion, "the new character must be decisively and absolutely fixed upon the property" (*f*). In other words, an actual sale or purchase, either immediately or in future, must be directed positively and absolutely, and not conditionally or contingently (*g*). The direction may be express or implied. It has been already mentioned that the direction must be free from objection on the score of remoteness (*h*).

No conversion unless a sale directed.

A direction that real estate shall be considered as personal, or vice versâ, is insufficient to effect a conversion, since the law does not allow property to be retained in one shape, and yet to devolve as if it were in another. But where a testator gives a power of investing money in the purchase of land and directs that until so invested it shall devolve as land, or, conversely, gives a power of selling land and directs that until sold it shall devolve as personalty, this is effective for the purposes of the trusts contained in the will; so that in the one case the money follows the trusts declared concerning land which is subject to the will, and in the other case the land follows the trusts declared concerning personalty which is subject to the will. In other words, the trusts are declared by reference. But the direction cannot affect the devolution of the

Effect of direction that money shall devolve as land, or vice versâ.

(*y*) *Sperling v. Toll*, 1 Ves. sen. 70; *Pearson v. Lane*, 17 Ves. 101. In such a case, where part of the land has been sold and the money not yet re-invested, the money will not pass under a devise of all the testator's interest in the land, if there is any part unsold to answer the description: *Re Pedder's Settlement*, 5 D. M. & G. 890.

(*z*) *Van v. Barnett*, 19 Ves. 102, stated post, p. 748.

(*a*) *Goodier v. Edmunds*, [1893] 3 Ch.

455; *Re Wood*, [1894] 3 Ch. 381; *Re Appleby*, [1903] 1 Ch. 565.

(*f*) Mr. Jarman, first ed. p. 526.

(*g*) *Tily v. Smith*, 1 Coll. 434; *Wall v. Colshead*, 2 De G. & J. 683. As to the effect of giving the trustees a discretion in respect of the time of sale, or of making the sale conditional on the consent or request of a certain person, see *infra*, pp. 751 seq.

(*h*) *Supra*.

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property by the rules of law, so that if the trusts fail, the direction is inoperative, for there is no true conversion (i).

Cases where money has been held converted.

Earlom v. Saunders.

And first as to the cases where money has been held to be converted. In *Earlom v. Saunders* (j), lands were devised to trustees to the use of the testator's wife for life, with remainder to his first and other sons in tail male, with remainder to his daughters in tail, with remainder to two persons as tenants in common in fee; and money was bequeathed to trustees to be laid out in the purchase of lands or any other security or securities as they should think proper and convenient; and the testator directed that the lands and securities should be made to and settled on the trustees, their heirs and assigns, in trust and to the use of his wife for life, and after her decease to such uses and under such provisions, conditions, and limitations, as his lands before devised were limited; Lord Hardwicke, on the ground that if the money was laid out on securities which were personal, all the limitations might not take place, considered the money to be constructively converted.

Cowley v. Hartstonge.

In *Cowley v. Hartstonge* (k), the point was much considered. The trust was to lay out money "either in the purchase of lands of inheritance, or at interest, as my trustees shall think most fit and proper, and then upon this further trust, to pay the rents of the said lands of inheritance, or the interest of the money, &c., to H. for his life," and then followed a series of limitations of estates for life and in tail to the sons and daughters of H., and to other persons in strict settlement. It was held in D. P. that taking the whole will together, the testator contemplated an investment in land at some time or other, and there was therefore a constructive conversion. There was an ultimate limitation to the testator's right heirs, executors and administrators; but Lord Redesdale said the meaning of that was merely that if all the previous limitations failed before the death of H., there was no further cause for investing in land, and the personal estate might

(i) *Att.-Gen. v. Mangles*, 5 M. & Wels. 120; *De Beauvoir v. De Beauvoir*, 3 H. L. Ca. 524; *Edwards v. Tuck*, 23 Bea. 268. As to *De Beauvoir v. De Beauvoir*, see Chap. XL.

In *Re Walker*, [1908] 2 Ch. 705, the testator devised his real estate by way of settlement, and directed that his trustees should hold and apply the proceeds of his personal estate as if they had arisen from a sale of the real estate under the Settled Land Act, 1882:

it was held by Parker, J., that this was not an imperative trust for conversion into realty, because under the Settled Land Act, capital moneys may be invested in the purchase of leaseholds. Compare *Att.-Gen. v. Ailesbury*, 12 A. C. 672; *Re Grange*, [1907] 2 Ch. 20.

(j) *Amb. 241*; see also *Johnson v. Arnold*, 1 Ves. sen. 169; *Meure v. Meure*, 2 Atk. 265.

(k) 1 Dow, 361.

be left to go to the testator's next of kin, and the real estate to the heir.

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In *Hereford v. Ravenhill* (l), fee-simple estates were devised in strict settlement, and money was bequeathed upon trust with consent to be invested in the purchase of freehold, leasehold, or copyhold messuages, lands or hereditaments, which were to be conveyed, settled, or assured to the like uses, &c., as the hereditaments thereinbefore devised stood limited. There was, also, a power to invest at interest till a purchase could be made. Lord Langdale, M.R., decided that this was a trust for conversion, and observed that the case before him differed from *Walker v. Denne* (presently noticed), in that the leaseholds to be purchased in that case were to be for very long terms of years. This difference is not very apparent; but the limitations in the several cases were such as easily to lead to different conclusions.

Hereford v. Ravenhill.

In *Cookson v. Reay* (m), the testator directed a sum of money to be invested in land or other securities for his son John, the interest of such money or produce of such lands to be paid to him for his life, and if he married with consent, and made a proper settlement on his wife, that the remainder should go to such child or children as he might have lawfully begotten, and on failure of these to the testator's son Isaac and his heirs for ever. Lord Langdale, without deciding the point, said that, upon the authorities of *Earlom v. Saunders* and *Cowley v. Hartstonge*, he was inclined to consider the money as directed to be laid out in the purchase of land, and that the direction to invest on some other securities had reference only to the time which might elapse before a purchase of land could be procured. On appeal to the House of Lords (n), Lord Brougham inclined to the same opinion by reason of the words "remainder" and "heirs" in the limitations to the children and Isaac. It would seem that "heirs" alone would not have supported this conclusion (o). However,

Cookson v. Reay.

(l) 5 Beav. 51.

(m) 5 Beav. 22.

(n) *Cookson v. Cookson*, 12 Cl. & Fin. 121.

(o) *Atwell v. Atwell*, L. R., 13 Eq. 23; *Walker v. Denne*, 2 Ves. jun. 170. In *Atwell v. Atwell* (also reported 41 L. J. Ch. 23), land was settled by deed to trustees to the use of the children of J. A., equally and their heirs and assigns, and the settlement contained a power of sale and also of re-investment of the proceeds in land;

the land was sold but the proceeds were invested on mortgage. Some of the beneficiaries had died before the sale took place, and others died afterwards. The order of Lord Romilly, M.R., as to the devolution of the respective interests in the settled property was as follows:—"that the shares therein of C. A. and Joseph A., two of the children of the settlor J. A., who died in early infancy before such conversion descended to their brother and heir at law J. B. A., and that the said

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*Simpson v.
Ashworth.*

assuming that the will had converted the money, the decision was that the beneficiaries had reconverted it.

In *Simpson v. Ashworth (p)*, the testator gave to his daughter C. 4,000*l.* out of his personal estate, and directed his executors to pay her the interest of 2,000*l.* till she attained the age of twenty-one years. He also directed his executors or the survivor of them, as soon as convenient after his decease, to purchase an estate, not to exceed 2,000*l.*, for her use and her lawful heirs, the daughter to come into possession, with the accumulations, at her age of twenty-one years. If the land was not bought before she attained that age, she was to receive the 4,000*l.*, and to give security for 2,000*l.*, to be returned, if she died without lawful heirs, to the testator's son and daughters that should have heirs, share and share alike, and provided the land be purchased, to be returned in the same manner. Lord Langdale held that the 2,000*l.* was intended to be converted at all events, and that the daughter took an estate tail. Applied to personal estate the gift over on the death of the daughter without heirs (i.e. heirs of her body) would have been void for remoteness; which of itself, according to *Earlom v. Saunders*, was strong reason for deciding in favour of the conversion.

Cases where
money has
been held not
converted.

*Curling v.
May.*

Next, with respect to the cases in which it was held that there was no conversion.

In *Curling v. May (q)*, the trust was to lay out money in the purchase of lands, or put the same out on good securities, upon trust for the separate use of H., her heirs, executors and administrators. The money never having been laid out, Lord Talbot decreed the administrator of H. to be entitled.

*Van v.
Barnett.*

In *Van v. Barnett (r)*, lands were covenanted to be conveyed to trustees to be sold, and the produce, with the consent of certain persons, was directed to be laid out in the purchase of lands or in government securities, and the latter trust was held not to operate as a reconversion, the trusts declared of the fund in its ultimate

J. B. A., John A., and F. W. A., three of such children, having died subsequently to such conversion as in the chief clerk's certificate mentioned, the interests of the said J. B. A. as well original as accrued, and interests of John A. and F. W. A. were at the times of their respective deaths personal estate, and that the plaintiff, as legal

personal representative of the said J. B. A. the settlor, the father and sole next of kin of such children, is entitled accordingly to five shares." See Reg. Lib. A. 3112, 16th November 1871.

(p) 6 Beav. 412.

(q) Cited 3 Atk. 255.

(r) 19 Ves. 102.

state not being such as to shew that a re-investment in land at some time or other was intended (s).

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In *Walker v. Denne* (t), where money was directed to be laid out in freehold lands, or long terms of years, in trust for A. for life, and afterwards for her children and their heirs, but if there should be no child or heirs of her body living at her death, then for the testator's right heirs, Lord Loughborough held that it was not converted into realty so as to escheat to the Crown on failure of heirs, there being an option in the trustees to have it laid out in either species of property. Indeed he doubted whether, even if there had been no such option, the Crown could have claimed. But his doubt appears to have referred as well to the general doctrine, as to its effect in regard to escheat. There would seem to be considerable difficulty in supporting the claim of the Crown to have the money laid out in such a case, as escheat was a consequence of tenure, and, therefore (it should seem) inapplicable to equitable interests of every description (u).

Walker v. Denne.

Doctrine of conversion in regard to escheat.

Sometimes there is no express trust for conversion, but the accompanying directions are such as lead to an implication that conversion was intended; as, where real and personal estate was devised to trustees in trust to "invest" the same in the funds (v), and again, where leaseholds were given upon the same trusts and subject to the same powers as those declared of the moneys to arise by sale of property previously given in trust for sale (w). But the same inference is not necessarily to be drawn from a trust to divide into several shares, if the trustees have an express power of sale (x); or though they are directed to "invest" some of the shares (y). In *Burrell v. Baskerfield* (z),

Implied trust for conversion.

(s) See also *Biggs v. Andrews*, 5 Sim. 424; *Rich v. Whitfield*, L. R., 2 Eq. 583, where however the point was rather assumed than decided.

(t) 2 Ves. jun. 170; see also *Van v. Barnett*, 19 Ves. 102.

(u) See 3 My. & K. 494; ante, p. 90, n. (f). The law of escheat is now extended to equitable estates and interests; see the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), s. 4. Some caustic remarks on the act will be found in Challis on Real Property, 2nd ed., pp. 39, 40.

(v) *Affleck v. James*, 17 Sim. 121; *Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595 (settlement).

(w) *Murton v. Markby*, 18 Beav. 196.

The question arose upon a claim by tenant for life to enjoy leaseholds in specie. See also *Tait v. Lathbury*, L. R., 1 Eq. 174, and per Lord Campbell, 2 D. F. & J. 138.

(x) *Greenway v. Greenway*, 29 L. J. Ch. 601, 605, 2 D. F. & J. 128; *Lucas v. Brandreth*, 28 Beav. 273; *Re Wintle*, 65 L. J. Ch. 863. See *Grieverson v. Kirsopp*, post, p. 755.

(y) *Cornick v. Pearce*, 7 Hare, 477.

(z) 11 Bea. 525. In *Re Cookes' Contract*, 4 Ch. D. 454, the question was whether the trustees could sell after the death of the tenant for life; no question of conversion seems to have arisen.

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however, a power to trustees to collect all the testator's property together, and to sell and convert into money, and to pay certain legacies, followed by a direction to divide the whole of the remainder of his property among certain persons, was held to create a trust for conversion. And in *Mower v. Orr* (a), where a testator after stating that his property consisted of copyholds, leasehold houses, merchandise in Australia, cash at his bankers and in the public funds, and that as it was so scattered about and not realized he could not state what he should die worth, divided it into twenty shares, sixteen of which he disposed of by giving a certain number to each of his three sons absolutely, and, as to the remaining four, he gave two to his daughter absolutely and two to be invested in the funds for the use of her children; and he appointed two of his sons executors, requesting them to get his property together and divide it according to his intention; it was held that the testator must be understood as directing a conversion of his copyhold estate into personalty. Wigram, V.-C., said that the division of the entire property into a number of shares, and the directions as to the investment and disposition of some of such shares, precluded the supposition that he intended the copyholds to remain unsold.

Option for trustees to invest in realty.

Where a will disposes of personalty only, the fact that the gift is framed with limitations appropriate to realty, some of which must fail of effect when applied to personalty, will not raise an implied trust to convert into realty. A testator gave the residue of his personal estate to trustees, upon trust in their option to invest part thereof either in the purchase of real estate or in personal securities, and directed that the real estate so purchased or the investments should be held subject to certain limitations declared by the will which were applicable only to real estate; it was held by the House of Lords (b), affirming the decision of the Court of Appeal, that there was no implication of a trust for conversion, so as to control the option of the trustees.

Direction for temporary investment does not prevent conversion.

A provision that, until land be purchased, the money shall be placed out on security at interest, does not prevent its receiving the impression of the real estate instantan (c), this being a mere temporary arrangement; unless it appears, as of course it may, from other parts of the instrument, that the arrangement is not, in fact, intended to be merely temporary; for instance, if by a final

(a) 7 Hare, 473. See *Re Wintle*, supra; *Owen v. Owen*, [1897] 1 Ir. R. 580 (settlement).

(b) *Evans v. Ball*, 47 L. T. 165.

(c) See *Edwards v. Countess of Warwick*, 2 P. W. 171; *Re Bird*, [1892] 1 Ch. 279.

disposition of the capital fund, in certain events, as money, it is shewn that the conversion is to take place only in the alternative events (*d*).

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A trust to sell within a specified period converts the property though no sale be made within the period ; the specification of time being directory only (*e*). In *Tily v. Smith* (*f*), the testator directed that his wife should hold one of his houses for her use to bring up his children E. and M., and at their arriving to the age of twenty-one years, then all his estates, real and personal, to be sold and converted into money, and the proceeds to be divided between his wife and as many children as she had at his decease. The wife and M. survived the testator, but E. died in his lifetime under twenty-one, and M. afterwards died under twenty-one, so that, strictly construed, the time for conversion never arrived. However, the V.-C. thought that the words " at their arriving," &c., meant only " subject thereto," or " when there shall be no child alive under twenty-one," and that in the event, which happened, of the wife or one or both of the daughters surviving the testator, he intended that there should positively and absolutely at some time and not conditionally or contingently, be a sale of the real estate. That time, he thought, arrived at or before the widow's death.

Trust to sell at a stated time.

Tily v. Smith.

Again, if the trust is imperative, it is not generally material that the sale or purchase is to be made only when the trustees think fit. Thus, in *Doughty v. Bull* (*g*), the trust was to sell as soon as the trustees should see necessary for the benefit of the testator's children, and to apply the money for their benefit ; and it was held that only the time of the sale, and not the question whether there should be any sale, was left to the discretion of the trustees. But a discretionary trust for sale does not effect a conversion (*h*).

Effect of sale or purchase being only when trustees think fit.

Doughty v. Bull.

If the purchase is to be made with consent or approbation (*i*), or on or after request or direction, the question whether or not a conversion is intended, must be answered from a consideration of the whole instrument, and especially of the trusts to which the property is subjected, and the persons by whom the request is to be made (*j*).

Effect where sale or purchase to be made upon request.

(*d*) *Wheldale v. Partridge*, 5 Ves. 388, 8 ib. 227.

(*e*) *Pearce v. Gardner*, 10 Hare, 287 ; and see *Cuff v. Hall*, 1 Jur. N. S. 972.

(*f*) 1 Coll. 434.

(*g*) 2 P. W. 320. See also *Robinson v. Robinson*, 19 Beav. 494 ; *Biggs v. Peacock*, 22 Ch. D. 284 ; *Re Raw*, 26 Ch. D. 601 ; *Re Heathcote*, 58 L. T.

43 ; *Minors v. Battison*, 1 App. Ca. 428.

(*h*) Post, p. 755.

(*i*) The person whose approbation is required will not be allowed to delay the sale for his own advantage and to another's prejudice, *Lord v. Wightwick*, 4 D. M. & G. 803, 6 H. L. Ca. 217.

(*j*) See *Waddington v. Yates*, 15

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*Lechmere v.
Carlisle.*

Thus in *Lechmere v. Earl of Carlisle* (*k*), L. covenanted within one year to lay out a sum of money in the purchase of lands, with the consent of trustees, and to settle them; and it was held that the money thus agreed to be laid out should be taken as land. To the objection that the trustees must previously give their consent, Sir J. Jekyll, M.R., replied, that in his opinion they were not to do the first act: L. ought to have proposed his purchase and settlement, upon which the trustees were to signify their agreement or disagreement.

*Thornton v.
Hawley.*

Again, in *Thornton v. Hawley* (*l*), Sir W. Grant was of opinion, that the circumstance that a sum of stock was to be sold by the trustees after request to them made by the husband and wife, or the survivor, or the executors or administrators of the survivor, and the produce laid out in the purchase of land with the consent of the same persons, did not prevent the fund being immediately impressed with the quality of real estate, because to such property alone were the limitations applicable, and also because it was hardly possible to suppose an intention to give an option to any person who should be an executor or administrator, whether it should be money or land, though it might be intended to give that option to the husband and wife. From these considerations he inferred that this requisition did not exclude the authority of the trustees to convert the property at their own discretion, without request; but only rendered it imperative on them to act on the request, if made. Mr. Jarman remarks (*m*):—"If the M.R. was right in his construction of the will, the conclusion at which he arrived respecting the nature of the property, was inevitable."

*Re Taylor's
Settlement.*

On the other hand, in *Re Taylor's Settlement* (*n*), houses held in fee simple had been vested by marriage settlement in trustees in trust, upon request of the husband and wife, or the survivor, to sell and invest the produce of the sale, and to pay the income of the money, or of the houses till a sale, to W. for life, and after his decease, to his wife for life, and after the decease of the survivor, to convey

L. J. Ch. 223; *Batteste v. Maunsell*, Ir. R., 10 Eq. 314 (settlement); *Mcc Gwire v. Mcc Gwire*, [1900] 1 Ir. R. 200 (settlement).

(*k*) 3 P. W. 211. And see *Wrightson v. Macaulay*, 4 Hare, 497.

(*l*) 10 Ves. 129; see also *Triquet v. Thornton*, 13 Ves. 345; *Johnson v. Arnold*, 1 Ves. sen. 169. But see Lord Eldon's judgment, in *Van v. Barnett*, 19

Ves. 102; where, however, the direction was alternative to invest in personal security or land.

(*m*) First ed. p. 527. Mr. Jarman treats the case as if the settlement had been made by will: it was made by deed.

(*n*) 9 Hare, 596; and see *Davies v. Goodhew*, 6 Sim. 585; *Huskisson v. Lefevre*, 26 Beav. 157.

the houses unless sold or to assign the money, to the issue of W. and his wife. The houses had been sold, not under the trust, but under compulsory powers in an act of parliament, which also provided that the purchase-money should be re-invested in land, to be settled to the same uses ; so that the money retained the character which the houses possessed under the settlement (o). Upon the question what that character was, Turner, V.-C., held that the settlement had not worked a conversion of the houses. He remarked that, in *Thornton v. Hawley*, the sale was, after the death of the husband and wife, to be made at the request of the executors or administrators of the survivor ; but, in the case before him, the sale was to be made only on the request of the husband and wife or the survivor ; so that no sale could be made after their deaths, and that words of request in cases of such nature must be construed as inserted for the purpose either of enforcing obligation or of giving discretion, as the context of the instrument might require. In this case, the general intent that the houses should be sold at some time or other was evidently wanting, the last proviso in the settlement directing that the property, if sold, was to be personal, if not sold, real.

"It seems," says Mr. Jarman (p), "that the converting effect of a trust for sale, in regard to a legatee to whom the proceeds are bequeathed, is not prevented by the fact, that in an alternative event, the testator has devised the property in terms adapted to its original state ; as he may have contemplated the possibility of the contingency happening before a sale could be effected ; besides which, it seems to have been considered that the property might be real estate as to one legatee, and personalty as to another, to whom it was given in an alternative event.

Effect of property directed to be sold being devised in a certain contingency as land.

"Thus, in the case of *Ashby v. Palmer* (q), where a testatrix devised and bequeathed her real and personal estates to trustees, upon trust, as soon as convenient after her decease, to sell, and with the money thereby raised, and the rents until the sale, to pay

Lands devised to be sold, and proceeds given to A. ;

(o) As to this, vide ante, pp. 733 seq.

(p) First ed. p. 527.

(q) "MS. ; s. c. 1 Mer. 296. The statement of this case is extracted from a note with which the author has been favoured. It supplies a deficiency in Mr. Merivale's report of it, in which, with less than his usual accuracy, he omits, in the statement of the will, the very bequest on which the question arose, and to the particular language of which the M.R. adverted."

(Note by Mr. Jarman.) See also *Tily v. Smith*, 1 Coll. 434, sup. ; *Ward v. Arch*, 15 Sim. 389 ; and see Lord Redesdale's remarks in *Cowley v. Hartstonge*, 1 Dow, 361, cited supra. But the mere fact that conversion is less necessary for distribution in one alternative than in another will not prevent a trust for sale from being imperative in both, *Wall v. Colshead*, 2 De G. & J. 683. And see *Wilson v. Coles*, 6 Jur. N. S. 1003.

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—with a limitation over of the monies, or the estate, if unsold, to B.

Held to be personal estate as to A.

her and her late husband's debts, and with the surplus to educate and bring up her daughter ; and when she should attain twenty-one, or marry, ' to pay the monies which should be in the hands of the trustees, by virtue of the will, undisposed of for the uses aforesaid,' to the daughter. And the testatrix went on to direct, that if the daughter died under twenty-one or unmarried, the monies in the hands of the trustees, *and such part of the real estate (if any) as should remain unsold at the time of her decease*, and not be applied for the payment of her debts or for the education of her daughter, should go to the testatrix's sister, her heirs, executors and assigns. The daughter attained twenty-one, but was a lunatic, and therefore incompetent to elect to take the estate as land or money. The question was, whether it went, at her death, to her heirs at law or next of kin. For the heir, it was contended that the estate was not to be sold at all events, but only to answer a particular purpose ; that the testatrix did not mean it to go as money ; *that she contemplated the possibility of its not being sold*. For the next of kin, it was argued that the estate was to be sold out and out ; that the testatrix had no objection that her sister should take it as land, if by accident it should remain unsold ; and she might have contemplated the premature death of the daughter before a sale could be effected ; in which event, and in that only, she directs that the trustees shall not proceed in the accomplishment of her purpose. And it was contended that the words ' pay to ' supported this construction ; and it was said that, at all events, the daughter was to take it as money. Sir W. Grant, M.R. : ' I think that the construction of this will admits of no reasonable doubt : it is the settled rule of this Court, that land once impressed with the character of money retains that impression till some act is done, by a person competent to do that act, to restore it to its primary character. The testatrix has directed the estate to be sold ; but the question is, not whether the estate shall be actually sold or not, but whether it is to be treated as personal estate. There is no gift to the daughter in any other shape than that of money. I see nothing inconsistent in the subsequent clause, by which, in the event of the death of the daughter under twenty-one, such part of the estate as should remain unsold is given to the sister (r). She might choose to give it to the daughter as money, and to the sister as land. There is no inconsistency in saying it shall be converted quoad the first taker, not quoad the second. The cases

(r) As to this, see also *Crabtree v. Bramble*, 3 Atk. 680.

which have arisen between the heir and next of kin of a testator have no application to the present' (s).

"And though a mere power of sale or purchase, of course, does not change the nature of the property; yet, the circumstance of the clause respecting the sale or purchase being framed in the language of a power, will not prevent its producing a constructive conversion, if the context of the will shows that it is meant to be imperative, or in the nature of a trust. Thus, in the recent case of *Grieverson v. Kirsopp* (u), where a testator gave to his widow, for the benefit and advantage of his children, power of selling his Woodfoot estate; and, by a codicil, expressed himself (in effect) thus: 'I do empower my wife to sell all my estates whatsoever, and the money arising from such sale, together with my personal estate, she, my said wife, shall and may divide and proportion among my said children, as she shall think fit and proper, or as she shall direct by will.' The estate was neither sold nor appointed by the widow. It was held that a trust for the children was created by the will, and that they were entitled equally. It was held also, that the direction to sell operated as a conversion of the real estate, and that the shares of those children who were dead devolved on their representatives as personalty.

Mere power does not produce conversion unless by force of the context.

"But although, in general, the presumption is that a testator does not intend the nature of the property to depend upon the option of the person through whom the conversion is to be effected (v); yet, if upon the whole will it appears to have been the intention of the testator to give to such person an absolute discretion to sell or not, the property in the meantime will, as between the real and personal representatives of the persons beneficially entitled, devolve according to its actual state. Thus, in *Polley v. Seymour* (w),

Nature of property made to depend on trustee's option to sell or not.

(s) "What is the effect of a direction to purchase land in a particular parish, in which it turns out that land cannot be obtained, is not settled. Lord Thurlow thought it could not be laid out elsewhere; Lord Loughborough, that it might. Lord Eldon has alluded to these conflicting opinions without stating his own; see *Broome v. Monck*, 10 Ves. 610; also *Hayes' Intro.*, 5th ed. p. 95."

(u) 2 Kee. 653. The codicil recited the will, and continued thus: "My will and mind is, that my wife S. C., and I do hereby empower her, by and with the assistance and help of the trustees therein named, to sell and dispose of all my estates, &c." In *Johnson v.*

Arnold, 1 Ves. sen. 169, there was a power to invest money in the purchase of land, coupled with a direction that until so invested it should be and enure [sic] to such purposes as if lands had been purchased: it was held that this operated as a conversion. See also *Nickisson v. Cockill*, 3 D. J. & S. 622; and the cases cited ante, p. 749.

(v) See further as to this, ante, p. 745.

(w) 2 Y. & C. 708; see also *Re Taylor's Settlement*, 9 Hare, 596, sup.; *Harding v. Trotter*, 21 L. T. 279; *Glover v. Heelis*, 32 L. T. 534; *Greenway v. Greenway*, 2 D. F. & J. 128; *Lucas v. Brandreth*, 28 Beav. 273; *Yates v. Yates*, 28 Bea. 637; *Re*

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a testatrix devised the residue of her real and personal estate to W., his heirs, executors and administrators, according to the different qualities thereof, upon trust to retain and keep the same in the state it should be in at the time of her decease, as long as he should think proper, or to sell and dispose of the whole, or such part thereof, as and when he or they should from time to time think expedient, and then, upon trust to invest the proceeds. The testatrix then directed that W., his heirs, executors or administrators, should stand possessed of all such the general residue of her real and personal estate, and after such sale, of the securities whereon the same should have been invested, in trust, out of the rents and profits, interest, dividends and proceeds, to pay several life annuities; and, after payment thereof, the testatrix directed W., his heirs, executors and administrators, to stand possessed of all the said residue of her said real and personal estate, and of the stocks, funds and securities whereon the same or any part thereof should have been invested, and the rents and profits, interest, dividends and produce thereof, in trust for five persons (including W. himself), in equal shares, and for their respective heirs, executors, administrators and assigns, according to the different qualities thereof. It was held, that upon the terms of this will, it was not the intention of the testatrix that the property should be converted out and out; but that W. had a discretion to sell the whole or any part of it, when and as he might think expedient; and that, until he exercised that discretion, the property must be considered to remain in the state it was in at the time of the death of the testatrix."

In short, a trust to sell which is so expressed as to give the trustees a discretion whether they shall sell or not, is equivalent to a power of sale, and therefore does not effect a conversion (x).

Death
duties.

The question whether real estate is absolutely converted by a direction or authority to sell, was formerly of considerable importance with reference to the claim of the Crown to legacy duty and probate duty in respect of money charged on or arising from the sale of land, but its importance has been much diminished by the Succession Duty Act, 1853, the Customs, &c., Act, 1888, and the

Ibbitson, L. R., 7 Eq. 226; *Re Hamlet*, 39 Ch. D. 426, 439. In *Minors v. Battison*, 1 App. Ca. 428, a direction to trustees to sell was held to work conversion, notwithstanding some equivocal expressions as to their "discretion" and "deciding to sell."

(x) *Re Hotchkys*, 32 Ch. D. 408; *Re Wintle*, 65 L. J. Ch. 863. The first trust in *Eyre v. Marsden*, 2 Keen, 564, seems to have been of this character, the second trust for sale being imperative.

Finance Act, 1894. With regard to legacy duty, the question formerly arose on the Stamp Act, 1815, which subjects to the duty "moneys to arise from the sale, mortgage, or other disposition of any real or heritable estate directed to be sold, mortgaged or otherwise disposed of." On this subject, the following points have been decided:—

1st. Where real estate is directed to be sold out and out, the duty attaches, though by reason of the legatee electing to take it as real estate the property is not actually sold (*y*). Rule on this subject.

2ndly. Where the trustees have an option to continue the property in its actual state or to sell for the purpose of distributing the proceeds according to the will, and in the exercise of this discretion they sell, the legacy duty attaches (*z*): but not if they do not sell (*a*). If the power of sale is given only for the purpose of re-investment in land (*b*), or for the variation of securities (*c*), or (it seems) for the purpose of raising debts and legacies or other prior charges (*d*), the duty is not payable, whether the property is sold or not, and although, after a sale, the beneficial owners have elected to take the property as money (*e*).

3rdly. Where a sale is directed by the Court in order to raise a charge, duty will attach on the amount necessary to satisfy the charge, if the will contains a power of sale which the donees of the power are compelled by the Court to exercise, but not (*f*) if the Court acts upon its general jurisdiction in such cases.

And it is to be observed, that where trustees are authorised to sell or not, as they think proper, and in virtue of this option they leave the property unconverted, the legacy duty is not attracted by a mere declaration in the will that the property shall be deemed to be personal estate, as it is not in the power of a testator to alter or regulate the nature of the subject of disposition by any such declaration (*g*).

Mere power of sale does not let in legacy duty.

(*y*) *Att.-Gen. v. Holford*, 1 Pri. 426; *Adv.-Gen. v. Ramsay's Trustees*, 2 C. M. & R. 224, n.; *Williamson v. Adv.-Gen.*, 10 Cl. & Fin. 1.

(*z*) *Att.-Gen. v. Simcox*, 1 Ex. 749.

(*a*) *Att.-Gen. v. Mangles*, 5 M. & W. 120; *Att.-Gen. v. Simcox*, 1 Ex. 749.

(*b*) *Miles v. Jennings*, 8 Ex. 830.

(*c*) *Re Evans*, 2 C. M. & R. 206; *Adv.-Gen. v. Smith*, 1 Macq. Sc. Ap. 760.

(*d*) Per Lord Cranworth, *Adv.-Gen. v. Smith*, sup.

(*e*) *Miles v. Jennings*, sup.

(*f*) *Hobson v. Neale*, 8 Ex. 368, 17 Beav. 178; *Harding v. Harding*, 2 Gif. 597.

(*g*) *Att.-Gen. v. Mangles*, 5 M. & Wel. 120. As to estate duty, see *Re Grimthorpe*, [1908] 1 Ch. 666, 2 Ch. 675. The note on legacy and probate duties, which was added by previous editors, has been omitted, as the subject does not fall within the scope of this treatise. As to legacies bequeathed free of duty, see Chap. XXX.

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Person absolutely entitled, may elect to take property in its actual state.

Who competent to make election.

Parol election whether good.

What amounts to an election.

Changing the securities.

V.—Election to take Property in its actual State.—"But although," continues Mr. Jarman (*h*), "a new character may have been in plain and unequivocal terms impressed upon property by means of a trust for conversion; yet such constructive quality is liable to be determined by the act of the person or persons beneficially entitled, who may, at any time before its conversion *de facto*, elect to take the property in its actual state. And then comes the inquiry, who are personally competent to make, and what amounts to, such an election. It is clear that an infant (*i*), or lunatic (*j*), is incompetent, and also [under the old law] a feme covert (*k*), unless under a power or trust authorizing her to deal with the property as a feme sole (*l*); [but a feme covert who was married on or after the 1st of January, 1883, is under no such disability, nor a feme covert who was married before that date, so far as regards property, her title to which accrued after that date (*m*)]. It was said by Lord Macclesfield in *Edwards v. Countess of Warwick* (*n*), that the election might be made by parol. This was denied by Lord Hardwicke, in *Bradish v. Gee* (*o*), but the affirmative appears to have been decided at the Rolls (*p*), in the case of *Chaloner v. Butcher*.

"The expressions or acts declaratory of such an intention, however, [though it is said they may be slight (*q*)] must be unequivocal (*r*). Thus, where (*s*) a person was, under a settlement, tenant in tail of lands, with a reversion in fee to himself, and was entitled under the same settlement to lands to be purchased with a certain sum of money and settled to the same uses; it was held, that his levying a fine of the land limited by the settlement, to bar the issue, did not demonstrate an intention to take as money the fund not laid out" (*t*).

And where a person, constructively entitled in fee simple to lands

(*h*) First ed. p. 533.

(*i*) *Carr v. Ellison*, 2 B. C. C. 56; *Van v. Barnett*, 19 Ves. 102. Except under the direction of the Court, *Robinson v. Robinson*, 19 Beav. 494.

(*j*) *Ashby v. Palmer*, 1 Mer. 296. As to what will amount to an election on behalf of a lunatic, see *Re Douglas and Powell*, [1902] 2 Ch. 296.

(*k*) *Oldham v. Hughes*, 2 Atk. 452; *Sisson v. Giles*, 3 D. J. & S. 614. As to a married woman electing by examination in Court to take the proceeds of sale in a partition action as personal estate, see *Standerling v. Hall*, 11 Ch. D. 652, ante, p. 733.

(*l*) *Re Davidson*, 11 Ch. D. 341.

(*m*) See the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75),

ss. 1, 2, 5.

(*n*) 2 P. W. 173.

(*o*) Amb. 229.

(*p*) 8th March, 1736, cited 3 Atk. 685.

(*q*) Per Lord Eldon, 8 Ves. 236.

(*r*) *Stead v. Newdigate*, 2 Mer. 531; *Re Pedder's Settlement*, 5 D. M. & G. 890.

(*s*) *Edwards v. Countess of Warwick*, 2 P. W. 171, 2 Eq. Cas. Ab. 42, pl. 3, 1 Br. P. C. Toml. 207; and see *Biddulph v. Biddulph*, 12 Ves. 161; *Dixon v. Gayfere*, 17 Beav. 433; *Griesbach v. Fremantle*, 17 Beav. 314; *Meredith v. Vick*, 23 Beav. 559.

(*t*) As to barring entails in lands to be purchased, see stat. 3 & 4 Will. 4, c. 74, ss. 70, 71; and 1 Hayes's *Introd.*, 5th ed. p. 204.

to be purchased with trust-money, called in part of the money, and placed it out upon a fresh security, in the name of a trustee for himself, his executors and administrators, it was held that he had by these acts elected to take that part as money (*u*), but that the rest of the money, whether subsisting upon the securities upon which it was originally placed, or on any other securities where no new trusts had been declared, ought to be considered as real estate.

But where (*v*) the legatee of the proceeds of an estate directed to be sold, entered upon the whole estate and made a lease of part of it, reserving rent to her heirs and assigns, she was held to have elected to take it as land. And letting to a new tenant from year to year has been held to bring the case within the same principle, on the ground that if the tenant were lawfully evicted by a purchaser under the trust for sale, the lessor would be liable to an action by the tenant (*w*).

Demising the property.

In *Re Gordon* (*x*) Jessel, M.R., thought that taking, and for nine years retaining, possession of the estate directed to be sold, was sufficient to prove an intention to re-convert; and Pearson, J., in *Re Lewis* (*y*) stated that he also had so decided in another case. But in *Re Lewis* the tenant of the land had an option of purchase, and Pearson, J., held that this was a sufficient reason why the property had not been sold, and that consequently mere possession for nine years was not evidence of election. And possession for two or three years by tenants in common, without more, has been held insufficient (*z*). The circumstance that, where several are entitled in common, a sale is required for convenient division of the property, would seem to diminish the probability of their intending to put an end to the trust (*a*). But where two tenants in common had been in possession for seven years, and it was clearly shewn that one of them, who was also the principal acting trustee, desired to retain the estate for building purposes, slight evidence of the concurrence of the other satisfied the Court that the latter also had elected to keep the estate unsold (*b*).

Taking possession of it: length of possession.

(*u*) *Lingen v. Sowray*, 1 P. W. 172; *Chandler v. Pocock*, 15 Ch. D. 491; 16 Ch. D. 648.

(*v*) *Crabtree v. Bramble*, 3 Atk. 680; and see *Mutlow v. Bigg*, 1 Ch. D. 385; *Re Douglas and Powell*, [1902] 2 Ch. 296.

(*w*) *Re Gordon*, 6 Ch. D. 531.

(*x*) *Supra*. But in *Meek v. Devenish*, 6 Ch. D. 566, Malins, V.-C., seemed

to be of a different opinion.

(*y*) 30 Ch. D. 654.

(*z*) *Kirkman v. Miles*, 13 Ves. 338; *Brown v. Brown*, 33 Beav. 399.

(*a*) In *Sisson v. Giles*, 3 D. J. & S., 614, the question what facts are required to shew an election by tenants in common was considered.

(*b*) *Re Davidson*, 11 Ch. D. 341.

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Taking possession of deeds.

Devising the land directed to be sold, as land.

Bequeathing as personalty a fund directed to be invested in land.

Where person bound to lay out money in land becomes himself entitled to it.

Again, in *Davies v. Ashford* (c), where a person made inquiry as to his interest in lands held upon trust for sale, and on finding that he was absolutely entitled to the money to arise from the sale, took the title deeds into his own possession (from whom or by what means he obtained them being held immaterial), it was held that there was sufficient evidence of his election that the land should not be converted.

A specific devise, to the ordinary uses of a strict settlement of real estate, of the land directed to be sold, is clear evidence of an intention to retain it unsold (d). Even a simple devise might apparently have this effect, if the property is described as land (e). And where (f) a person entitled to the absolute reversion in a fund of this description, who described himself in a memorandum at the foot of an account of the property as being entitled to the fund as residuary legatee of the last owner, which he was, made his will, in which, after devising certain real estate, he bequeathed the residue of his personal estate in possession or reversion, Sir W. Grant decided, that as the testator had described himself as residuary legatee, and had no other personal property to which the expression "in reversion" could be applied, it amounted to a demonstration of intention to bequeath this fund as personal estate. "There seems, however," as Mr. Jarman remarks (g), "to be some difficulty in drawing any such inference from the inaptitude of the terms of the bequest to any other *existing* property of the testator at the date of the will, seeing that a residuary disposition of this nature comprises after-acquired personalty" (h).

(c) 15 Sim. 42.

(d) *Meek v. Devenish*, 6 Ch. D. 566.

(e) *Sharp v. St. Sauveur*, L. R., 7 Ch. 343; *Re Grimthorpe*, [1908] 1 Ch. 666, where importance was attached to the fact that the devise was "in fee." But the point did not really arise: C. A., [1908] 2 Ch. 675.

(f) *Triquet v. Thornton*, 13 Ves. 345; compare *Re Skeggs*, 2 D. J. & S. 533.

(g) First ed. p. 535.

(h) "It seems, that where a person covenants to purchase land, and eventually himself becomes solely entitled to it, so that the obligation to lay out, and the right to call for, the money centre in the same person; the covenant is, without any act on his part, considered as discharged. As in *Chichester v. Bickerstaff*, 2 Vern. 295, where A. on his marriage covenanted to lay out a

sum of money in the purchase of land, to be settled to the use of himself for life; remainder to his intended wife for life; remainder to the first and other sons of the marriage in tail; remainder to the daughters in tail; remainder to his own right heirs. A. did not lay out the money, and survived his wife, who died without issue; and it was decided, that the money, though once bound by the articles, became free again by the death of the wife without issue, and the consequent failure of the objects of the several limitations; and was therefore, at the death of the settlor, his personal estate. This decision, indeed, was questioned by Lord Talbot, in *Lechmere v. Lechmere*, Cas. t. Talb. 90; and by Sir J. Jekyll, in *Lechmere v. Earl of Carlisle*, 3 P. W. 221; but Lord Thurlow, in the great case of *Pulteney v. Darlington*, 1 B. C. C. 238, 7 B. P. C. Toml.

Again, in *Cookson v. Reay* (i), where a sum of money subject to a trust for investment in land, which ultimately became liable to be settled upon one for life, with remainder to another in fee, was by those two persons, in a deed appointing new trustees, spoken of as moneys which they were then entitled to receive, and trusts for investment in "securities" were declared, it was held that there was sufficient evidence that they had elected that the money should not be converted, and this, although the trusts of the moneys and securities were declared by reference to a prior settlement, the trusts of which were also declared by reference to a former will, under which will it was assumed for the purpose of the decision that the money was constructively converted; this reference was held not sufficient to outweigh the direct words contained in the deed of appointment, as to the parties being entitled to the receipt of the money.

In *Harcourt v. Seymour* (j) there were several circumstances, from which, taken together, election was presumed; the principal one seems to have been, that the sum of money in question, which was subject to a trust for investment in land, (to which, when purchased, the testator would have been entitled in fee, subject only to a provision for his wife in bar of dower,) was included in a statement of the testator's personal property found among his papers after his death.

Harcourt v. Seymour.

"And here it may be observed," says Mr. Jarman (k), "that in order to amount to an election to take property in its actual, as distinguished from its eventual or destined, state, the act must be such as to absolutely determine and extinguish the converting trust; and hence it would seem to follow, that where two or more persons are interested in the property, it is not in the power of any one co-proprietor to change its character, in regard even to his own share; for, as the act of the whole would be requisite to put an

All persons interested must concur in act of election.

530,† expressed a strong opinion that it was right; which case went, Lord Eldon has said, to this: 'that if the property was at home, in the possession of the person under whom they claimed as heir and executor, the heir could not take it;' and his lordship observed, the question, then, was not upon the equity between the heir and the executor, but whether the property was

at home." (Note by Mr. Jarman.) But settled land is not "at home" during the continuance of a jointure under the settlement, *Walrond v. Rosslyn*, 11 Ch. D. 640.

(i) 5 Beav. 22, nom. *Cookson v. Cookson*, 12 Cl. & Fin. 121.

(j) 2 Sim. N. S. 12.

(k) First ed. p. 536.

† "The able and elaborate arguments of Sir John Scott (afterwards Lord Eldon), and Mr. Fearne, the counsel for the appellants, display the

deepest research into the subject, but they did not succeed in overturning the decree."

CHAP. XXII.

Owner of undivided share of land cannot elect.

Election by contingent owner pending the contingency.

Election by one tenant in common of money to be laid out in land.

Dispositions by partial owner before actual conversion.

end to the trust, nothing less will suffice to impress upon the property a transmissible quality, foreign to that which it had received from the testator. Thus, if lands be devised to trustees upon trust for sale, and to pay the proceeds to A., B., and C., in equal shares, and after the death of the testator, and before the sale is effected, A. grants a lease of his one-third, or does any other act unequivocally dealing with it as real estate, and then dies; his share will, nevertheless, it is conceived, devolve to his personal representatives, as it would still be the duty of the trustees to proceed to a sale, on account of the other shares, the converting trust having been created for the benefit of all" (l).

But if the whole of the proceeds are given to A. on a contingency, and on failure of that contingency to others, the primary donee may, pending the contingency, declare his intention to keep the land unsold, so as upon the happening of the contingency to re-convert the land, if no sale has been (as, of course it may nevertheless have been) previously made (m). And of course, if money be directed to be laid out in land for the benefit of A., B., and C. as tenants in common in fee, any one or more of them may take their shares of the money without the consent of the rest. "For," said Lord Cowper, "it is in vain to lay out this money in land for B. and C. when the next moment they may turn it into money, and equity, like nature, will do nothing in vain" (n). But it would seem that this rule does not apply where the land is directed to be settled on persons in succession (o).

Mr. Jarman also remarks (p) that "although it is not in the power of the owner of an undivided share, or any other partial interest in property which is directed to be converted, by his single act, to change its character, and thereby impart to it a different transmissible quality, it does not follow that every disposition by such partial owner adapted to the property in its actual state, is nugatory. On

(l) See 1 Br. C. C. 500; *Elliott v. Fisher*, 12 Sim. 505; *Holloway v. Radcliffe*, 23 Beav. 163; *Re Davidson*, 11 Ch. D. 341, 348; *Biggs v. Peacock*, 22 Ch. D. 284. But this rule would not apply where the trust for sale of land was for the purpose of paying debts, legacies, &c.; the devisee (or legatee of the surplus proceeds) subject to the charges, might himself clear them off and retain the land unsold, *Griesbach v. Fremantle*, 17 Beav. 314. So if the legatees, though not paid, acquiesced in the retention, *Mutlow v. Bigg*, 1 Ch. D. 385. And after a lapse of time and where no

prejudice accrues to them their acquiescence will be easily inferred, ib. As to the respective rights of a jointress and a portioner to insist on a trust for investment of money in land being carried out, see *Walrond v. Rosslyn*, 11 Ch. D. 640.

(m) *Meek v. Devenish*, 6 Ch. D. 566, explaining *Sisson v. Giles*, 3 D. J. & S. 614.

(n) *Seeley v. Jago*, 1 P. W. 389. And a small sum (A.'s share) might be as advantageously laid out in land for A. as a large sum (the entire fund) for A., B., and C.

(o) See *Walrond v. Rosslyn*, supra.

(p) First ed. p. 537.

the contrary, it is clear that if a person entitled to a partial interest in money to be laid out in land, shows an intention to dispose thereof by will, or otherwise, as personal estate, it will pass by such disposition (*q*); though, on the death of the donee [intestate], it would devolve to *his* real representative (*qq*). So, if the legatee of the proceeds of real estate directed to be sold devise the land in its character of real estate, the devisee will be entitled to the fund in question, though it would, when acquired, be personal estate in the hands of such devisee" (*r*).

If a testator is entitled to a share of the proceeds of sale of land subject to a trust for sale, and is not entitled to any real estate in the proper sense of the term, a gift by him of "my real estate" will *primâ facie* pass his interest in the proceeds of sale (*s*).

Where property subject to a trust for conversion was settled by the owner on her marriage, and a power to reconvert (or retain the property in its actual state) was reserved to the trustees, to be exercised with the consent of the tenants for life or the survivor, it was held by Sir W. P. Wood, V.-C., that the power ceased as soon as the property had vested absolutely in the children, although one of the tenants for life was still living (*t*).

Delegation of power by beneficiary.

"And here it may be observed," continues Mr. Jarman (*tt*), "that where (*u*) real estate was devised upon trust for sale, and the

Husband and wife may convey land

(*q*) *Triquet v. Thornton*, 13 Ves. 345.

(*qq*) In *Triquet v. Thornton* the interest was reversionary (ante, p. 760), and no question arose as to the ultimate devolution of the fund. Mr. Jarman's statement on this point does not seem to be borne out by the authorities. In *Crabtree v. Bramble*, 3 Atk. 680, Lord Hardwicke said that a person absolutely entitled to property constructively converted, subject to a prior life interest, could elect to reconvert it, and in *Meek v. Devenish*, supra, Malins, V.-C., decided that a person contingently entitled could elect. Lord Hardwicke's dictum was cited, apparently with approval, by Jessel, M.R., in *Re Gordon*, 6 Ch. D. 531. The election is of course liable to be defeated by an actual conversion before the interest falls into possession or becomes absolute, as the case may be. See Addenda.

(*r*) *Re Lowman*, [1895] 2 Ch. 348. See *Hewitt v. Wright*, 1 Br. C. C. 86.

(*s*) *Re Glassington*, [1906] 2 Ch. 305.

(*t*) *Doncaster v. Doncaster*, 3 K. & J. 26. And see *Rich v. Whitfield*, L. R., 2 Eq. 583. But cf. *Re Cookes' Contract*,

4 Ch. D. 454; *Biggs v. Peacock*, 22 Ch. D. 284.

(*tt*) First ed. p. 537.

(*u*) *May v. Roper*, 4 Sim. 360. This doctrine is sometimes made use of (in cases not falling within the Married Women's Reversionary Interests Act, 1857, or the Married Women's Property Acts) where a married woman has a reversionary interest in a fund of this description, which, in its character of personalty, she is incompetent to deal with, so as to bar her contingent right by survivorship; this object may be effected by means of a deed (duly acknowledged as to the wife) assigning the property: *Briggs v. Chamberlain*, 11 Hare, 69, overruling *Hobby v. Collins*, 4 De G. & S. 289; and see *Tuer v. Turner*, 20 Beav. 560; *Franks v. Bollans*, L. R., 3 Ch. 717; *Re Durrant and Stoner*, 18 Ch. D. 106. The doctrine applies in the case of a married woman who with her husband is entitled to a debt secured by a mortgage of land: *Williams v. Cooke*, 4 Giff. 343. *Re Newton's Trusts*, 23 Ch. D. 181, is overruled: *Miller v. Collins*, [1896] 1 Ch. 573.

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directed to be sold as real estate.

Election to take personal property in specie.

Destination of undisposed of interests in property directed to be converted.

proceeds were to be divided among several persons, one of whom was a married woman, who (the estate being unsold) joined with her husband in levying a fine of her share therein; it was held, that the wife was, by this means, barred of her equity to a settlement out of the fund. And the same effect, it is conceived, would now be produced by the husband and wife conveying the property by a deed acknowledged by her, according to the statute of 3 & 4 Will. 4, cap. 74, ss. 77, 79."

The doctrine of election, in the ordinary sense of the term, cannot, from the nature of the case, apply to personal property which has been bequeathed upon trust for sale. But in such a case the beneficiaries, if absolutely entitled and sui juris, can elect to take the property in specie, so as to put an end to the trust for sale (*v*).

VI.—Destination of undisposed-of Interests in Property directed to be Converted.—A. *Doctrine of Conversion as between Claimants under Will, and Real and Personal Representatives of Testator.*—"It is clear," says Mr. Jarman (*w*), "that, where a testator directs real estate to be converted into money, for certain purposes, and the trusts of the will directing the application of the money, either as originally created, or as subsisting at the death of the testator, do not exhaust the whole beneficial interest, such unexhausted interest, whether the estate be eventually sold or not (*x*), belongs to the heir as real estate undisposed of (*y*). The heir is excluded, not by the direction to convert, but by the disposition of the converted property, and so far only as that disposition extends. Thus, in *Wilson v. Major* (*z*), where lands were given by a testator to his wife upon trust to sell and invest the money upon security at interest, and he gave and bequeathed the interest and dividends of the same to the use of his said wife, without making any ulterior disposition of the fund, Sir W. Grant, M.R., held that, there being

(*v*) *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296.

(*w*) First ed. p. 553. Compare the doctrine of lapse as applied to charges on land, ante, p. 439.

(*x*) See *Hill v. Cock*, 1 V. & B. 173.

(*y*) 2 Vern. 571; ib. 645; 3 P. W. 20; 2 Dick. 500; 1 Br. C. C. 503; 2 Br. C. C. 589; 3 Br. C. C. 355; 4 B. C. C. 411; 2 Ves. jun. 271; ib. 683; 3 Ves. 210; 4 Ves. 542; ib. 803; 10 Ves. 500; 11 Ves. 87; ib. 205; 12 Ves. 413; 16 Ves. 188; 18 Ves. 156; 1 V. & B. 173; ib. 410; 2 V. & B. 294; 2 Kee. 564;

1 R. & My. 752; 5 My. & Cr. 125; 4 Y. & C. 507. The most important of the cases thus cited by Mr. Jarman, including *Ackroyd v. Smithson*, are referred to in detail, post, in this section. The case of *Ogle v. Cook*, cited 1 Br. C. C. 512, had been considered as a solitary exception to this class of cases; but it was afterwards discovered that the very point which was alleged to have made it so was left undecided. See R. L., cited 2 Ves. jun. 686.

(*z*) 11 Ves. 205; see also *Robinson v. Taylor*, 2 Br. C. C. 589.

no declaration of the trust of the money beyond the life of the wife, it resulted to the testator's heir. CHAP. XXII.

"And the same principle, it is now settled, applies in the converse case of money being directed to be laid out in land, which is then devised for a limited estate only; the fund ultra that interest, though eventually turned into land, goes as personal estate undisposed of to the residuary legatee or next of kin of the testator, on the ground that *the will operates to convert the fund so far only as it disposes of it.*" Principle same, whether land or money is the object of conversion.

Thus, in *Cogan v. Stephens (a)*, where the testator directed his executors immediately to lay out the sum of 30,000*l.* in the purchase of an estate, the income of which he settled on one for life, with remainder to others in tail, subject to which the estate (which was to be purchased and always run in the testator's name) was given to a charity. The money was not laid out, and the gift to the charity being void under the Statute of Mortmain, and the prior limitations having determined, it was held by Sir C. Pepys, M.R., that the next of kin, and not the heir at law of the testator, was entitled to the fund.

The same principle was followed by Lord Langdale, M.R., in *Hereford v. Ravenhill (b)*.

It sometimes happens that a testator devises his lands by way of executory limitation, so that the vesting is in suspense, and bequeaths personalty upon trust to be invested in the purchase of land to be settled to the same uses. In such a case, so long as the vesting is in suspense, the rents of the devised lands belong to the testator's heir at law, and it was at one time supposed that the same rule applied to the income of the personalty (c), but this error was corrected in accordance with the principles laid down in *Ackroyd v. Smithson (d)*, and it is now settled that in the case supposed the income of the personalty follows the corpus (e).

Interim income of personalty to be laid out in purchase of land.

The general rule above stated also applies, as Mr. Jarman points out (f), "where the testator's disposition of the converted Lapsed share of proceeds of real estate devolves to heir.

(a) 1 Beav. 482, n.; 5 L. J. (N. S.) Ch. 17; *Head v. Godlee*, Johns. 536; *Countess of Bective v. Hodgson*, 10 H. L. C. 656.

(b) 1 Beav. 481; *Hereford v. Ravenhill*, 5 Beav. 51. The decision in *Fletcher v. Chazman*, 3 Br. P. C. Toml. 1, where, however, no claim appears to have been made by the next of kin, and a dictum of Lord

Redesdale, 3 Dow, 207 (see also 4 Br. C. C. 527), are thus virtually overruled.

(c) *Hopkins v. Hopkins*, Ca. t. Talbot, 44; 1 Atk. 580, Hawkins on Wills, app.

(d) 1 Br. C. C. 503, post, p. 766.

(e) *Bective v. Hodgson*, 10 H. L. C. 656.

(f) First ed. p. 555.

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property, though originally complete, has partially failed in event by the decease of any one of the objects in the testator's lifetime ; in which case the interest comprised in the lapsed gift devolves to the person who would have been entitled to the entire property, if the testator had died wholly intestate in regard thereto.

" The title of the heir, under such circumstances, to a lapsed share of real estate directed to be sold, was established in *Ackroyd v. Smithson (g)*, well known as containing the celebrated argument of Lord Eldon (then Mr. Scott), which Lord Thurlow admitted to have changed his opinion. The testator devised all his real and personal estate in trust to be sold and converted into money, to pay debts, legacies, and funeral expenses ; and the overplus to be paid to certain persons (to whom he had bequeathed pecuniary legacies), in proportion to their respective legacies. Some of these legatees died in the testator's lifetime ; and, on a question whether their lapsed shares belonged to the heir at law or next of kin of the testator, Lord Thurlow at first inclined to the opinion that the next of kin were entitled, but, upon further argument, his Lordship decided in favour of the heir. He said, that he used to think, when it was necessary for any of the purposes of the testator's disposition, to convert land into money, that the undisposed-of money would be personalty ; but the cases fully proved the contrary. It would be too much, he observed, to say, that if all the legatees had died, the heir could, as he certainly might, prevent a sale ; and yet that, because a sale was necessary, the heir should not take the undisposed part of the produce.

Effect of failure of devise by contingency or illegality.

" So, if the produce of real estate directed to be sold be disposed of in a certain event which does not happen, or for a purpose which is illegal, the beneficial interest comprised in the contingent or illegal gift which thus fails devolves to the heir.

Failure of disposition of real and personal estate respectively.

" And it is, of course, immaterial that the testator has combined his personal estate in the same gift with the proceeds of the real estate ; the effect in such case being that, by the failure of the intended disposition, the real estate descends to the heir, and the personalty devolves to the next of kin of the testator. Thus, in *Jessopp v. Watson (h)*, where a testator directed a mixed fund, composed of the produce of his real and personal estate, to be

(g) 1 Br. C. C. 503. On the question whether, where the Court or a trustee sells more than necessary of the estate of a living owner, there is an equity to reconvert for his heir, see *Steed v. Preece*, L. R., 18 Eq. 192, and the other

cases cited, ante, p. 732.

(h) 1 My. & K. 665 ; see also *Roberts v. Walker*, 1 R. & My. 752 ; *Edwards v. Tuck*, 23 Beav. 268 ; *Bedford v. Bedford*, 35 ib. 584.

applied to certain specified purposes, and the residue to be divided equally among his children or child at twenty-one, if sons, and twenty-one or marriage, if daughters; and if no such child, to such person or persons as he should by his codicil appoint. The testator died without having made a codicil, leaving an only daughter his heir, who died under twenty-one, intestate and unmarried. Sir J. Leach, M.R., held, that so much of the residuary fund as was constituted of real estate, descended to the daughter as heir at law (i), and that so much as was constituted of personalty devolved to and was divisible among the persons entitled under the Statute of Distributions to the personal estate of the testator.

“ So, in the case of *Eyre v. Marsden* (j), where a testator gave his real and personal estate to trustees upon trust, at any time after his decease, to sell and convert the property, and during the lives of his children to accumulate the annual income; and, after the decease of such surviving child, he gave the produce of the real and personal estate (directing such part as had not been previously converted, to be then converted), to his grandchildren. One of the children having survived the testator more than twenty-one years, the trust for accumulation became void for the excess under the statute of 39 & 40 Geo. 3, c. 98 (l), and the income being held to be thenceforth undisposed of during the life of the surviving child, was claimed by the next of kin of the testator, as well of the proceeds of the real as the personal estate, on the ground that there was an absolute conversion. But Lord Langdale, M.R., decided that it belonged to the heir, observing that the sale was directed for the purposes of the will, and for the benefit of the legatees, not for the benefit of the next of kin, whose claim was therefore confined to the income of the personal estate.

“ The position that the heir is not excluded by any conversion, however absolute, may seem, indeed, to be indirectly encountered by those cases in which a distinction has been carefully drawn between absolute and qualified conversion (m). The learned Editor of Peere Williams’s Reports, in a note which has often been referred to with commendation (n), states the question in

Distinction
between
conversion
to all intents
and
conversion
for purposes
of will.

(i) But apparently as personalty: see *Re Richerson*, [1892] 1 Ch. p. 382.

(j) 2 Kee. 564, cited ante, p. 390. See also *Re Perkins*, [1909] 53 Sol. J. 698. In both of these cases conversion took place under a power, not under a

trust.

(l) The *Thellusson* Act, ante, p. 377.

(m) *Wright v. Wright*, 16 Ves. 188.

(n) *Cruse v. Barley*, 3 P. W. 20, Mr. Cox’s n.

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Conversion
for purposes
of will—
what.

those cases to be, 'whether the testator meant to give to the produce of the real estate the quality of personalty *to all intents*, or only so far as respected the *particular purposes* of his will.' There seems to be no ground to except to this statement of the doctrine, provided that, by an indication of intention to give to real estate the quality of personalty 'to all intents,' we are allowed to understand something very special and unequivocal, amounting, in effect, not merely to a disposition of the fund as personalty to the legatees named in the will, but to an alternative gift to the persons entitled by law to the personal estate, in the event of the failure of the intended disposition. Unless such an interpretation be given to the terms of this proposition, it must, however respectable the authority from which it proceeded, be pronounced to be not strictly accurate; at all events, it is not an explicit statement of the rule, and requires, it is conceived, in order to be a safe guide in its application, the following explanatory addition: 'But that every conversion, however absolute in its terms, will be deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin.' The respective claims of his own representatives, it may be confidently affirmed, are, in such cases, not in the contemplation of the testator, who always calculates on his legatees surviving him" (o).

Examples of
conversion
for purposes
of will only.

Accordingly, it is now settled, that neither a direction that the proceeds of the sale of land shall be deemed personal estate (p), nor such a direction joined with an express declaration that the heir at law shall not take in case of lapse (q), will exclude the claims of the heir at law as against the next of kin. If there is a residuary bequest, a direction that the proceeds of the real estate shall form part of the personalty, will make them pass by the

(o) In *Re Cameron*, 26 Ch. D. 19, an implied direction to use real estate for the purpose of carrying on a business seems to have been considered as equivalent to a trust for conversion pro tanto so as to bring the undisposed-of profits within the principle of *Ackroyd v. Smithson*.

(p) *Taylor v. Taylor*, 3 D. M. & G. 190, overruling *Phillips v. Phillips*, 1 My. & K. 649; and see *Robinson v. London Hospital*, 10 Hare, 19; *Gordon v. Atkinson*, 1 De G. & S. 478; *Flint v.*

Warren, 16 Sim. 124; *Shallcross v. Wright*, 12 Beav. 505; *Hopkinson v. Ellis*, 10 ib. 169; *Williams v. Williams*, 5 L. J. (N. S.) Ch. 84; *Collins v. Wake-man*, 2 Ves. jun. 683 (as to the 1000l.). But Jessel, M.R., though he admitted it was so settled, yet thought such a direction might well have been held to mean that the next of kin should take, *Court v. Buckland*, 1 Ch. D. 610.

(q) *Fitch v. Weber*, 6 Hare, 145; *Sykes v. Sykes*, L. R., 4 Eq. 200.

residuary bequest (*r*). Even if the testator gives a share of his residue to A., who happens to be his heir at law, and by codicil revokes the gift, this does not prevent A. from claiming such part of the lapsed share of residue as consists of real estate (*s*). CHAP. XXII.

Mr. Jarman continues (*t*): "Upon the principle that real estate directed to be sold is converted only for the purposes of the will, it was held by Sir W. Grant (*u*), that such a devise in trust to pay certain legacies did not throw open the fund to simple contract creditors, though he said that a substantive and independent intention to turn real estate into personalty, at all events, would have that effect. Such a conversion, however, as that referred to by his Honor, must be of a special kind. It must have no specified object, for a specification of the object, we see, will confine it; or it must contain some expressions shewing that it is not so confined. In short, it must be manifest that the property is to be considered as personalty quoad this purpose, or, in other words, that the fund is intended to be subjected to the claims of simple contract creditors." As to conversion subjecting fund to simple contract debts.

Again, where a testator, having devised lands to trustees upon trust for sale, did not dispose of the surplus proceeds, and died without heir or next of kin, it was held that the Crown had no title to the surplus proceeds, (as it would have had if they had been personalty,) but that the trustees were entitled to retain them for their own benefit (*v*). Trustees entitled where no heir.

In further confirmation of the principle in question, it is now settled that the undisposed-of residue of money to arise from the sale of real estate will not pass under a general bequest of personalty in the same will, unless the testator expressly declares that it shall be considered as part of his personal estate, or unless such As to proceeds of real estate, passing under a residuary bequest.

(*r*) *Infra*. As to the case of *Countess of Bristol v. Hungerford*, cited by Mr. Jarman under a misapprehension as to the nature of the decision, see ante, p. 702.

(*s*) *Gordon v. Atkinson*, 1 De G. & S. 478.

(*t*) First ed. p. 561.

(*u*) *Gibbs v. Ougier*, 12 Ves. 413.

(*v*) *Taylor v. Haygarth*, 14 Sim. 8. See also *Cradock v. Owen*, 2 Sm. & Gif. 244, 245. In the case of deaths since the 14th August 1884, the Intestates Estate Act, 1884, applies. In *Re Bond*, [1901] 1 Ch. 15, land was devised

by an owner in fee simple to A. for life with no devise over; the testator died in 1882 without an heir. The land was sold by A. under the powers of the Settled Land Acts, and a fund representing the proceeds of sale remained in the hands of the trustees; on the death of the tenant for life it was held that the fund was money which vested in the Crown as bona vacantia. Kekewich, J., distinguished the case from *Taylor v. Haygarth* on the ground that in the latter case there was an express trust for sale.

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Berry v.
Usher.

Real fund
will not pass
under a
bequest of
personalty.

an intention can be collected from the force and meaning of the expressions used by the testator through the whole will (*w*).

Thus, in *Berry v. Usher* (*x*), the appointment of two persons as joint residuary executrix and executor, was held not to give them the proceeds of real estate directed to be sold. And in *Maugham v. Mason* (*y*), where A. devised freehold chambers to trustees and their heirs, upon trust to sell, and apply the money arising by such sale towards payment of the legacies by his will bequeathed; and the rents, until sold, to be applied to the same uses; and after giving certain legacies, the testator then, as to all the residue of his personal estate, after payment of his debts, &c., bequeathed the same to trustees, upon trust to convert the said residue into money, and lay the same out as therein mentioned. Sir W. Grant held that the produce of the sale of the real estate, after payment of the legacies, resulted to the heir, and did not pass under the residuary bequest.

This construction, it will be observed, was somewhat aided by the circumstance of the trust being to convert the residue into money, which could not strictly apply to the money produced by the real estate; but the M.R., though he adverted to this circumstance, decided the case upon the general principle, that where there was a direction to sell land for a particular purpose, the surplus did not form "part of the personal estate, so as to pass by the residuary bequest."

Dixon v.
Dawson.

So, in *Dixon v. Dawson* (*z*), the testatrix devised and bequeathed her real and personal estate upon trust to sell and convert, and out of the proceeds of the real estate to pay her debts and testamentary expenses, and also certain legacies and annuities, and in case the proceeds should be insufficient, then to pay the same out of the personal estate, and she also bequeathed legacies to charities to be paid out of her personal estate, and then proceeded thus:—"Should any part of my personal estate and effects still remain undisposed of, after satisfying all my just debts and personal and other incidental expenses, and providing for the said charities herein mentioned, and paying the several legacies or sums of money herein bequeathed or directed to be paid thereout, then upon trust that my said trustees shall pay and transfer the residue and remainder of

(*w*) See per Sir J. Leach, in *Phillips v. Phillips*, 1 My. & K. 661. See also *Sprigg v. Sprigg*, 2 Vern. 394, where land was devised to be sold, and thereout to pay a contingent legacy, which failed, and the residue to B.; it was

held that B., and not the heir, benefited by the failure of the legacy; otherwise, if it had been an absolute legacy.

(*x*) 11 Ves. 87.

(*y*) 1 V. & B. 410.

(*z*) 2 S. & St. 327.

my said estate and effects not hereby otherwise disposed of unto, &c." It was decided by Sir J. Leach, V.-C., that the last gift did not include the residue of the proceeds of the real estate, and that the heir at law was entitled.

Collis v. Robins.

And in *Collis v. Robins* (a), where the testator devised real estate upon trust for sale, and out of the proceeds and the rents in the meantime to pay the testator's debts and the trustees' costs and certain legacies, and the will then proceeded, "and as to all and singular my ready monies and securities for money to me belonging, and all other my personal estate and effects whatsoever and wheresoever the same may be at the time of my decease, I give and bequeath, &c," Sir J. K. Bruce, V.-C., held that the surplus of the proceeds of the real estate belonged to the heir at law.

"But it is clear," says Mr. Jarman (b), "that if there be a declaration that the money arising from the sale shall be considered as part of the testator's personal estate, it will pass under a general bequest of personalty in the same will (c).

Conversion to all intents effected by declaration that proceeds of realty shall be personalty, or by blending real and personal estates.

"And it seems, that where the testator has blended the proceeds of the real and personal estates in regard to one legatee taking a temporary interest, it is to be inferred that he does not intend them to be subsequently severed; and accordingly, in such a case, very slight circumstances will suffice to extend a bequest applicable in terms to the personalty only, to the produce of the real estate, in order to avoid such severance. Thus, where (d) a testator gave his real estate and the residue of his personalty to trustees, to sell and convert the same, and invest the proceeds, and then gave the interest, dividends and produce of the whole of his real estate, and of the residue of his personalty, to his wife for life, and after her

(a) 1 De G. & S. 131. See also *Brown v. Bigg*, 7 Ves. 279, stated ante, p. 741.

(b) First ed. p. 566.

(c) For this proposition Mr. Jarman cites *Collins v. Wakeman*, 2 Ves. jun. 683 (stated post, p. 781, on another question), but the point does not seem to have been argued for the heir. The principle, however, is clearly established, or rather taken for granted, in several modern cases: *Robinson v. London Hospital*, 10 Hare, 19; *Bright v. Larcher*, 3 De G. & J. 148; *Field v. Peckett*, 29 Bea. 568. In *Kidney v. Coussmaker* (1 Ves. jun. 436), it was

held, that where a testator had devised real estate in trust to be sold, and directed the produce to be applied in payment of the incumbrances on the estate, and the remainder to be considered as part of the residue of his personal estate, and then bequeathed the residue of his personalty after payment of his debts, the fund was subjected to the debts. Sir W. Grant, in *Gibbs v. Ougier*, supra, expressed his doubt of the soundness of the decision, but it was approved in *Bright v. Larcher* and *Field v. Peckett*.

(d) *Byam v. Munton*, 1 R. & My. 503.

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decease he gave one moiety of the interest, dividends and produce of *the residue of his personal estate and effects*, or the securities on which the same should be invested, to his brother M., his executors, administrators, and assigns, and he gave the other moiety of the interest, dividends and produce of *the residue of his personal estate and effects*, or the securities on which the same should be invested, to his sister-in-law B. for life; and, after her decease, he gave the *whole* of the principal of such moieties, or the *whole residue of his estate* whatsoever and wheresoever, and the securities on which the same should be invested, to his said brother M., his heirs, executors, administrators and assigns; and the question being whether the sister-in-law was entitled to a moiety of the income arising from the proceeds of the real estate, Sir J. Leach, M.R., decided in the affirmative" (e).

The blending of the proceeds of the two estates for any purpose not exhausting the whole, is always taken as rendering probable an intention that they shall be kept together throughout, and as inviting such a construction of subsequent words of gift as will carry that intention into effect. Thus, in *Court v. Buckland* (f), where a testator devised and bequeathed his real and the residue of his personal estate in trust to sell, and to dispose of the net moneys to arise from such real and residuary personal estate (after payment of debts and legacies) according to the trusts thereafter declared concerning the same. He then declared that until sale the real and personal estate should be subject to the trusts thereafter declared concerning the said net moneys, and that the rents and annual produce thereof should be deemed income for the purposes of the same trusts, and that the real estate should be transmissible as personal estate. The testator then directed a sum to be set apart out of the said net moneys to answer a life annuity, subject to which it was to form part of his residuary personal estate; and, subject to the annuity and to legacies and debts, the testator directed his trustees to stand possessed of his residuary personal estate in trust as to one moiety for his son, and, as to the other, for his daughter and her children. Jessel, M.R., held that the net proceeds of the real estate were included in the trusts of the "residuary personal estate."

(e) See *Wall v. Colshead*, 2 De G. & J. 683, post, and *De Beauvoir v. De Beauvoir*, 3 H. L. C. 524, stated in Chap. XL.

(f) 1 Ch. D. 605. See also *Spencer v. Wilson*, L. R., 16 Eq. 501; *Norreys v. Franks*, Ir. R., 9 Eq. 18.

Again, in *Singleton v. Tomlinson* (g), a testator directed his executors to pay his funeral expenses and debts "out of the proceeds of his property." He then recited that he was possessed of "landed and chattel property," and directed his executors to sell his "landed estates" for the best price. He gave certain legacies; he specifically devised a certain estate; and specifically bequeathed his plate and furniture; and concluded, "I constitute A. my residuary legatee." It was held in the House of Lords that A. was entitled to the surplus proceeds of the real estate, as well as of the personal estate, after payment of the funeral expenses, debts and legacies (h).

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Effect, after blending, of appointing a "residuary legatee."

At the present day, the question must be treated as one purely of construction, unaffected by any special indulgence to the heir. No case, indeed, has gone further against the heir than the early one of *Mallabar v. Mallabar* (i), where a testator devised and

(g) 3 App. Ca. 404. See also *Wildes v. Davies*, 1 Sm. & Gif. 482, and other cases, post, Chap. XXVII. In *Griffiths v. Pruett*, 11 Sim. 202, the gift was of "any sum appearing after fulfilling" the will, an expression as properly applicable to the proceeds of real estate as to personalty. And see *Bromley v. Wright*, 7 Hare, 334.

(h) In this case, the heir at law relied on *Kellett v. Kellett* (1 Ba. & Be. 533, 3 Dow, 248), where a testator bequeathed legacies to several children; he bequeathed his interest in certain lands to A., and then proceeded as follows:—"The remainder of my properties I devise to my executors to make good the above sums and the following sums, that is to say": and then, after enumerating other legacies, he concluded thus:—"And I also ordain, appoint and devise the said W. G. and H. executors to this my last will and testament; also my residuary legatees, share and share alike." It was contended by the executors that the real estates were by the will, and for the purposes of it, turned into personal estate, to the residue of which they were entitled; or that if there was no such conversion, yet, by the manifest intention of the testator, they were legally and beneficially entitled to such parts of the estates as should remain after payment of the debts, legacies, &c., except the estates specifically devised to A. But Lord Manners held that the intention was not made plain enough to disinherit the heir: The executors appealed to the

House of Lords, relying principally on the argument, that by constituting them residuary legatees, the testator intended them to take the residue of all that was included under the word "properties" in the preceding devise: but the House refused to disturb the decree. Lord Eldon said, "I should very much misrepresent the state of my mind with respect to this question, if I did not say that it is a state of infinite doubt, whether, according to the rules of law, and as collecting the intention of the testator from the whole of the will, the residue was intended by the testator to include the real estate. It is a whimsical way of putting it; but I feel a strong bias towards the opinion that he did mean to include it. I cannot say that the decision in this case is wrong, and I cannot say that it is right; but as I cannot say that it is wrong, it appears to me that the decree ought to be affirmed." Lord Redesdale expressed himself nearly to the same effect. Although the trust clearly authorized a sale to pay legacies, there was no express direction to sell; a fact upon which Lord Manners laid great stress. But although the land was thus less clearly treated as "something that was all to be turned into money," it is reasonably plain that neither Lord Eldon nor Lord Redesdale, if the case had come originally before him, would have held that any part of the testator's "properties" was undisposed of.

(i) Ca. t. Talb. 78.

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bequeathed all his lands in certain counties to his sister C., her heirs and assigns, upon trust that the same should be sold, and out of the moneys arising therefrom all his just debts paid; and out of the remainder of the money he bequeathed certain legacies, including one to the heir at law; and then, after his "debts and legacies paid as aforesaid, and subject to the same," the testator gave the residue of his personal estate to his said sister, whom he appointed sole executrix. The produce of the real estate, after paying debts, was claimed by the heir. Lord Talbot admitted parol evidence against him; but afterwards decreed, upon the will itself, that there was no resulting trust, and that the executrix should have the whole residue, including the produce of the real estate.

"This case," as Mr. Jarman points out (j), "has been treated by Sir W. Grant as being governed by its particular circumstances (k), and certainly the giving of the residue 'after debts and legacies paid as aforesaid,' afforded an argument that it was intended to include the fund in question, which had been expressly subjected to those charges."

Conversion to all intents of land specifically devised.

In *Wall v. Colshead* (l), a testator devised several estates to his children severally for their respective lives, and after their death to his executors upon trust to sell and divide the proceeds equally between their respective children; he gave the residue of his property to two of his children in equal shares, and if any of his children died under twenty-one, he gave the part or parts intended for such child to the survivors for life, and after the decease of the survivors or survivor, he gave such part or parts to his executors upon trust to sell and pay the proceeds to their, his, or her children; two of the children died without issue: it was held by Knight Bruce and Turner, L.JJ., though not without some hesitation, that the testator intended a conversion out and out, and not only for the purpose of division between the children of the tenants for life.

Heir takes as personalty—where.

B.—*Doctrine of Conversion as between Persons claiming under Heir or Next of Kin.*—"It is observable," says Mr. Jarman (m), "that where a *partial* undisposed-of interest in real estate directed to be sold results to the heir at law of the testator, it becomes

(j) First ed. p. 563.

(k) In *Maugham v. Mason*, 1 V. & B. 416, stated ante, p. 770. See also the observations of Sir J. Leach, M.R., in *Phillips v. Phillips*, 1 My. & K. 660,

and *Collis v. Robins*, stated ante, p. 771.

(l) 2 De G. & J. 683.

(m) First ed. p. 568. Cited with approval by Chitty, J., in *Re Richerson*, [1892] 1 Ch. p. 382.

personalty in his hands. Thus, in *Wright v. Wright* (n), where A. devised his real estate in trust to be sold to pay his debts, &c., and the residue in trust for his daughter, but if she died in the lifetime of his wife, to his wife for life, and, at her decease, to go as he (the testator) should by a codicil direct. He left no codicil. The daughter died [intestate] in the widow's lifetime. The reversionary interest in the fund expectant on the widow's decease, which descended to the daughter as the heir at law of the testator, was, at her death, claimed respectively by her administratrix as personalty, and by her heir at law as real estate. Sir W. Grant, M.R., held, on the authority of the case of *Hewitt v. Wright* (o), (in which the same principle was applied to a disposition by deed,) that it was personal estate in the daughter, and accordingly belonged to her administratrix. According to the doctrine already stated (p), it is clear that no act on the part of the heir electing to take such partial interest as real estate, would avail to change its character."

And even where the land itself remains unsold, it results to the heir as personal estate (q).

"But if the purposes of the will *wholly* fail, as if all the legatees of the moneys to be produced by the sale die in the testator's lifetime, so that there is a total failure of the objects for which the conversion was to be made, the property will devolve upon the heir as real estate" (r). And in such a case it is immaterial that a sale has by mistake taken place on the supposition that the trusts

Where the objects of the conversion wholly fail.

(n) 16 Ves. 188; see also *Smith v. Claxton*, 4 Mad. 484; *Jessop v. Watson*, 1 My. & K. 665; *Dixon v. Dawson*, 2 S. & St. 327; *Carr v. Collins*, 7 Jur. 165; *Tily v. Smith*, 1 Coll. 434; *Hatfield v. Pryme*, 2 Coll. 204; *White v. Smith*, 15 Jur. 1096; *Bagster v. Fackereil*, 26 Beav. 469; *Wilson v. Coles*, 28 Beav. 215; *Hamilton v. Foot*, Ir. R., 6 Eq. 572.

(o) 1 Br. C. C. 86. As to conversion by deed, see *Clarke v. Franklin*, 4 K. & J. 257; *Re Grimthorpe*, [1908] 2 Ch. 675.

(p) Ante, p. 761. In *Wright v. Wright* the land had been actually converted into money, so that no question of election could have arisen. In saying that no act on the part of the heir would avail to change the character of the property, Mr. Jarman probably means "no act on the part of the heir during the continuance of the

trust for conversion, and while the property remains unconverted"; but is it clear that the heir cannot elect in such circumstances? See ante, p. 763, n. (qq).

(q) *Re Richerson*, [1892] 1 Ch. 379; and the cases cited in note (o).

(r) In support of this proposition, Mr. Jarman refers to Sir J. Leach's judgment in *Smith v. Claxton*, 4 Madd. 493. As to *Chitty v. Parker*, 2 Ves. jun. 271, see *Att.-Gen. v. Lomas*, L. R., 9 Ex. 29; *Simmons v. Rose*, 6 D. M. & G. 411. "Where a person . . . has directed a conversion for a particular special purpose, or out and out, but the produce to be applied to a particular purpose, when the purpose fails, the intention fails; and this Court regards him as not having directed the conversion" per Lord Eldon, *Ripley v. Waterworth*, 7 Ves. p. 435; *Re Grimthorpe*, [1908] 2 Ch. 675.

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have not wholly failed (*s*) : but the question whether the will causes a conversion or not is to be determined by the circumstances as they exist at the testator's death, and therefore where it is uncertain at that period whether a conversion will be required for the purposes of the will, the heir will take the property as personalty, although those purposes may have failed before a sale takes place (*t*).

But this doctrine only applies where the real estate is devised separately : it does not apply where the testator creates a mixed fund of his real and personal estate. Thus in *Att.-Gen v. Lomas* (*tt*) the testator directed his real estate to be sold and the proceeds, with his personalty, to be held in trust for the payment of debts and legacies, and as to the residue on certain trusts which failed ; at the death of the testator's heiress, part of the real estate remained unsold : it was held that it devolved to her as personalty.

Next of kin
takes as realty
—where.

In the converse case, i.e., where personal estate is directed to be laid out in land, which is to be held on trusts which (either originally or by lapse) leave part of the interest undisposed of, this partial interest results to the testator's next of kin or residuary legatee as real estate, in case of whose death it passes to his heir at law, or devisee (*u*).

When land is devised charged with a sum of money, which is

(*s*) *Davenport v. Coltman*, 12 Sim. 610. Cf. *Bowra v. Rhodes*, 31 L. J. Ch. 676.

(*t*) *Carr v. Collins*, 7 Jur. 165, per *Shadwell*, V.-C. On this Mr. Theobald (Wills, 7th ed. p. 259) makes the following observation : "The proposition may be right, but no such question arose in *Carr v. Collins*, where there was no intestacy." In *Carr v. Collins* the testator devised his real estate upon trust for sale and payment of his debts and certain legacies, and directed one half of the residue to be paid and applied to or for the benefit of his son John, or his issue as the trustees should think proper. John survived the testator, but died without issue before the property was sold, having by his will made such a disposition of his property as would give an absolute interest to the plaintiff in John's moiety of the testator's estate if that estate devolved as personalty, but only an estate for life if it devolved as realty. *Shadwell*, V.-C., held that it devolved as personalty. He said : "At the death of the testator it was

uncertain whether John Bell might have any issue or not, therefore the character of the property was impressed upon it at the death of the testator." It is submitted that the proposition in the text (which is contained in the third edition of this work, by Messrs. Wolstenholme and Vincent), is correct.

(*tt*) L. R., 9 Ex. 29.

(*u*) *Curteis v. Wormald*, 10 Ch. D. 172 ; overruling *Reynolds v. Godlee*, Johns. 536, 582, where Wood, V.-C., held that it resulted to the executor, and through him to the next of kin, as personal estate. The V.-C. put the case of the liberated fund being wanted to make good abated legacies under the will, "in which case the land purchased must certainly be dealt with as the estate of the testator which the executors must apply as personal estate in payment of the legacies." But the case is scarcely relevant. Nothing of course results to the next of kin until all the purposes of the will which ought to be satisfied have been satisfied. *Curteis v. Wormald* was followed in *Re Skerrett's Trusts*, 15 L. R. Ir. 1.

given on trusts which do not exhaust the entire beneficial interest in the money, so that after it has been raised the undisposed-of interest sinks for the benefit of the devisee (*v*), the devisee takes it as he finds it, viz., as personalty. This, of course, assumes him to be absolutely entitled to the land (*w*).

VII.—Effect of Failure by Lapse, or otherwise, of Pecuniary Gifts out of Proceeds of Land.—Under the old law, in cases where real estate was devised to be sold, and a sum of money forming part of the proceeds was undisposed of, the question whether it went to the heir, or to the residuary legatee of the fund, or to the general residuary legatee, was the subject of much difference of opinion (*x*).

Specific sums payable out of the produce of real estate belong to the heir—when.

It is clear, that a sum expressly excepted out of the produce of the sale, but not attempted to be disposed of, belonged to the heir (*y*).

Sums excepted but not disposed of.

Nor is it to be doubted, that where a legacy was payable out of a fund of this description upon a contingency which did not happen, the residuary devisee of the fund had the benefit of such failure, on the principle that, in the event which had happened, there was no actual disposition in favour of the legatee (*z*).

Sums given on a contingency;

Where, however, a sum of money, part of the proceeds of real estate, was in terms given to an object incapable by law of taking, the authorities respecting its destination are conflicting, though here, also, there seems to be a preponderance in favour of the heir (*a*). In *Page v. Leapingwell* (*b*), however, Sir W. Grant, M.R., appears to have decided, that a charitable gift out of a real fund went, not to the heir, (as might have been inferred from the observations in his judgment,) nor to the residuary devisee of the fund, but to the general residuary devisee; “a conclusion which,” as Mr. Jarman remarks (*c*), “it seems difficult to reconcile with the principle repeatedly laid down by Lord Eldon, and other judges, that a residuary devise is, under the old law, in effect, a specific devise

—given to objects incapable of taking.

(*v*) See as to this ante, p. 441.

(*w*) *Re Newberry's Trusts*, 5 Ch. D. 746.

(*x*) Having regard to the effect of the Wills Act, s. 25 (see post, p. 786), the remarks of the learned author of this work on this question are somewhat abbreviated. For a fuller statement and discussion of the cases on the subject, see the 4th ed. of this work, vol. I. pp. 632 et seq.

(*y*) *Collins v. Wakeman*, 2 Ves. jun. 683, stated post, p. 781; *Watson v.*

Hayes, 5 My. & Cr. 125; and as to trusts for conversion in deeds, see *Emblin v. Freeman*, Pr. Ch. 541; *Van v. Barnett*, 19 Ves. 102; *Griffith v. Ricketts*, 7 Hare, 311; *Matson v. Swift*, 8 Beav. 368.

(*z*) Ante, p. 440.

(*a*) *Cruse v. Barley*, 3 P. W. 20; *Collins v. Wakeman*, 2 Ves. jun. 683; *Gibbs v. Rumsey*, 2 V. & B. 294. See post, pp. 783 et seq.

(*b*) 18 Ves. 463.

(*c*) First ed. p. 570.

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of the lands not included in the particular devises contained in the will." In *Jones v. Mitchell (d)*, where A. devised his real estate, after certain limitations, to trustees in trust to be sold, and out of the moneys to be produced by the sale, to pay certain legacies, and then a legacy of 800*l.* to charities, and to pay the residue to B. ; Sir J. Leach, V.-C., held that the void legacy of 800*l.* belonged to the heir, on the principle that the residuary devisee of real estate, or of the price of real estate, could take nothing but what was at the time intended for him.

Destination of lapsed sums specifically given out of the produce of real estate.

The principle seems to apply, with exactly the same force, to the case of lapse ; and, undoubtedly, at one period, the established rule as to these cases also was, that the heir was entitled on failure of the devise ; unless, according to the doctrine of some cases (e), the produce of the sale was blended with the personal estate in one general residuary disposition.

Principle governing the cases.

"The ground upon which this rule was established (and the principle is equally applicable to every class of cases before noticed), is this : that where a testator devises real estate to be sold, and out of the produce gives a specific sum, say 1,000*l.*, to A., and the residue to B., the residue is to be considered as a gift of the specific sum which the purchase-money, after deducting 1,000*l.*, shall happen to amount to ; the gift being the same in effect as if the testator had said, I give to B. the purchase-money minus 1,000*l.*, which I give to A. It is a mere distribution of the purchase-money among them, the one taking a certain and the other an uncertain share ; and B. has no more right, *in any event*, to take the share of A., than A. has to take the share of B." (f).

Claim of the heir negatived in *Noel v. Lord Henley*.

A different doctrine was, however, propounded in a subsequent case (g), which was as follows :—Lord W. devised certain real estates to trustees, upon trust for sale, and out of the produce to pay certain sums of money, including a sum of 5,000*l.* to his wife, her executors and administrators, in part satisfaction of 10,000*l.* secured to her by their marriage settlement out of certain trust funds in case of her surviving him and failure of issue of his body by her (h) ; and after these purposes he directed the trustees to

(d) 1 S. & St. 290. See also *Taylor v. Bland*, W. N. 1880, p. 155.

(e) See Lord Thurlow's judgment in *Hutcheson v. Hammond*, 3 Br. C. C. 148 ; *Kennell v. Abbott*, 4 Ves. 802 ; but as to which see post.

(f) First ed. p. 571. See this principle affirmed in *Hutcheson v. Hammond*, 3 Br. C. C. 128.

(g) *Noel v. Lord Henley*, 7 Pri. 241, Dan. 211, 322.

(h) "If the devise could have been considered as subject to this contingency, there would be no difficulty in reconciling the decision with *Hutcheson v. Hammond*, on the principle before stated in regard to contingent charges, ante, p. [440]. It seems to be impossible,

invest the residue of the said moneys upon certain trusts. The testator's wife died in his life-time. One question was, whether the 5,000*l.* devolved upon the heir or next of kin, or belonged to the persons entitled to the residue. Richards, C.B., held, that by the lapse the residuary devisees of the fund were entitled.

The decree as to the 5,000*l.* was affirmed in the House of Lords (*i*). Lord Redesdale grounded his opinion on the view that the death of a legatee in the testator's lifetime, thus causing the legacy to lapse, is a contingency to which every person who makes a disposition by will must be deemed to know that such a disposition is subject. Lord Eldon concurred in the decree, but apparently on a different ground; for he said (using the word "contingency" in a different sense, as it seems, from Lord Redesdale) that the 5,000*l.* was only to be payable upon a contingency; and that not having happened, no direction was given, the will having failed with reference to that part of it.

Noel v. Lord Henley affirmed in D. P.

As Mr. Jarman points out (*ii*): "The reasoning . . . on which Lord Redesdale grounded his opinion, is directly opposed to the principle recognized in a great variety of cases (*j*), that a testator is in general supposed to calculate upon his dispositions taking effect, and *not* to provide for the happening of events in his life-time which will defeat them, as the death of legatees, &c. The whole doctrine of lapse stands upon this principle."

Remarks upon *Noel v. Lord Henley*.

Fortunately, however, the perplexing uncertainty in which the doctrine was thus placed, was in some degree dissipated by the subsequent case of *Amphlett v. Parke* (*k*), presently stated, which, as eventually decided, appears to have restored the authority of *Hutcheson v. Hammond*. Lord Brougham's judgment, on the appeal, contains a detailed examination of many of the cases, among which, however, neither *Hutcheson v. Hammond*, nor *Noel v. Lord Henley*, is to be found, nor do they appear to have been cited at the bar. Indeed, the question chiefly discussed in this case was, whether the declaration that the produce of the sale should be deemed personal estate, and the blending of such produce with the general residuary personal estate, did not so absolutely convert it into personal estate as to exclude the heir; and the adjudication in the negative affords the strongest possible

however, consistently with sound construction, or the principle upon which it was decided, so to treat it." (Note by Mr. Jarman.) See however Lord Eldon's remarks on the appeal.

(*i*) *Noel v. Lord Henley*, 1 Dan. 322,

12 Pri. 213.

(*ii*) First ed. p. 574.

(*j*) See accordingly *Robinson v. London Hospital*, 10 Hare, 28.

(*k*) 4 Russ. 75, 2 R. & My. 221.

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confirmation of the doctrine of *Hutcheson v. Hammond*, in opposition to *Noel v. Lord Henley*, in both which these circumstances were wanting.

Whether
blending of
proceeds of
real and per-
sonal estate
excludes the
heir.

Mr. Jarman continues (*l*): "The unavoidable mention of *Amphlett v. Parke* has rather anticipated the subject next to be considered, namely, whether the circumstance of the produce of the real estate being blended with the general personal estate constitutes a ground for excluding the heir, by applying to the mixed fund the rule applicable to the latter species of property; such rule being (as is well known) that the residuary legatee takes, even under the old law, whatever is not effectually disposed of to other persons. It seems difficult to discover any solid reason why the blending of the two funds should produce this consequence. The testator, intending the proceeds of the two species of property to go in the same manner, comprises them in the same disposition for mere convenience, and to avoid a needless repetition of language; and the effect ought, one should think, to be the same as if, in one part of his will, he had given the proceeds of the real estate to A., and in another part, the proceeds of the residuary personal estate to A. How far the authorities lend their support to such a conclusion, will be seen by the following statement of them.

Cruse v.
Barley.

"A leading case on this subject is *Cruse v. Barley* (*m*), where a testator devised all his freehold and copyhold lands to P. and his heirs, in trust to sell the same, and, in the first place, to pay off all incumbrances upon the premises, and all his just debts. He devised all his personal estate to the same trustee, in trust to sell, and to apply the money arising by the sale, *and also the money to be produced by sale of the real estate*, amongst his five children: viz. to his eldest son C. 200*l.* at his age of twenty-one; the residue amongst his four younger children at their respective ages of twenty-one or marriage. C. died under twenty-one; upon which a question arose as to the 200*l.*, which, it was admitted, never vested in C. Sir J. Jekyll, M.R., having ordered the precedents to be looked into, declared that the 200*l.* should be construed as land, and descend to the heir: for that it was the same as if so much land as was of the value of 200*l.* was not directed to be sold, but suffered to descend.

Remark on
Cruse v.
Barley.

"The legacy in this case was contingent, and failed by the non-happening of the event on which it depended; a circumstance which was not adverted to, but which would clearly now be held

(*l*) First ed. p. 575.

(*m*) 3 P. W. 20.

to take it out of the principle in question (*n*). It is enough, however, for the present purpose, that the heir was not excluded by the blending of the residue of the fund with the personal estate.

"The next case is *Durour v. Motteux* (*o*), where a testator devised all his estate [mentioning various species of real and personal property], to trustees to sell; and, after payment of all his debts, funeral expenses and legacies, to place out all the residue of his personal estate at interest, upon securities, upon the trusts therein mentioned. One of the questions was, whether a legacy of 1,200*l.*, which was void, (because to be laid out in land for charitable purposes,) belonged to the heir or the residuary legatee. Lord Hardwicke decided in favour of the legatee; laying some stress upon the fact of the real estate being turned into personal, and observing, that the intent to include the whole in the residue plainly appeared from the testator's description of *all* his personal estate; so that the whole of the real was to be considered as personal property (*p*).

"In this case (which has been regarded as a leading authority) we find, for the first time, the circumstance of the blending of the produce of the real and personal estates was made the ground of the decision; and this principle was still more distinctly recognized in the subsequent case of *Hutcheson v. Hammond* (*q*), where Lord Thurlow, while deciding in favour of the heir's title to a lapsed legacy, payable out of the proceeds of real estate, added, 'though if a testator has blended his real with his personal fund, and has made a residuary legatee, it will carry all that is not disposed of.'

"No allusion to any such doctrine, however, occurs in the case of *Collins v. Wakeman* (*r*), (the next of this class,) where a testator devised certain lands to W., his heirs and assigns, in trust to sell; and the money arising from such sale he directed to be considered as part of his personal estate, and to be disposed of by his said trustee and executor, his heirs, executors and administrators, in manner following: he then gave several pecuniary legacies out of

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Durour v. Motteux.

Residuary legatee held to be entitled to void legacy.

Dictum of Lord Thurlow in *Hutcheson v. Hammond.*

Collins v. Wakeman.
Heir held to take legacy excepted out of proceeds of land, but not disposed of.

(*n*) See ante, pp. 440 seq., and *Doe d. Wells v. Scott*, 3 M. & Sel. 300; the principle of which is, of course, applicable to devises out of the produce of real estate devised to be sold.

(*o*) 1 Ves. sen. 320; more fully and accurately stated, 1 S. & St. 292, n.

(*p*) Of this case, Sir W. Grant has observed, "From the little Lord Hardwicke is reported to have said, it is difficult to ascertain from what expressions he inferred that, by the description of all his personal estate, the testator

meant to include everything in the residue. The decision is generally accounted for by the particular manner in which the sale was directed, and the circumstance of the testator having blended the real and personal estates in one gift to trustees, to sell the *whole* with his personal estate," &c., 1 V. & B. 417; see also 2 R. & My. 232; but see *ib.* 245.

(*q*) 3 Br. C. C. 148.

(*r*) 2 Ves. jun. 683.

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his said trust monies and personal estate, and gave to his executor W. the sum of 1,000*l.*, to be disposed of according to any instructions he might leave in writing. The testator then gave all the residue of his [personal estate subject to debts, legacies, &c., to M.]. The testator left no instruction as to the 1,000*l.* which was now claimed by the residuary legatee, the next of kin, and the heir at law. Lord Loughborough decided in favour of the heir; observing, that ‘where the Court has no direction from the testator, to whom the money arising from any part of his real estate shall go, it rests with his heir at law’ (s).

Remark on
Collins v.
Wakeman.

“In this case, it will be observed, the express declaration, that the produce of the sale should be considered personal estate (which was held sufficient to make the residue of the fund pass under the general bequest of personalty), did not, in Lord Loughborough’s opinion, authorize the Court to apply to the produce of the real estate the rule applicable to personalty, in reference to the effect of the failure of a specific gift.

Kennell v.
Abbott.

“This case was soon followed by *Kennell v. Abbott* (t), where a testatrix devised a certain copyhold estate to A. and her heirs, in trust to sell, and out of the monies arising therefrom to pay certain legacies; she then made some specific bequests; and, as to the residue of the purchase-money arising from the sale of the said estate, household goods, and all the residue of her monies, securities for money, personal estates and effects whatsoever, she gave to B., her executors and administrators, subject to her debts and funeral expenses; and she appointed B. executrix. One of the legacies payable out of the produce of the land was void on account of fraud in the legatee; which raised a question, whether it belonged to the residuary legatee or the heir. Sir R. P. Arden, M.R., held, that it devolved to the residuary legatee. He distinguished *Hutcheson v. Hammond*, on the ground of there being two residues—a special residue of the money arising from the sale, and the general residue; but that here the testatrix had given particular parts of her estate, stock, leasehold estate, household goods, furniture, and many other articles, and this copyhold estate, which she ordered at all events to be sold, and out of the purchase-money she directed these legacies to be paid; and she made a residuary disposition, ‘as to which,’ continued his Honor,

Residue of
real fund
being blended
with the per-
sonalty, void
legacy held
to fall into
residue.

(s) In *Amphlett v. Parke*, 2 R. & My. 221, Lord Brougham treated *Collins v. Wakeman* as a case in which the next of kin and the heir at law were the only

litigating parties; but, according to the printed report, the residuary legatee also claimed.

(t) 4 Ves. 802.

‘ the question is, whether it is not to all intents a general residuary clause, carrying everything not disposed of. I am of opinion it is, under *Mallabar v. Mallabar*, and *Durour v. Motteux*. It is making the real estate, to all intents and purposes, personal; and then, taking a retrospective view of what she had done, and meaning to give everything not disposed of, she adds this residuary clause. Therefore, I think this estate is turned entirely into money.’

“ This case seems to have occasioned much of the uncertainty in which this doctrine has been long involved, by contradictory decisions. It was certainly founded on a very partial view of the then state of the authorities, as neither *Cruse v. Barley*, nor *Collins v. Wakeman* was noticed by the M.R., though the latter case was the latest upon the subject; having been decided only a short period before, by his contemporary on the Equity Bench.

Remark on
Kennell v.
Abbott.

“ We now come to *Gibbs v. Rumsey (u)*, where a testatrix devised her freehold, copyhold and personal estates to trustees, upon trust to sell, and out of the money to arise by the sale, together with her ready money and other effects, she bequeathed certain charitable legacies, and 100*l.* to her trustees for their care and trouble. And she afterwards bequeathed the residue of the monies arising from the sale, and all the residue of her personal estate, to her trustees and executors, to dispose of as they should think proper. It was held, that these trustees took the residue for their own benefit under this bequest; and, with respect to the charitable legacies, Sir W. Grant treated it as a point quite clear, that they went to the heir at law, and not to the residuary legatee or next of kin. The principal question in the case was, whether the devisees were trustees of the surplus or not (*v*); and it is observable that the point, as to the destination of the void legacies, does not appear to have been discussed; nor was the case of *Kennell v. Abbott* cited, or a single argument advanced in favour of the residuary legatees.

Gibbs v.
Rumsey.
Heir held to
take void
legacies.

Observation
upon *Gibbs v.*
Rumsey.

“ The subject, however, was much more fully investigated in the subsequent case of *Amphlett v. Parke (w)*, where A. devised freehold and copyhold lands to M. and P., upon trust for sale, and directed that the monies to arise from such sale should be considered as part of her personal estate; and then went on to direct that, out of the monies to arise from the sale and all other her personal estate, certain legacies should be paid, and all the residue of her personal estate, and the monies arising from her real estate, the testatrix

Amphlett v.
Parke.

(u) 2 V. & B. 204. Compare *Gravenor v. Hallum*, Amb. 643, referred to ante, p. 442.

(v) Ante, p. 482.
(w) 1 Sim. 275, 4 Russ. 75, 2 R. & My. 221.

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Heir held to
take void
legacies.

Lord
Brougham's
judgment in
Amphlett v.
Parke.

Remark on
preceding
cases.

Green v.
Jackson.

gave upon certain trusts. Sir J. Leach, V.-C., held, that some of the legacies which had lapsed fell into the residue . . . but his judgment was reversed by L.C. Brougham, who decided in favour of the heir, after an elaborate examination of many of the authorities.

"The only case which his Lordship seemed to consider to press strongly against the heir was *Kennell v. Abbott*, which he deemed to be inconsistent with the current of authority, especially *Cruse v. Barley*, *Digby v. Legard* (x), and *Gibbs v. Rumsey*, and to have been founded on a misconception of *Durour v. Motteux*, in the report of which, in Vesey, the will was not accurately stated, and the decision appeared from a MS. of Lord Hardwicke's judgment in his possession, to have chiefly turned on another question. The case of *Mallabar v. Mallabar*, Lord Brougham regarded as standing on special grounds, especially that of a legacy being given to the heir at law, but which circumstance has not invariably, we have seen (y), been considered to be of so much weight. In that case, however, the question, as already shown (z), was not, as to the destination of a lapsed or void legacy given out of the proceeds of real estate; but *whether such proceeds passed under a general residuary disposition*.

"It will be observed, that, in several of the preceding cases, including *Gibbs v. Rumsey*, and *Amphlett v. Parke*, the entire proceeds of the real estate, (not merely, as in *Kennell v. Abbott*, the surplus, after payment of the legacies in question,) were blended with the personalty, the legacies being charged on such mixed fund; so that the fact of the void or lapsed legacy being made payable out of the personal, as well as the real, estate, was not considered to afford a ground for applying to such legacies, in toto, the rule applicable to personal estate.

"In the interval between the original decree in *Amphlett v. Parke* and its reversal, occurred the case of *Green v. Jackson* (a), where a testator bequeathed all his personal estate to trustees, upon trust to pay some legacies, and also devised all the residue of his real estate (after some particular devises) to the same trustees, their heirs and assigns, upon trust to sell. The testator then directed,

(x) 3 P. W. 22, Cox's note, 2 Dick. 500. "A. devised her real and personal estate to trustees, in trust to sell, to discharge debts and legacies, and to pay the residue to five persons in equal shares. One of them died before the testatrix, and Lord Bathurst held, that the share of the deceased residuary legatee in the real estate resulted to

the testatrix's heir. The case, therefore, does not appear immediately to belong to the class of authorities discussed in the text, but ranks with *Ackroyd v. Smithson*, stated ante, p. 766."

(Note by Mr. Jarman.)

(y) Ante, p. 707.

(z) Ante, p. 773.

(a) 5 Russ. 35, 2 R. & My. 238.

Void legacies
held to fall
into residue.

that the monies which should be received by his trustees by such sale, and by virtue of the bequest of the personalty, and all other his monies which should come to their hands, after his debts and legacies, and two sums directed to be sunk by way of annuity, and all costs attending the execution of the will should be paid and provided for, should be placed in a banking-house until the whole (except certain sums) should be got in. He then directed his trustees to pay considerable sums for charitable purposes, and concluded with a direction to them to pay and apply all the residue of the monies in their hands, after full satisfaction and discharge of the aforesaid several payments and bequests, to certain persons. It was admitted that the charitable legacies failed in the proportion which the produce of the real estate bore to the produce of the personalty (*b*). The heir at law claimed the benefit of such failure; but Sir J. Leach, M.R., on the authority of *Durour v. Motteux*, and also, he said, upon principle, held that the failure of the charitable legacies enured for the benefit of the residuary legatees; and that no distinction could be made between that part of the residue which had arisen from the real estate, and that part which had arisen from the personal estate: he observed that the facts in *Gibbs v. Rumsey* were not distinctly stated, and the argument there turned on another point. His Honor did not advert to the other opposing authorities.

"The case of *Green v. Jackson* was referred to by Lord Brougham in *Amphlett v. Parke*, as warranted by the particular terms of the will; but as his Lordship's remarks went to impugn the authority of *Durour v. Motteux*, on which it was chiefly founded, they probably induced the appeal which was brought against the decision of the M.R., and which was argued before Lord Lyndhurst, who, however, affirmed the decree, and that, too, chiefly on the authority of *Durour v. Motteux*. The circumstance that, in *Green v. Jackson*, the legacy was void ab initio, and in *Amphlett v. Parke* failed in event by lapse, seems to furnish no solid distinction between these cases; for the principle applicable to each species of case is, it is conceived, the same" (*c*).

Remark on
Green v.
Jackson.

The last case on this subject appears to be *Salt v. Chattaway* (*d*), in which a testator devised and bequeathed to trustees all his real

Salt v.
Chattaway.

(*b*) On this subject, vide ante, p. 265.

(*c*) Mr. Jarman's remarks on another decision of Leach, M.R., viz., *Cooke v. The Stationers Company*, 3 My. & K. 262 (referred to ante, p. 442), are

omitted, as the decision seems not to affect the principle laid down in *Amphlett v. Parke*.

(*d*) 3 Beav. 576.

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and personal estate, "subject to the payment thereof of his just debts, funeral and testamentary expenses," upon trust to sell and receive the purchase-money and all money that might be owing to him at his decease, "and thereof and out of the ready money he might die possessed of to pay, among other legacies, a legacy of 100*l.* to A. when he should attain the age of twenty-one, and to divide the residue into three parts, which he then proceeded to dispose of. A. died under twenty-one, in the testator's lifetime; the contingency upon which the legacy was given thus never happened. According to the principle before stated (*e*), this would seem to have been the natural ground for holding that the legacy fell into the residue. Lord Langdale, however, passed over this ground, and based his decision that the legacy fell into the residue, on the decisions in *Durour v. Motteux* and *Green v. Jackson*.

General
remarks on
the cases.

"Here, then" says Mr. Jarman (*f*), referring to the cases before *Salt v. Chattaway*, "closes the long line of cases respecting the destination of pecuniary legacies, originally void or failing by lapse, so far as they are payable out of the proceeds of real estate, where *such proceeds are blended with the general personal estate*. The state of the authorities is certainly not such as to justify the hope of all litigation being at an end on this perplexing subject. An adjudication founded on a full examination of *all* the cases is still wanting.

Rule in re-
gard to wills
since 1837.

"The question, of course, will present itself under a different aspect in reference to wills made or republished since the year 1837, and containing a residuary devise, as such devise is made by the 25th section of the recent act of 1 Vict. c. 26, to extend to all *interests* in real estate comprised in any devise which fails by lapse or from being contrary to law, or otherwise incapable of taking effect; but the remarks occurring on this point have already found a place in connection with the subject of the failure of pecuniary charges on real estate, not directed to be converted, to which it will be sufficient to refer" (*g*). The general principle in such cases is that when the sum is a charge, as distinguished from an exception, the failure still (as before the act) enures for the benefit of the specific devisee, not of the residuary devisee (*h*).

(*e*) Ante, pp. 440 and 777.

(*f*) First ed. p. 586.

(*g*) Ante, p. 445.

(*h*) *Tucker v. Kayess*, 4 K. & J. 339 (will dated 1853); *Sutcliffe v. Cole*, 3

Drew. 135 (will dated 1843, 24 L. J. Ch. 486). And see the judgment in *Carter v. Haswell*, 26 L. J. Ch. 576, where it was immaterial whether charge or exception; the general (being the

Sometimes a testator, after bequeathing a sum of money which he charges on his real estate, directs that in a certain event the sum shall sink into the residue of his personal estate: in such a case, if the sum is not actually raised, and there is no necessity to raise it, the general rule is that it sinks into the real estate, the testator being considered not to have shewn any intention that it should be raised out of his real estate for the mere purpose of benefiting his personal estate (*i*).

only) devisee could alone benefit by the failure. The case is more properly one of a void particular devise falling into

residue.

(*i*) *Johnson v. Webster*, 4 D. M. & G. 474; *Re Duke of Somerset*, 55 L. T. 753.

CHAPTER XXIII.

POWERS OF APPOINTMENT AND DISPOSITION.

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Operation of
a power of
appointment.

I.—Preliminary (a).—A power of appointment is either a power of original disposition, or a power to revoke an existing disposition and make a new one ; in the latter case, it is obvious that the existing interests are vested, and (after much discussion) it is now settled that where the power is one of original disposition, and is followed by a limitation in default of appointment, the interests so limited are vested, subject to be divested by an exercise of the power (b). The point is of importance when it is a question

(a) This chapter is new, except so far as it incorporates a few passages contained in Chap. XX. of previous editions of this work, on the "Operation of a General Devise of Real Estate" (Chap. XXV. in this edition). It does not profess to deal with those general principles which are common to all powers of appointment, whether exerciseable by deed or by will. As to these, the reader is referred to the treatises of Lord St. Leonards, Mr. Chance, and Mr. (now Lord Justice) Farwell.

(b) Sugden, Powers, 8th ed. p. 452 ; *Doe v. Martin*, 4 T. R. 39 ; *Smith v. Lord Camelford*, 2 Ves. jun. 698 ; *Reade v. Reade*, 5 Ves. 744 ; *Re Ware*, 45 Ch.

D. 269. As to *Woodcock v. Rennick*, see post, p. 824. On principle it would seem clear that where there is a gift to the children of A., in such shares as A. shall appoint, and A. never has more than one child, that child takes an absolute interest, and no appointment by A. can affect it, or give him a new title ; on the authorities, however, the point is by no means clear : see *Sweetapple v. Horlock*, 11 Ch. D. 745, where *Re Frowd's Settlement*, 4 N. R. 54, and *De Serre v. Clark*, L. R., 18 Eq. 587, are discussed. In *Lovett v. Lovett*, [1898] 1 Ch. 82, the power was to appoint to issue.

whether a person's interest in a trust fund passes to his trustee in bankruptcy, or is subject to his marriage settlement, or the like (c).

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The rules for ascertaining the persons to take in default of appointment, where they constitute a class are stated elsewhere (d).

Class taking in default, how ascertained.

It may here be observed that it is not strictly accurate to divide powers of appointment into two classes, general and special. The essence of a general power is that the donee of the power can appoint to whomsoever he pleases (e), and it will be noticed that sect. 27 of the Wills Act does not use the words "general powers," but the words "power to appoint in any manner the donee may think proper." Even if the donee can appoint to himself, yet if certain persons are excluded as objects of the power, such a power is not of the nature of the power referred to in sect. 27 (f). There is a class of powers which are not special in the sense that there is a distinct class of objects of the power, and yet are not general; to this class belong powers where the donee can appoint to any person or persons other than himself, his executors or administrators, or other than certain classes of persons. The Legacy Duty Act, 1796, uses language which implies that for the purposes of that act the two classes of power, special and general, were meant to include all possible cases (g), and in the case of *Platt v. Routh* (h) it was consequently held that limited powers of the kind above referred to were, for the purposes of that act, general powers. The question as to whether a power is general or not is sometimes of importance with reference to the question whether estate duty is payable by virtue of the definition contained in sect. 22 of the Finance Act, 1894, and also as to the applicability of the Rule against Perpetuities in relation to appointments under such powers.

General and special powers.

A power of appointment, as a general rule, requires for its

Distinction between powers of appointment and powers of disposition.

(c) *Lee v. Olding*, 25 L. J. Ch. 580; *Re Vizard's Trusts*, L. R., 1 Ch. 588; *Re Andrews' Trusts*, 7 Ch. D. 635; *Sweetapple v. Horlock*, 11 Ch. D. 745; *Re Maddy's Estate*, [1901] 2 Ch. 820.

(d) Chap. XLI. (gifts to next of kin, relations, &c.); Chap. XLII. (gifts to children).

(e) Sugden on Powers, p. 394;

Farwell on Powers, 2nd ed. p. 7.

(f) *Re Byron's Settlement*, [1891] 3 Ch. 474.

(g) See per Lord Abinger, 6 M. & W. at p. 788.

(h) 3 Bea. 257, 6 M. & W. 756, affirmed sub nom. *Drake v. Att.-Gen.*, 10 Cl. & F. 257.

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exercise some more or less formal expression of intention (a), while a power of disposition, although it may be expressed so as to confer a mere power of appointment (as where a power to dispose of property by will is given), may be expressed so widely as to include the exercise of powers incident to ownership, such as a power of using, selling, or otherwise alienating the property, which may obviously be exercised without any formal expression of intention (b).

Appointment operating as direct gift.

In some cases, where a person purports to charge or appoint property in exercise of a specific power, and of all other powers, and the charge or appointment cannot take effect under the specific power, it takes effect out of the appointor's own interest in the property (c).

Power equivalent to absolute interest.

The cases in which a person to whom a power of disposition or appointment is given takes an absolute interest, are considered in Chapter XXXIII.

Power to appoint income.

An absolute power of appointing the income of a fund carries the power to appoint the capital (d).

Absolute interest with superadded power.

II.—What Words will create a Power.—If an absolute interest in property is given in the first instance, superadded words purporting to give a power of disposition are, as a rule, surplusage (e). Thus, a devise to a married woman to be her sole and separate property, and with power to her to appoint the same to her children and husband in such a way as she may think fit, gives her the absolute property (f).

(a) See *Irwin v. Farrer*, 19 Ves. 86; *Holloway v. Clarkson*, 2 Ha. 521; *Re Davids' Trusts*, Johns. 495; *Pennock v. Pennock*, L. R., 13 Eq. 144. In *Mackenzie v. Mackenzie*, 3 Mac. & G. 559, the donee of a general power appointed to his own executors and administrators, and this was held to make the property his own.

(b) See *Brodrick v. Brown*, 1 K. & J. 328. "There is nothing in the word 'disposal' essentially indicating power rather than property, independently of the context"; per Knight Bruce, V.-C., in *Nowlan v. Walsh*, 4 De G. & S. p. 586, where the V.-C. seems to cast doubts on the accuracy of the decisions in *Reith v. Seymour*, 4 Russ. 263, and *Archibald v. Wright*, 9 Sim. 161. Compare *Re Pounder*, *Re Stringer*, and *Re Sanford*, post.

(c) *Cross v. Hudson*, 3 Br. C. C. 30; *Jones v. Southall*, 30 Bea. 187; *Sing v.*

Leslie, 2 H. & M. 68; *Re James*, [1910] 1 Ch. 157.

(d) *Re L'Herminier*, [1894] 1 Ch. 675.

(e) See *Hixon v. Oliver*, 13 Ves. 108; *Doe d. Herbert v. Thomas*, 3 A. & E. 123; *Howorth v. Dewell*, 29 Bea. 18.

(f) *Brook v. Brook*, 3 Sm. & G. 280; *Foxwell v. Van Grutten*, [1900] W. N. 97. In the case of married women subject to the old law, a power of appointment by will, notwithstanding coverture, could be given in addition to absolute ownership; *Bull v. Kingston*, 1 Mer. 314; *Hales v. Margerum*, 3 Ves. jun. 299. The general principle of the Court of Chancery was that it would not allow an equitable merger or coalescence of interests given to a married woman, if the result would be to defeat its own rules aimed at the protection of married women from marital control: *Whittle v. Henning*, 2 Ph. 731. But since the Married Women's Property Act, 1882,

So if personal property is given to A., with a power to dispose of it by will or "at his death," he takes an absolute interest (*g*). CHAP. XXIII.

And it is, of course, immaterial that the power of appointment or disposition is confined to a class of persons, such as the children of the devisee or legatee (*h*).

The doctrine applies even if the absolute interest is not given directly, but is implied from an indefinite gift of the income of the property (*i*). Thus, where a testator bequeathed the dividends of stock to a woman, to be paid to her notwithstanding any future coverture, with a direction that her receipts should be a sufficient discharge, and that at her death she might leave it to anyone she chose, it was held that she took an absolute interest (*j*).

Absolute gift
cut down to
life interest
with power of
disposition.

And even if words are added declaring the testator's intention to be that the devisee shall enjoy the property during his life, and by his will dispose of the same as he thinks proper, they do not, of themselves, cut down the absolute interest previously given (*k*).

On the other hand, after an apparently absolute gift, the testator may go on to use words which shew that he meant to give a life interest, with a power of appointment or disposition over the capital (*l*). Thus a gift to A., to be vested in her on her attaining twenty-one, and to be subject to her disposition thereof, followed by a gift over in the event of her dying under twenty-one or without disposing of the property by her will, gives her a life interest with a power of appointment by will (*m*). So a gift to A. "for her own absolute use and benefit and disposal," with a gift over of any part remaining "undisposed of" at her death, gives A. a life interest, with a power of disposition by act inter vivos, but not by will (*n*). But the distinction between a case of this kind, and a case where

this doctrine has ceased to be of importance: see *Re Davenport*, [1895] 1 Ch. 361, post. In *Farwell on Powers* (p. 107), *Barrymore v. Ellis*, 8 Sim. 1, and *Medley v. Horton*, 14 Sim. 222, appear to be treated as correctly decided, notwithstanding *Brown v. Bamford*, 1 Ph. 620; *Harnett v. Macdougall*, 8 Bea. 187, and *Moore v. Moore*, 1 Coll. 54; sed quære.

(*g*) *Comber v. Graham*, 1 R. & My. 450. This was the construction adopted in *Re Mortlock's Trust*, 3 K. & J. 456, but the will seems to be wrongly punctuated.

(*h*) *Haworth v. Dewell*, 29 Bea. 18; *Brook v. Brook*, 3 Sm. & G. 280; and cases on precatory trusts, cited Chap. XXIV.

(*i*) *Weale v. Olive*, 32 Bea. 421.

(*j*) *Southouse v. Bate*, 16 Bea. 132.

(*k*) *Doe v. Thomas*, 3 Ad. & E. 123. In that case the devise was to a woman, but nothing seems to have turned on this.

(*l*) See *Constable v. Bull*, 3 De G. & S. 411, and other cases cited in Chap. XIV.

(*m*) *Borton v. Borton*, 16 Sim. 552. See *Ahearne v. Aherne*, 9 L. R. Ir. 144.

(*n*) *Re Pounder*, 56 L. J. Ch. 113; *Doe v. Glover*, 1 C. B., 448. Compare *Re Pedrotti's Will*, 27 Bea. 583; *Re Fox*, 62 L. T. 762, and *Re Richards*, [1902] 1 Ch. 76 (in all of which the power of disposition was restricted to purposes of maintenance); *Re Thomson's Estate*, 14 Ch. D. 263, and *Pennock v. Pennock*, L. R., 13 Eq. 144 ("power to take and apply").

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Gift to
parent and
children.

the donee takes an absolute interest, or a life interest with a general power of appointment, is now difficult to draw (*n*).

Where the gift is for the benefit of a person and his children, it may be so expressed as not to confer concurrent interests, but to give the parent a life interest, with a power of appointment among the children (*o*). In *Re Haly's Trusts* (*p*), a sum was bequeathed to A. for her sole and separate use, "and to be appropriated by her to and amongst her children in such shares as she shall think proper." A. predeceased the testator, and it was held that the children took under the implied gift to them, from which it seems to follow that if A. had survived the testator she would either have held the fund upon trust for the children, or would have taken an estate for life with a power of appointment among the children (*q*).

Provision
for death of
legatee with-
out having
disposed of
property

Where a testator gives property to A., and then provides for the case of A.'s dying without having disposed of it, the question arises whether the original gift is an absolute one, in which case the gift over is repugnant and void; or whether A. takes an estate for life, with a general power of appointment, followed by a gift over in default of appointment.

may not affect
absolute gift,

Thus, if a testator gives property to A. "for his own use," or "for his absolute use and benefit," or the like, and goes on to provide that on A.'s death any part of the property not disposed of by him shall go to some one else, this gives A. an absolute interest, and any part of the property not disposed of at his death forms part of his estate (*r*).

or may cut
it down to
life interest
with power.

On the other hand, the whole frame of the will may negative the idea of an absolute gift. Thus, in *Re Stringer's Estate* (*s*), the testator gave to J. all his property, with full power to sell and dispose of it in any way he thought fit, by deed, will, or otherwise, and appointed him executor, but if J. did not dispose of the property, the testator gave it or the part undisposed of to other persons, and appointed other executors: there were various provisions in the will to take effect after the death of the survivor of the testator and J.: it was held that J. took a life estate with a general power of appointment. And where a testator gave all his property to his wife, "so that she may have full possession of it and entire

(*n*) See the cases of *Re Stringer*, 6 Ch. D. 1; *Re Jones*, [1898] 1 Ch. 438, and *Re Sanford*, [1901] 1 Ch. 939, cited post.

(*o*) *Bradshaw v. Bradshaw*, [1908] 1 Ir. R. 288.

(*p*) 23 L. R. Ir. 130.

(*q*) Compare *Rorke v. Abraham*, [1895] 1 Ir. R. 334, post.

(*r*) *Re Yalden*, 1 D. M. & G. 53; *Re Mortlock's Trust*, 3 K. & J. 456; *Par-nell v. Boyd*, [1896] 2 Ir. R. 571; *Re Jones*, [1898] 1 Ch. 438. See also *Re Hanbury*, [1904] 1 Ch. 415, reversed on appeal, [1905] A. C. 84.

(*s*) 6 Ch. D. 1.

power and control over it," with a gift over in the event of her dying without having devised or appointed it, it was held that she took an estate for life only with a general power of appointment (*t*). The decision, however, seems to have partly turned on the fact that the testator had previously by his will made a different disposition of his property, including a gift of the residue to his wife absolutely, and that the disposition above stated was contained in a codicil.

A power of appointment may be created by informal words, such as words giving a power of "settling" or "disposing" of property in a certain way (*u*). But vague words will not create a power if such a construction is inconsistent with the general scheme of the settlement containing them (*v*). Informal words.

As a general rule, a limitation to a person for life, and after his death to his heirs and assigns, does not give him a power of appointment (*w*).

In *Re Holden* (*x*), where a testator gave a life interest in property to A., and on his death "gave all the remainder of my personal property which may then exist" to B., this was held not to give A. a power of disposition.

But a gift of property to A. for life, with full power to will away any part at her decease, followed by a gift over of the residue and remainder of what was undisposed of by her, was held to give her a power of appointment over the whole (*y*).

In *Atkinson v. Jones* (*z*), a testator gave one moiety of his residue upon trust for M. for life, and after her death as to one half of it as she should appoint, and as to the other half upon the trusts thereafter declared of the other moiety, which he gave upon similar trusts for E., with a similar cross limitation of one half upon the trusts thereinbefore declared concerning M.'s moiety: it was held

Power created by cross limitations.

(*t*) *Re Sanford*, [1901] 1 Ch. 939. See *Re Pounder*, 56 L. J. Ch. 113, ante, p. 791; and *Rorke v. Abraham*, [1895] 1 Ir. R. 334, where it was held that the power was limited to children, and in default of appointment they took equally; *Bradshaw v. Bradshaw*, [1908] 1 Ir. R. 288.

(*u*) *Beachcroft v. Broome*, 4 T. R. 441; *Kennerly v. Kennerly*, 10 Ha. 160; *Downes v. Timperson*, 4 Russ. 334. See *Comiskey v. Bowring-Hanbury*, [1905] A. C. 84, where there was an absolute gift, subject to an executory gift over, which in its turn was subject to a power of appointment created by informal

words expressing the testator's confidence that the donee would dispose of the property for the benefit of the objects of the gift over: see Chap. XXIV.

(*v*) *Van Grutten v. Forwell*, 84 L. T. 545.

(*w*) *Milman v. Lane*, [1901] 2 K. B. 745, in which *Tapner v. Merlott*, Willes, 177, and *Quested v. Michell*, 24 L. J. Ch. 722, are discussed. See also *Brookman v. Smith*, L. R., 7 Ex. 271.

(*x*) 59 L. T. 358. Compare *Re Thomson's Estate*, 14 Ch. D. 263, and the other cases cited supra, p. 791.

(*y*) *Cooke v. Farrand*, 7 Taunt. 122.

(*z*) *Johns*. 246.

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that the effect was to give M. and E. between them a power of disposing of the whole of the testator's residuary estate.

Where a testator gave the income of his property to his wife for life, and directed that in case the income should not be sufficient she was to use such portion of the property as she might deem expedient, and that on her decease "what was left" of the property should be divided among certain persons: it was held that the wife had a general power of appointment over the capital during her life, but the question whether she could appoint by will was not decided (*a*).

Life interest enlarged into absolute interest.

A gift to A. for life, followed by a general power of appointment and a gift in default of appointment to A.'s executors or administrators, seems to confer on A. an absolute interest (*b*).

What words will create a testamentary power.

In *Bristow v. Skirrow* (*bb*), a testator gave leaseholds upon the same trusts as his wife might declare with respect to the disposition of her residuary personal estate by her will: it was held that this gave her a general testamentary power of appointment.

A power to appoint, without saying in what manner, or a power to appoint "by writing," or "by deed or otherwise," authorizes an appointment by will (*c*). And if the power is to appoint by a "writing" or "instrument" executed with certain prescribed formalities (such as sealing and delivery, or attestation), it may be exercised by a will executed with those prescribed formalities, but it cannot be exercised by an ordinary will (*d*).

A gift of property to A. for life, and "at" or "after" his decease, to such persons as he shall appoint, or to be "at his disposal," gives A. a power of appointment by deed or will (*e*), unless some words are added (such as "leave" or "will" or "bequeath") which imply a testamentary disposition, in which case the power can only

(*a*) *Re Richards*, [1902] 1 Ch. 76. See *Re Pedrotti's Will*, 27 Beav. 583; *Re Fox*, 62 L. T. 762; *Re Rowland*, 86 L. T. 78; ante, p. 464.

(*b*) Chap. XXXIII.

(*bb*) 27 Bea. 585.

(*c*) Sugden on Powers, 214; *Lisle v. Lisle*, 1 Br. C. C. 533; *Taylor v. Meads*, 4 D. J. & S. 597. In *Doe v. Glover* (1 C. B. 448), a gift over in the event of A. not disposing and parting with his interest, was held not to authorize a disposition by will; but see *Holmes v. Godson*, 8 D. M. & G. 166.

(*d*) *Taylor v. Meads*, supra; *Kibbet*

v. Lee, Hob. 312; *Orange v. Pickford*, 4 Dr. 363; *West v. Ray*, Kay, 385; *Smith v. Adkins*, L. R., 14 Eq. 402, and cases there cited.

(*e*) *Tomlinson v. Dighton*, 1 P. W. 149; *Ex parte Williams*, 1 J. & W. 89; *Reith v. Seymour*, 4 Russ. 263; *Re Davids' Trusts*, Johns. 495; *Humble v. Bowman*, 47 L. J. Ch. 62; *Re Jackson's Will*, 13 Ch. D. 189; where the cases *Kennedy v. Kingston*, 2 J. & W. 431; *Reid v. Reid*, 25 Bea. 469; and *Freeland v. Pearson*, L. R., 3 Eq. 658, are disapproved. As to *Woodcock v. Renneck*, 1 Ph. 72, see post, p. 824.

be exercised by will (*f*). So if the donee, being a married woman, is restrained from alienating the corpus (*g*). CHAP. XXIII.

On the other hand, a gift of a life estate, followed by a power of disposition, may be so expressed as to confine the power to acts inter vivos (*h*), or to give the donee an absolute interest (*i*).

In *Re Bolton Estates* (*j*), it was held that a power to create a jointure conferred by a private act of 1535, was exerciseable by a testamentary instrument, although the power of disposing of land by will did not exist before 1540. Power created before Statute of Devises, 1540.

If a power is exerciseable by any writing executed by the donee in the presence of two witnesses, and he executes a document of a testamentary character, this is "a writing in the nature of a will in exercise of a power" within the definition contained in sect. 1 of the Wills Act, and must, therefore, comply with the requirements of sect. 9 (*k*). Writing in the nature of a will.

In *Re Broad* (*l*), it was held that if a power is exerciseable by will, or by "any writing purporting to be a will," it may be exercised by a document purporting to be the will of the donee and signed by him, although insufficiently attested and, therefore, incapable of probate. Writing purporting to be a will.

Where a testator, after giving his wife a life interest in his property, continued as follows: "And I devise and empower her by her will or in her lifetime to dispose of my estate in accordance with my wishes verbally expressed by me to her," it was held that the clause purporting to give the wife a power of disposition was void for uncertainty (*m*). Uncertainty.

(*f*) *Doe v. Thorley*, 10 East, 438; *Walsh v. Wallinger*, 2 R. & M. 78; *Paul v. Hewetson*, 2 My. & K. 434; *Moore v. Ffolliot*, 19 L. R. Ir. 499. See *Cruwys v. Colman*, 9 Ves. 319.

(*g*) *Archibald v. Wright*, 9 Sim. 161; *Re Flowers*, 55 L. J. Ch. 200. According to *Re Waddington*, [1897] W. N. 6, a mere restraint on anticipation does not have this effect.

(*h*) *Re Thomson's Estate*, 14 Ch. D. 263, and other cases cited in Chap. XIV.

(*i*) *Re Jones*, [1898] 1 Ch. 438, and other cases cited in Chap. XXXIV.

(*j*) [1903] 2 Ch. 461.

(*k*) *Re Barnett*, [1908] 1 Ch. 402; *Bainbridge v. Smith*, 8 Sim. 86; *Re Daly's Settlement*, 25 Bea. 456.

(*l*) *Re Broad*, [1901] 2 Ch. 86. In *Gullan v. Grove*, 26 Bea. 64, Romilly, M.R., refused to treat a portion of a duly signed and attested will (the other

portion having been destroyed) as a writing "purporting to be a will." And see *Re Edmonstone*, 49 W. R. 555, where a testamentary document insufficiently attested, and not referring to the power or the property subject to it, was held not to be a "writing duly executed." In *Re Barnett*, supra, some doubt seems to have been felt by Warrington, J., whether the decision in *Re Broad* was correct, having regard to the definition of "will" in s. 1 of the Wills Act.

(*m*) *Re Hetley*, [1902] 2 Ch. 866. Compare *Buckle v. Bristow*, 10 Jur. N. S. 1005. It is hardly necessary to say that a power to appoint to A. or B. is not open to objection on the score of uncertainty: see *Longmore v. Broom*, 7 Ves. 124, and other cases cited in Chaps. XIV. and XVIII.

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A general power will not be cut down to a special power except by express words (*m*).

Contingent power.

III.—When and by whom exerciseable.—The general principle is that a power given to a designated person, to be exercised upon a contingency, can be well executed before the contingency happens. Thus if a woman has a power exerciseable by will in the event of her marriage, she can exercise it before the marriage (*n*).

Power given to contingent person.

A general power given to the survivor of two persons can be well exercised, during their joint lives, by the will of the one who turns out to be the survivor (*o*). And the same principle would appear to apply to any general power given to a contingent person who eventually proves to be the person entitled to exercise it (*p*).

A different rule seems to apply to special powers. Thus in *Re Moir's Trusts* (*q*), a special power was given to A. and B., exerciseable by deed during their joint lives, and in default of such appointment by the survivor by deed or will: it was held by Bacon, V.-C., that it was not well executed by the will, made during the joint lives, of the actual survivor.

A power exerciseable by persons answering a particular description at a certain time, cannot be exercised by persons who answer that description at a different time (*r*).

Where contingency does not happen.

It is hardly necessary to say that if a power is limited to arise upon a contingent event which does not happen, the power is not exerciseable. Thus, if property is settled upon such trusts as a married woman shall, in the event of her predeceasing her husband, by will appoint, the power is not well exercised by a will made during coverture, if she survives him (*s*). But if the words of contingency are ambiguous or obscure, regard will be paid to the general scheme of the instrument creating the power (*t*).

(*m*) *Mackinley v. Sison*, 8 Sim. 561.

(*n*) *Logan v. Bell*, 1 C. B. 872, and other cases cited Farwell, 144.

(*o*) *Thomas v. Jones*, 1 D. J. & S. 63, 2 J. & H. 475. The decisions in *MacAdam v. Logan*, 3 Br. C. C. 310, and *Doe v. Tomkinson*, 2 M. & S. 165, seem to have been rendered obsolete by the Wills Act.

(*p*) Farwell, 155. It does not seem to have been decided whether a general power, expressly made exerciseable by the survivor of two persons after the death of the other, can be exercised by a will made during their joint lives by the person who eventually survives.

(*q*) 46 L. T. 723. In *Cave v. Cave*,

8 D. M. & G. 131, and *Re Blackburn*, 43 Ch. D. 75, the power was expressly made exerciseable after the death of one.

(*r*) *Valentine v. Fitzsimons*, [1894] 1 Ir. R. 93.

(*s*) *Price v. Parker*, 16 Sim. 198; *Trimmell v. Fell*, 16 Bea. 537; *Willock v. Noble*, L. R., 7 H. L. 580; *Re Cuno*, 43 Ch. D. 12. Compare *Van Grutten v. Foxwell*, 84 L. T. 545. As to the wills of married women disposing of their separate estate, see ante, Chap. III.

(*t*) *Wilkinson v. Thornhill*, 61 L. T. 362. As to the doctrine of *Avelyn v. Ward*, see Chaps. XXXVII and LVIII.

A power limited to arise upon a future or contingent event must be distinguished from a power which takes effect upon a future event, but is presently exerciseable. The former, not being exerciseable before the event upon which it is limited to arise, happens, is, it seems, void for remoteness, unless the event is such that it must happen within the legal period (*u*).

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Future event.

In *Blight v. Hartnoll* (*v*), Fry, J., said: "I think that when a power of appointment amongst a class of persons is given, the appointor must know the class—must be able to ascertain the class amongst whom he or she is to divide the property. It is a discretionary power to be exercised with reference to the respective circumstances and merits of the persons who are to take, and that cannot be exercised where the persons are not known." But this statement was not necessary for the decision of the case, and is generally considered to be incorrect (*w*).

Whether objects of special power must be known to donee.

A power to appoint among several objects is not necessarily defeated by the death of any of them (*x*).

Death of one of several objects.

A power to appoint by will to any "existing member of my family" means a member living at the date of the will creating the power (*y*).

Where under a settlement the husband's life interest is determinable on bankruptcy, it is a question of construction whether this puts an end to his power of appointment (*yy*).

If a power is exerciseable by will, and the donor requires that it shall be exercised within a certain period, the question arises whether he merely means that the will shall be made within the period, or whether he means that the will must become operative by the death of the donee within the period. As a general rule, it seems to be sufficient that the will should be made within the period (*z*), but it may appear from the context or general scheme of the instrument creating the power, that the donor requires the will to become operative by the death of the donee during the prescribed period (*zz*).

Power to be exercised within a certain period.

(*u*) *Marsden on Perp.* 238. Compare *Goodier v. Johnson*, 18 Ch. D. 441; *Goodier v. Edmunds*, [1893] 3 Ch. 455; *Blight v. Hartnoll*, 19 Ch. D. 294; and the other cases cited ante, pp. 307 seq.

(*v*) 19 Ch. D. 294.

(*w*) See *Farwell*, 146. As to the point decided in the case, see p. 310.

(*x*) See post, Chap. XLIV.

(*y*) *Sinnott v. Walsh*, 5 L. R. Ir. 27.

(*yy*) *Haswell v. Haswell*, 2 D. F. & J. 456; *Wickham v. Wing*, 2 H. & M.

436; *Potts v. Britton*, L. R., 11 Eq. 433; *Re Aylwin*, L. R., 16 Eq. 585; *Re Stone's Estate*, Ir. R., 3 Eq. 621, 18 W. R. 222.

(*z*) *Re Illingworth*, [1909] 2 Ch. 297, where the cases of *Burnham v. Bennett*, 2 Coll. 254, 1 De G. & S. 513, and *Cave v. Cave*, 8 D. M. & G. 131, are discussed. In *Burnham v. Bennett* the instrument appears to have been a fabrication.

(*zz*) *Cooper v. Martin*, L. R., 3 Ch. 47; *Potts v. Britton*, L. R., 11 Eq. 433.

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Wills Act, ..
s. 10.

IV.—Formalities to be observed.—In the case of powers which are expressly made exercisable by will (*a*), regard must be had to sect. 10 of the Wills Act, which enacts that : “ No appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required ; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.”

Accordingly, a testamentary power of appointment created before the Wills Act, is properly exercised by a will executed with the formalities required by the act (*b*).

This enactment does not prevent the donor of the power from imposing conditions or restrictions not relating to the formalities of execution. Thus, a special power which is exercisable by the survivor of two persons after the death of the other, cannot be exercised by one during their joint lives, even although that one survives (*c*). So a power made exercisable by will expressly referring to the power, cannot be exercised in any other way (*d*).

The Wills Act provides (sect. 1) that in the construction of the act the word “ will ” shall extend to “ an appointment by will or by writing in the nature of a will in exercise of a power.” In *Re Barnett* (*e*), a fund was settled by A. upon certain trusts, subject to a proviso that it should be lawful for A., by any deed or deeds, writing or writings, with or without power of revocation, to be by her duly executed in the presence of two witnesses, to revoke any of the provisions of the settlement and to appoint other trusts in their place. She signed a document by which she did not in terms revoke any of the provisions of the settlement, but she dealt with the settled fund, and with other property, and directed that her funeral expenses should be paid. This document was signed by her in the presence of two witnesses, but as her signature was not placed at the foot or end thereof, it could not be proved as a will. It was held that this was a writing in the nature of a will in exercise

(*a*) As to powers exercisable by “ writing,” &c., see ante, p. 794.

(*b*) *Hubbard v. Lees*, L. R., 1 Ex. 255 ; *Freme v. Clement*, 18 Ch. D. 499, post, p. 859.

(*c*) *Cave v. Cave*, 8 D. M. & G. 131 ; *Re Blackburn*, 43 Ch. D. 75, post, p. 835.

(*d*) *Phillips v. Cayley*, 43 Ch. D. 222,

post, p. 809. This statement is now only accurate so far as relates to special powers : see *Re Waterhouse*, and other cases cited, post p. 805.

(*e*) [1908] 1 Ch. 402. As to *Re Broad*, [1901] 2 Ch. 86 (“ writing in the nature of or purporting to be a will ”), see ante, p. 795.

of a power, and not being executed in accordance with sect. 9 of the act; it was invalid as an exercise of the power. If the document had been confined to an immediate disposition of the settled fund, it would apparently have been valid.

Aiding defective execution.

Before the Wills Act, the Court would in certain cases and in favour of certain persons, especially the wife and children (or adopted children) of a testator, aid the defective execution of a power by his will. Thus, if a power required to be exercised by a will signed in the presence of two witnesses, and the testator, by a will unattested, or only attested by one witness, exercised it in favour of his children, or of one or more of his children, equity would, as a general rule, hold it to be properly exercised (*f*). But since the Wills Act, a power which requires to be exercised by will cannot be exercised by a will not complying with the statutory requirements, and the Court has no jurisdiction to aid an execution which is defective in this respect (*g*), unless the testator is domiciled abroad, and special formalities are prescribed (*h*).

The old doctrine, however, applies to powers which are exercisable by deed. Thus in *Bruce v. Bruce* (*i*), a person who had a power of appointment by deed exercised it by will, duly executed, in favour of her children, and it was held to be a good execution of the power. But in such a case the will must be executed in accordance with the requirements of the Wills Act, by reason of the definition of "will" contained in the act (*j*).

Operation of testamentary appointment

There was formerly some question as to the proper functions of the Court of Probate and the Court of Construction with regard to the operation of a testamentary appointment, and it was at one time thought that the Judicature Acts would make a difference in the practice (*k*). This does not appear to have been the case, and the practice as now settled may be stated as follows :—

(*f*) *Wilkes v. Holmes*, 9 Mod. 485; *Lucena v. Lucena*, 5 Bea. 249; *Hume v. Rundell*, 6 Madd. 331; *Morse v. Martin*, 34 Bea. 500 (as to this case, see *Re Walker*, [1908] 1 Ch. 560).

(*g*) *Re Kirwan's Trusts*, 25 Ch. D. 373.

(*h*) *Re Walker*, [1908] 1 Ch. 560.

(*i*) L. R., 11 Eq. 371; *Sneed v. Sneed*, Amb. 64; *Cooper v. Martin*, L. R., 3 Ch. 47.

(*j*) See *Re Barnett*, [1908] 1 Ch. 402, *supra*. As to the case of *Kennard v. Kennard*, L. R., 8 Ch. 227, see *Re*

Kirwan's Trusts, 25 Ch. D. 373.

(*k*) See the remarks in the 4th edition of this work (p. 29 seq.), where the following cases are cited: *Draper v. Hitch*, 1 Hagg. 674; *Stevens v. Bagwell*, 15 Ves. 139; *Barnes v. Vincent*, 5 Moo. P. C. C. 201, 10 Jur. 233, 4 No. Cas. Supp. xxxi.; *Tatnall v. Hankey*, 2 Moo. P. C. C. 342; *De Chatelain v. De Pontigny*, 1 Sw. & Tr. 411, 29 L. J., Prob. 147; *Paglar v. Tongue*, L. R., 1 P. & D. 158; *In b. Fenwick*, ib. 319; *In b. Munday*, 1 Curt. 590; *Douglas v. Cooper*, 3 My. & K. 378; *Ward v. Ward*,

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- Probate, when necessary. (1) A testamentary appointment in exercise of a power over personal estate is inoperative unless duly proved or recognized by the Court of Probate as a will (*l*). Under the old law, a will merely exercising a power over real estate did not require to be proved, and in the case of a married woman was not entitled to be proved (*m*). But since the Married Women's Property Act, 1882, the will of a married woman can, it seems, be proved as a matter of course in every case. And where a person makes a will in exercise of a general power over real estate, and dies after 1897, it seems that it must be proved (*n*).
- Effect of probate. (2) Grant of probate (*o*) is conclusive as to the testamentary character of the document proved. It only remains for the Court of Construction to determine whether the necessary formalities have been complied with (*p*), and whether in other respects the power has been duly exercised (*q*).
- English domicil. (3) In the case of a will executed in accordance with English law, by a person domiciled in England, the probate is sufficient evidence of the due execution of the power, so far as formalities are concerned (*r*).
- Lord Kingsdown's Act. (4) A will admitted to probate under Lord Kingsdown's Act is not a good exercise of a testamentary power of appointment, unless executed in accordance with sect. 10 of the Wills Act (*s*).
- Will in English form by testator domiciled abroad. (5) A testamentary document exercising a power of appointment, executed in accordance with the requirements of English law by a person domiciled abroad, is recognised by the English Courts as a testamentary instrument, although not valid as a will according to the law of the appointor's domicil. The modern practice is not to grant probate, but letters of administration with the will annexed. If the appointor is a married woman, the grant is limited to the appointed property, unless the husband consents to a general grant being made (*t*).

11 Beav. 377; *D'Huart v. Harkness*, 34 Beav. 324; *In b. Hallyburton*, L. R., 1 P. & D. 90; *In b. Tharp*, 3 P. D. 76.

(*l*) *Ross v. Ewer*, 3 Atk. 160. As to probate in British colonies and possessions abroad, see *Re Tootal's Trusts*, 23 Ch. D. 532; *Re Vallance*, 24 Ch. D. 177; *Colonial Probates Act*, 1892.

(*m*) *In b. Tomlinson*, 6 P. D. 209; *In b. Hornbuckle*, 15 P. D. 149.

(*n*) Land Transfer Act, 1897.

(*o*) This includes a grant of administration with the will annexed: see *Re Price*, [1900] 1 Ch. 442.

(*p*) *Douglas v. Cooper*, 3 Myl. & K.

378; *D'Huart v. Harkness*, 34 Bea. 324.

(*q*) *Paglar v. Tongue*, L. R., 1 P. & D. 158.

(*r*) See *Ward v. Ward*, 11 Bea. 377, a case under the old law.

(*s*) *Re Kirwan's Trusts*, 25 Ch. D. 373; *Hummel v. Hummel*, [1898] 1 Ch. 642. See the remarks on these decisions in *Re Price*, [1900] 1 Ch. 442.

(*t*) *In b. Alexander*, 29 L. J. P. 93; *In b. Hallyburton*, L. R., 1 P. & D. 90; *In b. Huber*, [1896] P. 209; *In b. Tréfond*, [1899] P. 247; *In b. Vannini*, [1901] P. 330; *Re Baker's Settlement Trusts*, [1908] W. N. 161; *Murphy v. Deichler*, [1909] A. C. 446.

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Will in foreign form.

(6) Where a power is exerciseable by will, and the donee is domiciled abroad, a will executed by him in accordance with the law of his domicile and recognized as a valid will by the Court of Probate in England, although not executed in accordance with the formalities required by English law, operates as an exercise of the power if an intention to exercise it appears by the will, and if no special formalities are prescribed by the instrument creating the power (*u*).

Defective execution.

(7) In such a case as that last supposed, if special formalities are prescribed by the instrument creating the power, and they are not observed by the testator, the defective execution may be aided by the Court in accordance with its general principles (*v*).

Testamentary capacity.

(8) In a case falling within (5) or (6), the appointment takes effect according to English law, and not according to the law of the appointor's domicile. From this follow two corollaries: first, the appointor may, by exercising the power, dispose of the property in a way not permitted by the law of his domicile (*w*); and secondly, a general devise or bequest contained in the will operates as an exercise of a general power under sect. 27 of the Wills Act, if the appointor shews an intention that his will should take effect according to English law, but not otherwise (*x*).

Where special formalities must be observed.

(9) In a case where the provisions of the Wills Act do not apply, if special formalities are required by the instrument creating the power, and the donee is domiciled abroad, it is not sufficient that the instrument purporting to exercise the power should be a will according to the law of the domicile; it must also comply with the terms of the power (*y*).

Land.

(10) According to *Murray v. Champernowne* (*z*), a will made in exercise of a power to appoint land must be executed in accordance with the formalities required by the *lex loci*, and a will so executed is a valid appointment, although the will itself is invalid by the law of the testator's domicile. In the same case, it was held that where a person has a power of appointing the proceeds of sale of land subject to a trust for sale, but not sold, the power is to be

Trust for sale.

(*u*) *D'Huart v. Harkness*, 34 Bea. 324; *Re Harman*, [1894] 3 Ch. 607; *Re Price*, [1900] 1 Ch. 442; *Re Walker*, [1908] 1 Ch. 560.

(*v*) *Re Walker*, [1908] 1 Ch. 560.

(*w*) *Re Hernando*, 27 Ch. D. 284; *Pouey v. Hordern*, [1900] 1 Ch. 492; *Re Bald*, 76 L. T. 462; *Re Mégret*, [1901] 1 Ch. 547.

(*x*) *Re Price*, *supra*; *Re D'Este's*

Settlement Trusts, [1903] 1 Ch. 898; *Re Scholefield*, [1905] 2 Ch. 408, [1907] 1 Ch. 664; *Re Baker's Settlement Trusts*, [1908] W. N. 161.

(*y*) *Barretto v. Young*, [1900] 2 Ch. 339.

(*z*) [1901] 2 Ir. R. 232. Compare *Bank of Africa v. Cohen*, [1909] 2 Ch. 129.

treated as a power to appoint immoveable property within this doctrine (*y*).

Express
or implied.

Power de-
stroyed and
replaced by
new one.

Misdescrip-
tion of
property.

Implied
exercise
of power.

V.—General Powers.—(1) *Execution by Specific Disposition.*—

An intention to execute a general power may be express or implied.

In *Thompson v. Simpson* (*z*), A. had a general power of appointment by deed or will: she made a will expressly exercising the power; she subsequently executed a deed in exercise of the power, by which she reserved to herself a general power of appointment by will: it was held that the will was not an exercise of the power, and that the fund went as in default of appointment.

The fact that a testator misdescribes property which he purports to appoint, does not necessarily prevent the appointment from taking effect. Thus, if he has a power of appointment over the proceeds of sale of Blackacre, and by his will appoints Blackacre itself to X., this will *primâ facie* operate as a good appointment of the proceeds of sale (*a*). And if a person has a power of appointing a limited interest in a certain property, and by his will appoints that property by name to X., this may operate as an exercise of his power, unless he has some other interest in the property which will satisfy the terms of the appointment (*b*).

In the absence of an express exercise, as to which no question usually arises (*c*), an intention to exercise a power may be inferred from a reference to the power itself in a preceding part of the will (*d*). Thus in *Walker v. Laxton* (*e*), a testatrix who had a power of appointment over a sum of 2,200*l.* made a will in which she recited the power and proceeded to "give and bequeath" to various persons, not objects of the power, legacies amounting in all to 2,200*l.*: it was

(*y*) Ante, p. 3, note (*g*). The question is a difficult one, but it is submitted that the decision is correct, for the reason that in cases of conflict of laws the true nature of the property should be regarded. Otherwise English leaseholds would be subject to the law of the domicile. The distinction is not between real and personal property, but between moveable and immoveable property. It is observable that Andrew, J., relied to some extent on a note in the first edition of Dicey's Conflict of Laws; in the second edition this note does not appear and there are other alterations tending to shew that the learned author thinks the point more doubtful than he at first supposed.

(*z*) 50 L. J. Ch. 461.

(*a*) Per Cairns, L.J., in *Cooper v. Martin*, L. R., 3 Ch. 47. See this and other cases cited, *infra*, p. 840.

(*b*) See *Farmer v. Bradford*, *infra*.

(*c*) See *Davies v. Fisher*, 5 Bea. 201. As to the requirement that the appointment shall refer to the power, see the cases of *Re Waterhouse* and *Re Lane*, *post*.

(*d*) As to the principles which ought to guide the Court in inferring an intention of this nature, see *Denn v. Roake*, 5 Barn. & C. 720; *Bennett v. Aburrow*, 8 Ves. 609; *Cunninghame v. Anstruther*, L. R., 2 Sc. & D. 223.

(*e*) 1 Y. & J. 557.

held, notwithstanding the absence of any words connecting the legacies with the power, that the gifts were intended to be appointments, and therefore could not take effect as legacies.

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Again, an intention to exercise a general power of appointment may be inferred from a reference to the specific property subject to the power (*d*). Thus, where a testatrix who had a power of appointment over certain personal property, including a sum of stock, made a will bequeathing pecuniary legacies, followed by a bequest of "all the rest and residue of my bank stock, goods, &c., and all other property, &c., excepting 50*l*. of my bank stock," this was held to denote an intention to include in the general bequest the residue of the stock which was subject to the power, and to charge it with the legacies (*e*). Here, the expression, "my bank stock," joined with the other terms in the will, was *prima facie* evidence that the testator was pointing to a specific existing fund; parol evidence was therefore admissible, to shew whether she had any such fund of her own to which the bequest was applicable; and this being proved in the negative, the decision was inevitable. And it may be stated as a general rule, that where the bequest is on the face of the will thus specific, and it is ascertained by parol evidence that the testator has no other such fund, the power will (other things attended to) be well executed (*f*). Beyond this, of course, parol evidence cannot be adduced to influence the construction in any of these cases (*g*).

Parol evidence.

But the mere bequest of a sum of money, corresponding in amount to that which is the subject of the power, raises no such inference, though the testator, when he made his will, was not possessed of any other property affording a fund for payment; as it is possible that he may have calculated on the future acquisition of property adequate to satisfy the legacy (*h*). For the same reason, the

(*d*) See *Scrope's Case*, 10 Rep. 143*b*. *Lounds v. Lounds*, 1 Y. & J. 445, seems to have been decided on this ground (see *Davies v. Thorns*, 3 De G. & S. 347), for at that time it was not settled that parol evidence of the state of the testator's property was admissible.

(*e*) *Walker v. Mackie*, 4 Russ. 76. It was also decided that leaseholds subject to the same power passed by the words "other property." This part of the decision was questioned by Pepys, M.R., *Hughes v. Turner*, 3 My. & K. 697; but see *Standen v. Macnab*, 6 B. P. C. Toml. 193, decreeing the personal estate to pass with the real; and

see Sugd. Pow. 321, 8th edition; *Harvey v. Stracey*, 1 Drew. 73.

(*f*) *Innes v. Sayer* (*Sayer v. Sayer*), 7 Hare, 381, 3 Mac. & G. 606; *Horwood v. Griffith*, 4 D. M. & G. 708; *Tredennick v. Tredennick*, [1900] 1 Ir. 354. Compare *Rooke v. Rooke*, 2 Dr. & Sm. 38, and the other decisions with regard to special powers, post.

(*g*) *Standen v. Standen*, 2 Ves. jun. 589. And as to the subject generally, see further Sugd. Pow. 8th edition, 289, 2 Chance on Powers, 83.

(*h*) *Jones v. Trucker*, 2 Mer. 533; *Davies v. Thorns*, 3 De G. & S. 347, explaining *Forbes v. Ball*, 3 Mer. 437.

CHAP. XXIII. mention of "money in the funds" in a general bequest of personal estate, and the fact of the testator having no stock of his own at the date of the will, did not, under the old law, cause the bequest to operate as an appointment of stock over which the testator had a general power of disposition (i).

Where testator has interest as well as power.

In *Farmer v. Bradford* (j), Blackacre was settled, subject to a term of 500 years, to such uses as A. should appoint, and in default of appointment to him in fee; the trusts of the term were to raise £1000, over which, in the event, A. had a general power of appointment, with a trust, in default, for other persons; A. by his will devised Blackacre to B.: it was held that this devise took effect out of A.'s interest, and did not operate as an exercise of his power to appoint the £1000, which therefore went in default of appointment. If he had had no interest in Blackacre except the £1,000, his devise of the estate might have operated as an execution of his power.

Power of revocation.

The general principle above stated applies where the power is one of revocation as well as appointment. Thus, if a man settles land in Dale, reserving a power of revocation and new appointment by will, and devises all his lands in Dale to J. S., having no other lands in Dale, this is a good exercise of the power (k). So if he makes a will by which he disposes of the property upon trusts which vary in some respects from those declared by the settlement, this *prima facie* operates as a revocation of the settlement pro tanto (l).

Where will would otherwise be inoperative.

Where a testator affects to deal with some property in general terms, not defining it, under such circumstances that the will cannot have effect except upon the property comprised in the power, this may shew an intention to exercise the power (m).

Republication.

As to the effect of republication, see post, p. 842.

Interest.

If a testator, having a general power over a fund, expressly appoints a particular sum out of that fund to A., this is a specific gift, and A. is entitled to interest on it from the death of the testator (n).

"Residue."

The construction of the word "residue," when a testator

(i) *Webb v. Honnor*, 1 J. & W. 352. Compare *Re Huddleston*, [1894] 3 Ch. 595, and the other decisions with regard to special powers, post, p. 833.

(j) 3 Russ. 354.

(k) *Deg v. Deg*, 2 P. W. 412.

(l) *Quin v. Armstrong*, Ir. R., 11 Eq. 161.

(m) Per Wood, V.-C., in *Brodrick v. Brown*, 1 K. & J. 328; *Bennett v. Aburrow*, 8 Ves. 609.

(n) *Re Marten*, [1901] 1 Ch. 370.

appoints part of a fund to A. and the residue to B., is discussed later (j).

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General
reference
to powers.

Independently of sect. 27 of the Wills Act (k), it is clear that if a testator disposes of "all property over which I have any power of disposition by will," this operates as an exercise of a general power of appointment by will. It also operates as an exercise of a general power conferred on the testator after the date of the will (l). Such a clause is often inserted in wills as a common form, and in most cases it does no harm. But it sometimes happens that a settlor who gives a person a limited interest in property, with a gift in remainder, wishes to confer on him a power to appoint the whole or part of the property in any way he pleases, so as wholly or partially to defeat the interests of the remainder-men, but desires that the power shall not be exercised either by the operation of sect. 27 or by the common clause above referred to: in other words, he does not wish the interests of the remainder-men to be defeated, except by a deliberate exercise of the donee's discretion. In such cases it is usual to insert in the power words requiring that it shall only be exercised by a will "expressly referring to this power," or "expressly purporting to exercise this power," or the like, the object, of course, being to require the testator to refer to the power in such a way as to shew that he had it in his mind. On this supposition a will disposing of "all property over which I have any power of disposition by will" would not comply with such a requirement. However, it has been held that it does (m). It would not be respectful to question the accuracy of these decisions, but they certainly defeated the intention of the donor of the power in each case.

(2) *Execution by a General Devise or Bequest.*—(a) *Old Law.*— Realty.

Before the Wills Act, a general devise or bequest did not operate as an execution of a general power of appointment over real estate, unless an intention to exercise the power could be inferred from the language of the will and the testator's circumstances (n). Thus, if a testator, by a will made before and not

(j) Page 859. See *Re Bringloe*, 26 L. T. 58, stated post, p. 860, n. (s).

(k) Post, p. 808.

(l) *Re Old's Trusts*, 54 L. T. 677 ("property over which I have any disposing power"). See *Patch v. Shore*, 2 Dr. & S. 589.

(m) *Re Waterhouse*, 98 L. T. 30; *Re Rolt*, [1908] W. N. 76; *Re Lane*, [1908] 2 Ch. 581. Compare the cases on s. 27 of the Wills Act, post, p. 809.

(n) See *Jones v. Curry*, 1 Swanst. 66; Sugden on Powers, 342.

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republished on or since the 1st January, 1838, devised all his hereditaments or real estate, and it appeared that he had no real estate at the time of its execution, but that he had a general testamentary power over real estate, the devise operated as an appointment under the power (o). And where real estate was settled to the separate use of a married woman in fee, with a testamentary power of appointment, a general devise by her took effect as an appointment under the power (p).

On the other hand, if the testator had real estate on which the will could operate, it would be presumed that the devise was made with a view to such property, and not as an exercise of the power (q). On the same principle, where a testator who had freehold property, and a power over freeholds and copyholds, devised his freehold and copyhold estates, the devise operated as an execution of the power with respect to the copyholds (there being no other property of this description on which it could operate), but not as to the freeholds (r). So, if a testator devised all his lands in the parishes of A. and B., having lands in A. only, and a power over lands in A. and also in B., the devise would exercise the power over the lands in B., but not the power over those in A. (s).

Personalty.

As Mr. Jarman points out (t): "The ground on which a general devise has been held to operate as an appointment of real estate, it is obvious, does not apply to personalty (u); for as a will of personal estate comprises whatever property of this description a testator dies possessed of, without regard to the period of its acquisition, it is not necessarily to be presumed, that the testator had any specific property in his view when he made it; and, therefore, even if it should happen that the testator had no other disposable property at the time of making his will or at

(o) *Att.-Gen. v. Vigor*, 8 Ves. 256. See also *Standen v. Standen*, 2 Ves. jun. 589, 6 Bro. P. C. 193, where the fact that the testatrix had no real estate seems to have been the principal reason for holding that a residuary devise and bequest passed both real and personal estate over which she had a power of appointment. In all these cases the onus of proving that the testator had no real estate upon which the devise could operate, lay on the person claiming as appointee; *Doe d. Caldecott v. Johnson*, 7 M. & Gr. 1047.

(p) *Curteis v. Kenrick*, 3 M. & Wel. 461, 9 Sim. 443; *Churchill v. Dibben*, 9 Sim. 447, n.

(q) *Sir Edward Clere's Case*, 6 Co.

176; *Ex parte Caswall*, 1 Atk. 559; *Hoste v. Blackman*, 6 Madd. 190.

(r) *Lewis v. Llewellyn*, T. & R. 104.

(s) *Napier v. Napier*, 1 Sim. 28; *Roake v. Denn*, 4 Bli. N. S. 1. See also *Doe v. Roake*, 2 Bing. 497; *Denn v. Roake*, 5 B. & Cr. 720.

(t) First ed. p. 630.

(u) *Jones v. Curry*, 1 Sw. 66. See, however, *Standen v. Standen*, *supra*. "Leaseholds, of course, are undistinguishable from other personal estate in this respect, though in some cases they have most inconsiderately been treated as governed by the same principle as devises of freehold estates. See *Grant v. Lynam*, 4 Russ. 292." (Note by Mr. Jarman.)

his death, than the subject of the power (*v*), or that its exclusion from the will, will leave nothing for the residuary clause to operate upon, or will leave the personal estate inadequate to the payment of pecuniary legacies, still the will does not operate as an appointment under the power (*w*). And the circumstance that the donee, being a married woman, has no general testamentary capacity (but who, it is to be remembered, may have separate estate, disposable by will), has been held not to constitute a ground for varying the construction" (*x*). But it must be observed that in all the cases where it was so held it appeared that in fact the married woman, at the time of making her will, had separate estate which would or might pass by the general bequest; and it seems that unless this was proved affirmatively the bequest operated as an appointment (*y*). Under the Married Women's Property Act, 1882, a married woman has a general testamentary capacity in respect of her separate property, and consequently the doctrine laid down in *Shelford v. Acland* has ceased to be of importance (*z*).

Distinction where the testatrix is a married woman.

A general gift of "all my real and personal estate and effects whatsoever whereof I have power to dispose," or the like, was generally taken not as a mere superfluous mention of the ordinary powers which, as owner, the testator had of disposing of his own property, but as a reference to any power which he might possess of appointing property not strictly his own (*a*). Most of the cases involving this doctrine relate to special powers, and will be found in a subsequent section of this chapter.

Reference to testator's own property may include property subject to power.

The doctrine was applied strictly. Thus, a codicil professing to be made in exercise of a certain power "and all other powers," but not referring to property over which the testatrix had a general power of appointment, created since the date of her will, was held not to make the property pass under a general appointment contained in the will (*b*). A general devise of all the lands which the testator had power to dispose of was held not to extend to moneys to arise from the sale of lands, over which moneys the testator had

(*v*) *Buckland v. Barton*, 2 H. Bl. 136; *Langham v. Nenny*, 3 Ves. 467; *Croft v. Slee*, 4 Ves. 60; *Bradley v. Westcott*, 13 Ves. 445. As to the effect of a specific reference to a particular kind of property in a residuary gift, see *Webb v. Honnor*, *supra*, p. 804, n. (*i*).

(*w*) *Andrews v. Emmot*, 2 B. C. C. 297; *Nannock v. Horton*, 7 Ves. 391; *Bennett v. Aburrow*, 8 Ves. 609.

(*x*) *Lovell v. Knight*, 3 Sim. 275; *Lempriere v. Valpy*, 5 Sim. 108; *Evans*

v. Evans, 23 Beav. 1.

(*y*) *Shelford v. Acland*, 23 Beav. 10 (which was decided on this ground, though the will was since 1837, and was therefore a good appointment under 1 Vict. c. 26, s. 27); *Att.-Gen. v. Wilkinson*, L. R., 2 Eq. 816.

(*z*) See *Re Herdman's Trusts*, 31 L. R. Ir. 87, where the power was special.

(*a*) *Lowe v. Pennington*, 10 L. J. Ch. 83.

(*b*) *Jowett v. Board*, 16 Sim. 352.

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merely a power of appointment (c). And a general devise or bequest, expressed to be made in exercise of all powers enabling the testator, did not operate as an execution of a power of revocation and new appointment, if there was other property to which the devise or bequest could apply (d).

In *Maddison v. Andrew* (e), the testator had made a voluntary settlement of land by which he reserved to himself power to "charge, limit, or appoint" any sums not exceeding 1,000*l.*; he made a will by which he charged all his estate, real and personal, with his debts and legacies: it was held that this was a good exercise of the power.

Reference to
part of fund
insufficient.

Where a testator had a power of appointment over a fund or property, the fact that he disposed of a specific part of it as his own property did not make the residuary gift in his will operate as an exercise of the power in respect of the remainder (f).

But where a testator declared his intention of disposing of a sum of stock over which he had a power of appointment, and then gave various parts of it, but not the whole, to different people, it was held that the balance was effectively appointed by a bequest of "the residue of my personal estate" (g).

What
amounts
to an appoint-
ment in wills
made or
republished
since 1837.

(b) *Under Wills Act*.—The preceding doctrines, however, do not apply to wills made or republished since 1837, the Wills Act having provided (sect. 27) that a general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner (h),

(c) *Adams v. Austen*, 3 Russ. 461.

(d) *Pomfret v. Perring*, 5 D. M. & G. 775, *infra*.

(e) 1 Ves. sen. 58.

(f) *Hughes v. Turner*, 3 My & K. 666, where the facts were in dispute. Compare *Elliott v. Elliott*, 15 Sim. 321, and *Butler v. Gray*, L. R., 5 Ch. 26, post, p. 827.

(g) *Re Comber's Trust*, 14 W. R. 172. If the power had been a special one, a more strict construction would have been applied. See *Butler v. Gray*, post, p. 827.

(h) "The language of the section is addressed to bequests of a general description, not to bequests of particular property," per Fry, J., *Re Greaves's Settlement Trusts*, 23 Ch. D. 318. Thus a bequest of "securities for money" will pass a sum of Consols over which the testator has a general power of appointment (*Turner v. Turner*, 21 L. J. Ch. 843), and a bequest of "all stock, shares, and securities which I possess or to which I am entitled" will pass railway and colonial stocks which the testator is not possessed of or entitled to,

shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

A power is not the less general within the meaning of this section because it is to be executed by will only, and not by deed (*i*). But a power is not general within the meaning of this section if the instrument creating the power prescribes conditions as to the exercise of the power (not being conditions as to the mode of execution), and in such case a general devise or bequest will not, under sect. 27, be a good execution of the power unless the conditions are complied with (*j*). Thus, where a settlement gave to the settlor a general power of appointment over a sum of stock to be exercised by will or codicil expressly referring to the power, it was held by the Court of Appeal that a general bequest of his personal estate, not referring to the power, did not operate to pass the stock (*k*). So a power to appoint in favour of any persons except a specified person or class of persons, is not a general power within sect. 27 (*l*). But it seems that a power to appoint in favour of any persons except A., B., and C. may become a general power by the death of A., B., and C. before the power is exercised (*m*). And a power given to a woman by her marriage settlement to appoint to any "person or persons, child or children," is a general power (*mm*).

What powers
are general
within s. 27.

A general bequest will operate under sect. 27 as an exercise of a power to appoint a sum charged on land, even where the testator also has a power of appointing the land itself, which he exercises by the same will (*n*).

Sum charged
on land.

but over which he has a general power of appointment (*Re Jacob*, [1907] 1 Ch. 445). Any words which would operate as a residuary gift (such as, "I constitute A. my residuary legatee") will operate as an execution of a power under this section: *Re Spooner's Trust*, 2 Sim. N. S. 129.

(*i*) *Hawthorn v. Shedden*, 3 Sm. & Gif. 293; *Lefevre v. Freeland*, 24 Beav. 403; *Re Powell's Trusts*, 39 L. J. Ch. 188.

(*j*) *Re Phillips*, 41 Ch. D. 417; *Re Tarrant's Trust*, 58 L. J. Ch. 780; *Re Davies*, [1892] 3 Ch. 63.

(*k*) *Phillips v. Cayley*, 43 Ch. D. 222, overruling *Re Marsh*, 38 Ch. D. 630. But a requirement that the will shall "expressly purport" to exercise the power is sufficiently complied with if the testator bequeaths property over

which he has "any disposing power". *Re Waterhouse*, 98 L. T. 30. So if the donor requires that the will shall "expressly refer to this power": *Re Lane*, [1908] 2 Ch. 581, following *Re Roll*, [1908] W. N. 76. See ante, p. 805.

(*l*) *Re Byron's Settlement*, [1891] 3 Ch. 474; ante, p. 789, where the question whether powers can be accurately divided into "general" and "special" is referred to.

(*m*) *Ib.* The question whether a power was general or restricted also arose in *Bristow v. Skirrow*, 27 Bea. 585, stated ante, p. 794.

(*mm*) *Cosfeld v. Pollard*, 3 Jur. N. S. 1203.

(*n*) *Clifford v. Clifford*, 9 Ha. 675. See *Farmer v. Bradford*, 3 Russ. 354, ante, p. 804.

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Power to
direct sum
to be raised.

If a testator has power by will to charge certain real estate with a maximum sum of money (say 10,000*l.*) for such purposes or for the benefit of such persons as he may direct, this power is not exercised by a will containing merely a general or residuary bequest. Such a power is really a double power, namely, a power to create a sum not exceeding 10,000*l.* and a power to appoint it; it "requires a distinct intention and a distinct act to bring the subject into existence before the general power of appointment can operate upon it" (o), and this intention is not implied by sect. 27 (p).

In *Re Jones* (q), a testator gave his residuary real and personal estate upon trust for conversion, and directed the proceeds to be held upon certain trusts for the benefit of his widow and issue; and he empowered his widow by will to appoint that any sum not exceeding 20,000*l.* should be raised and paid or applied for the benefit of such persons as she should think fit: it was held by Kay, J., that this power was exercised by a general bequest contained in the widow's will. In *Re Salvin* (qq), Buckley, J., distinguished *Re Jones* from the case before him on the ground that the effect of the trust for conversion in *Re Jones* was to create a fund of personal estate, and that the power was simply a power of appointment over part of the fund.

Power of
revocation.

A general devise or bequest will not, under sect. 27, operate as an exercise of a power of revocation and new appointment (r), although a general devise or bequest may, it seems, have that operation on the ground of implied intention; for example, in a case where the gift would otherwise be wholly inoperative (s). The general rule applies to the case where the power of revocation is contained in the instrument originally creating it, as well as to the case where the power is reserved by an appointment made in exercise of the original power (t).

The doctrine in question only applies to powers which are strictly powers of revocation (u).

Power to
charge money
on land.

In *Re Wallinger's Estate* (v), a person had power to create a mortgage or charge on certain lands as security for any sum not exceeding 2,000*l.*, for such purposes as he should appoint: it was held that this power was not exercised by a residuary gift.

(o) Per Fitzgibbon, L. J., in *Re Wallinger's Estate*, [1898] 1 Ir. R., at p. 150.

(p) *Re Salvin*, [1906] 2 Ch. 459.

(q) 34 Ch. D. 65.

(qq) *Supra*.

(r) *Palmer v. Newell*, 20 Bea. 32; *Charles v. Burke*, 43 Ch. D. 223, n.; *Re Brace*, [1891] 2 Ch. 671; following the

principle laid down in *Pomfret v. Per-ring*, 5 D. M. & G. 775, post, p. 831.

(s) *Ibid*.

(t) *Re Goulding's Settlement*, 48 W. R. 183.

(u) *Re Jones*, 34 Ch. D. 65, stated *supra*.

(v) [1898] 1 Ir. R. 139.

Where a testator has a power of appointment over lands which have been sold, and the proceeds are liable to be applied in the purchase of other lands, the question whether the power is exercised by a residuary bequest of personalty seems to depend on two questions. One is, whether any person other than the testator has a right to require the money to be re-invested in land, for if so, the residuary bequest will not operate as an appointment under sect. 27 (*w*). But if no one other than the testator has that right, the further question arises whether he has shewn an intention of treating the money as personalty; if he has, the money will pass under the bequest (*x*); if he has not, it will only pass as land—e.g., under a residuary devise (*y*).

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Conversion.

Conversely, a devise of all lands which the testator has power to dispose of, or (what is now the same thing) a residuary devise, will not pass moneys to arise from the sale of lands (*z*).

As to the effect of conversion in adeeming appointments of specific property, see p. 839, *infra*.

Although it is now settled that a devise may be residuary under sect. 25 of the Wills Act, notwithstanding that it is limited to a particular description of real estate (*a*), it is clear that a particular residue is not within either sect. 25 (*b*) or sect. 27. Thus, where by marriage settlement a testatrix had power to appoint estates A. and B., and she made her will reciting the power and giving A. to one person, and "all other the hereditaments comprised in the settlement not hereinbefore disposed of" to another; she then by codicil revoked the appointment of estate A. and appointed it on charitable trusts, which were void: it was held that estate A. did not pass by the appointment of "all other hereditaments," &c., for that this was not a general or residuary gift, but clearly specific (*c*). And a gift by a married woman of the "residue of her separate property" was held not to include a lapsed share of a fund over which she had a general power (*d*).

Particular
residue is not
within s. 27.

(*w*) *Gillies v. Longlands*, 4 De G. & S. 372; *Re Greaves's Settlement*, 23 Ch. D. 313.

(*x*) *Gale v. Gale*, 21 Bea. 349; *Blake v. Blake*, 15 Ch. D. 481. In *Chandler v. Pocock*, 15 Ch. D. 491, 16 Ch. D. 648, the testatrix obtained a transfer of the proceeds of sale from the trustees to herself: *Re Harman*, [1894] 3 Ch. 607.

(*y*) *Re Duke of Cleveland's S. E.*, [1893] 3 Ch. 244. In that case the further question arose whether the money was to be treated as land in Staffordshire, from the sale of which it

arose: the C. A. held that as it might be invested in land situate anywhere in England, it did not pass under a devise of land in Staffordshire. See *Basset v. St. Levan*, 43 W. R. 165.

(*z*) *Adams v. Austen*, 3 Russ. 461.

(*a*) *Mason v. Ogden*, [1903] A. C. 1. See Chap. XXV.

(*b*) See *Springett v. Jennings*, post, p. 951.

(*c*) *Re Brown's Trusts*, 1 K. & J. 522.

(*d*) *Wilkinson v. Schneider*, L. R., 9 Eq. 423, 429. See *Freme v. Clement*, 18 Ch. D. 511, 512.

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1 Vict. c. 26,
s. 27, applies
to wills
of married
women.

Pecuniary
legacies are
appointments
within s. 27,
and directions
to pay debts.

Operation
of s. 27.

The applicability of this section to the construction of the wills of married women has been disputed, but without success. Their testamentary capacity is not enlarged by the statute, but their wills, when made, have the benefit of the more liberal rules of interpretation laid down by it (e).

General pecuniary legacies are "bequests of personal property described in a general manner," and operate under this section as appointments, so far as the subject of the power is required in aid of the testator's own estate for payment of the legacies (f). To the same extent a direction to pay the testator's debts will operate as an appointment (g). And although in the cases where these points were decided executors had also been appointed, that circumstance does not appear to be essential (h). "It seems not unreasonable to hold that a testator having a general power, and directing a certain application of his property, must be taken in all cases to exercise the power to the extent to which the direction is effectual" (i). But "it has not yet been decided that an appointment of an executor without more would make the fund assets. And so to hold would appear to give a very unnatural construction to the section" (j).

Where a power of appointment is exercised by a general bequest by virtue of sect. 27, the property appointed is included in and passes by the bequest according to the terms of the will, and not as if a separate execution of the power were read into the will; the will operates, in fact, as if the testator had added to the bequest: "in thus disposing of my personal estate I include any personal estate over which I have a general power of appointment." If, therefore, the testator charges his debts and legacies on his real estate, in aid of his personal estate, and his own personal estate is insufficient for payment of his debts and legacies, the fund over which he has a power of appointment is deemed to form part of his personal estate, and the residuary legatees (to whom the fund

(e) *Bernard v. Minshull*, Johns. 276; *Thomas v. Jones*, 2 J. & H. 475, 1 D. J. & S. 63; *Noble v. Willock*, L. R., 8 Ch. 778, 7 H. L. 580; *Re Ludlam*, 63 L. T. 330.

(f) *Hawthorn v. Shedden*, 3 Sm. & Gif. 293; *Widday v. Barnett*, L. R., 6 Eq. 193; *Re Wilkinson*, L. R., 8 Eq. 487, 4 Ch. 587; notwithstanding *Hurlstone v. Ashton*, 11 Jur. N. S. 725. See *Re Ludlam*, 63 L. T. 330, where a married woman, who had a general power of appointment over a reversionary fund,

but no separate estate, bequeathed to A. a legacy of 400*l.*: it was held that it was not payable until the fund fell into possession. As to *Shelford v. Acland*, 23 Bea. 10, see ante, p. 807, note (y).

(g) *Att.-Gen. v. Brackenbury*, 1 H. & C. 782; *Laing v. Cowan*, 24 Beav. 112.

(h) Per Wickens, V.-C., *Re Davies' Trusts*, L. R., 13 Eq. 166.

(i) *Ibid.*

(j) *Ibid.* Stuart, V.-C., thought otherwise, 3 Sm. & Gif. 304.

goes under sect. 27) are not entitled to throw the debts and legacies on the real estate in exoneration of the fund (*k*). But this result of sect. 27 does not follow if the testator has no property of his own; in such a case the dispositions of his will are read as being express exercises of the power of appointment (*kk*).

By the combined operation of sects. 24 and 27 of the Wills Act, where a will contains a general devise or bequest, a general power of appointment created after the date of the will, but in the testator's lifetime, will, unless a contrary intention appears, be executed by the will, if the will would have operated to execute the power had it been in existence at the date of the will (*l*).

Powers created after date of will.

It is hardly necessary to say that if A. by will gives B. a general power of appointment over property, and B. predeceases A., having made a will containing a residuary gift, this does not operate as an exercise of the power (*ll*). The power lapses.

Where donee predeceases donor.

The effect of sect. 27 is to reverse the old rule, and to throw on those who deny that a general devise or bequest executes a general power, the burden of proving by what appears on the face of the will the testator's intention that it shall not do so (*m*). This intention must, it seems, be clearly expressed. Even if the testator gives his residue to A. for life with remainders over, this will operate as an exercise of a power which is only given to the testator in the event of his surviving A. (*n*).

How a contrary intention may appear.

(*k*) *Re Hariley*, [1900] 1 Ch. 152.

(*kk*) *Re Ludlam*, 63 L. T. 330.

(*l*) Sugd. R. P. Stat. 379; and see *Carte v. Carte*, 3 Atk. 174; *Stillman v. Weedon*, 16 Sim. 26; *Cosfield v. Pollard*, 3 Jur. N. S. 1203; *Patch v. Shore*, 2 Dr. & Sm. 589; *Hodsdon v. Dancer*, 16 W. R. 1101; *Lake v. Currie*, 2 D. M. & G. 536; *Thomas v. Jones*, 2 J. & H. 475, 1 D. J. & S. 63; *Meredyth v. Meredyth*, Ir. R., 5 Eq., 565; *Boyes v. Cook*, 14 Ch. D. 53; *Re Hernandez*, 27 Ch. D. 284; *Airey v. Bower*, 12 A. C. 263. The power in *Stillman v. Weedon* seems to have been a special power, and the actual decision was, therefore, erroneous: see *Re Hayes*, [1900] 2 Ch. 332. As to *Re Old's Trusts*, 54 L. T. 677, see Farwell, 224. The better opinion is that sect. 24 does not apply to any powers of appointment except those coming within sect. 27; see per Stirling J. in *Re Wells' Trusts*, 42 Ch. D. 656, and post, p. 839.

(*ll*) *Jones v. Southall*, 32 Bea. 31; post, p. 840. It is suggested in Farwell on Powers, 226, that if A. by

will gives his son B. a power of appointment, and B. predeceases him, having made a will containing a residuary gift, this operates after A.'s death as an exercise of the power, under sect. 33 of the Wills Act; but sect. 33 only applies where "real or personal estate" is "devised or bequeathed" to the testator's child, and it is submitted that giving a power of appointment is not a devise or bequest within the meaning of the section; see *Holyland v. Lewin*, 26 Ch. D. 266.

(*m*) *Walker v. Banks*, 1 Jur. N. S. 606. But a specific exercise of a power existing at the date of the will is not converted by sect. 24 into an exercise of a new power substituted for the old power after the date of the will: *Thompson v. Simpson*, 50 L. J. Ch. 461. The decision seems to be questioned in Farwell on Powers, 225, but it is submitted that it is correct; the will contained no residuary gift.

(*n*) *Thomas v. Jones*, 2 J. & H. 475, 1 D. J. & S. 63.

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The fact that an appointment has been actually made, will not shew an intention to exclude the appointed property from a general residuary gift, where the appointment fails by lapse (*o*), or through uncertainty (*p*), or otherwise (*q*). And where the property was over-ridden by a power to sell and re-invest to the same uses, and, after the execution of the will, the property was sold accordingly: it was held that the express appointment was adeemed, but that the substituted property passed by the residuary devise in the will (*r*). The effect of the residuary gift upon the void or imperfect particular appointment is analogous to its effect upon a void or imperfect particular bequest; and the suggestion of a learned Judge (*s*), that the gift of a partial interest (as a life estate) in the subject of a power is so inconsistent with an appointment of the entire interest to the same person as to shew an intention to exclude it from a residuary request to that person, would probably not be followed, although founded on common sense (*ss*).

Moss v. Harter.

Effect where appointment would defeat testator's own settlement.

In *Moss v. Harter* (*t*), where by voluntary settlement personalty was settled as the settlor should appoint generally, and in default on himself for life, and after on several named persons. The settlor then under his power executed a deed appointing part of the fund; and afterwards made a will by which he bequeathed his residue "not otherwise effectually disposed of." It was held by Stuart, V.-C., that this bequest did not include the unappointed portion of the settled fund, on the ground that the whole fund was in fact "effectually disposed of" by the partial appointment, and, so far as that did not extend, by the limitation in default contained in the settlement. It was argued strongly against this construction that the words "not otherwise effectually disposed of" must be read "not otherwise by the will effectually disposed of," but the

(*o*) *Re Spooner's Trust*, 2 Sim. N. S. 129; *Bush v. Cowan*, 32 Bea. 228 (personalty). See as to realty, *Freme v. Clement*, 18 Ch. D. 499, 512. The reasoning of Jessel, M.R., on this point does not appear to be affected by the decision of the C. A. in *Holyland v. Lewin*, 26 Ch. D. 266.

(*p*) *Bernard v. Minshull*, Johns. 276. See also *Hickson v. Wolfe*, 9 Ir. Ch. Rep. 144.

(*q*) In *Re Elen* (68 L. T. 816) the appointment was contingent, and failed.

(*r*) *Gale v. Gale*, 21 Beav. 349; *Re Dowsett*, [1901] 1 Ch. 398, post.

(*s*) *Wood, V.-C., Scriven v. Sandom*, 2 J. & H. 745. See *Hopewell v. Ackland*, *Scutt v. Alberry*, *Roe v. Gilbert*, *Day v. Daveron* (all stated in next chapter), where remainders in fee were held to pass by general residuary devises to the same persons to whom life estates in the same property were specifically devised in a former part of the will.

(*ss*) See *Bush v. Cowan*, 32 Bea. 228, where the testator gave his residuary legatee the arrears of income of the settled fund.

(*t*) 2 Sm. & Gif. 458.

V.-C. thought that this would be to violate the express language of the will. He added that it was probably the intention of the legislature that sect. 27 should apply only to cases like *Cox v. Chamberlain* (u), where the power was in such ample terms as to amount to absolute property. The terms of this section, however, are certainly of more extensive import.

With reference to this decision, Lord St. Leonards says (v), “ The case is not without difficulty ; but where the property is, as in this case, settled by the testator himself upon others, in default of any appointment by him under his power, it would seem to require some indication of an intention by him to defeat his settlement in order to hold a general gift in his will, which can be satisfied by other property, to be an execution of his power.” But this observation was disapproved of by the Court of Appeal in *Re Clark’s Estate* (w), where it was held that the will would execute the power, whether the property was settled by the testator himself or by another person. In that case Cotton, L.J., said : “ With respect to the extract that has been read from Lord St. Leonards’ Treatise on Powers, I do not quite understand whether it is a statement of his own opinion, or merely a comment on the effect of *Moss v. Harter*. But if it is to be taken as an expression of his opinion that, in the case of a power of appointment in a settlement created by the testator himself, an indication of his intention to defeat his settlement must be shown, that appears to me to contradict the words of the statute, and I should hesitate to act, even upon Lord St. Leonards’ authority, against the expressed intention of the Legislature.” And James, L.J., expressed himself to the like effect. And in *Boyes v. Cook* (x), it was held by the Court of Appeal that a power was duly exercised by will, though the settlement creating the power was made after the will, for that only the will could be looked at to shew a contrary intention.

Remarks on
Moss v.
Harter.

This decision was approved by the House of Lords in *Airey v. Bower* (y). There a testatrix who had a general power of appointment by deed or will over the A. property, by her will in 1854 devised and bequeathed the residue of her estate to X. By deed poll in 1855 she appointed the A. property upon such trusts as she by deed or by her last will should “ from time to time or at any time thereafter appoint,” and in default of appointment upon trust for

Airey v.
Bower.

(u) 4 Ves. 631.

(v) Sug. Pow. p. 305, 8th edition.

(w) 14 Ch. D. 422.

(x) 14 Ch. D. 53, disapproving *Re*

Ruding’s Settlement, L. R., 14 Eq. 266.
See also *Re Hernando*, 27 Ch. D. 284 ;

Re Marsh, 38 Ch. D. 630.

(y) 12 A. C. 263.

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Y. She died in 1857. It was held that the will operated as an exercise of the power reserved by the deed poll of 1855, and that the property went to X.

Confirmation
of settlement.

Where a testator has a general power of appointment under a settlement, followed by a limitation over in default of appointment, a residuary devise or bequest contained in his will operates as an exercise of the power, even if the will contains an express confirmation of the settlement; the confirmation is considered to apply to those parts of the settlement which the testator has no power to disturb (z).

Whether an express confirmation of the settlement would shew a "contrary intention" within sect. 27 in a case where the testator's power covered the whole subject matter of the settlement, as in *Moss v. Harter* (supra), seems doubtful.

"Last will."

In *Pettinger v. Ambler* (a), a testator made a will containing a residuary devise; then he made a voluntary settlement of certain lands, under which he had a general power of appointment by his "last will"; then he made another will purporting to be his "last will," by which, in pursuance of the power, he charged the lands with an annuity: it was held by Romilly, M.R., that the residuary devise in the first will did not operate as an execution of the power. So far as the decision turned on the question of what was the testator's "last will," the M.R.'s reasoning seems somewhat artificial.

Sect. 27
often defeats
testator's
intention.

Where a testator makes a will containing a residuary gift, and afterwards settles part of his property, subject to an overriding general power of appointment reserved to himself, it is obvious that the statutory rule above stated probably defeats his intention (b).

Uses declared
by reference.

A residuary devise operates as an execution of a general power of appointing land, although it has been conveyed to uses similar to those of an existing settlement, and the testatrix has excepted the lands comprised in that settlement from the residuary devise (c).

How a con-
trary inten-
tion may be
shewn.

But a "contrary intention" within the meaning of sect. 27 may

(z) *Lake v. Currie*, 2 D. M. & G. 536; *Hutchins v. Osborne*, 4 K. & J. 252, 3 De G. & J. 142; and see *Atherton v. Langford*, 25 Beav. 5, where an expressed intention that lands over which the testator had a power should not be included in his will, but should go according to the settlement, was held not to prevent a share in the lands vested in the testator in default of the exercise by him of the power from passing under

the residuary gift in his will. In *Re Bringlee*, 26 L. T. 58 (stated post, p. 860, n. (s)), the point did not arise, as the case turned on the meaning of "residue" in an express appointment.

(a) L. R., 1 Eq. 510.

(b) See *Re Ruding's Settlement*, L. R., 14 Eq. 266 (overruled by *Boyes v. Cook*, supra), and *Airey v. Bower*, supra.

(c) *Hughes v. Jones*, 11 W. R. 898.

appear by implication. In *Thompson v. Simpson (d)*, where there were two settlements, one made before, and the other after, the will, it was held that a reference in the will to the power created by the first settlement shewed that the testatrix did not mean the will to operate as an execution of the power contained in the second settlement.

Where the donee of a general testamentary power is domiciled abroad, sect. 27 does not make his will operate as an execution of the power, unless he shews on the face of the will an intention that it shall take effect according to English law (*e*).

Effect
of foreign
domicil.

(3) *How far Exercise of General Power makes Property part of Testator's Estate.*—Where a general power is effectually exercised by will, the property, whether real or personal, becomes liable for the testator's debts (*f*), so far as his own property is insufficient to satisfy them (*g*). This liability is created by law, and the donee of the power cannot give any individual creditor a charge on the property, or priority over the other creditors, by making an appointment with that object, even if he has entered into a covenant to do so (*h*).

Liability
to debts.

The general rule above stated does not apply to property abroad, for the administration of such property is governed by the law of its locality. Consequently, if an Englishman exercises a general power of appointment over a trust fund subject to foreign law, he does not thereby make it assets for the payment of his debts (*i*).

Foreign
property.

A direction by a testator that his debts shall be paid, makes property over which he has a general power of appointment assets for the purpose, if his own property is insufficient, but it seems that the mere appointment of an executor will not have that effect (*j*).

If a person who has exercised a testamentary power is a bankrupt at the time of his death, the appointed property does not pass to the

(*d*) 50 L. J. Ch. 461.

(*e*) *Re Price*, [1900] 1 Ch. 442; *Re D'Este's Settlement Trusts*, [1903] 1 Ch. 898, ante, p. 801.

(*f*) *Holmes v. Coghill*, 12 Ves. 206; *Fleming v. Buchanan*, 3 D. M. & G. 976; *Williams v. Lomas*, 16 Bea. 1; *Re Hartley*, 69 L. J. Ch. 79. See *Re Newnham's Estate*, [1881] Week. N. 69, where it was held that the creditors had no claim against the trustees for a breach of trust. As to the rule where the testator be-

comes bankrupt, see *Jenney v. Andrews*, 6 Madd. 264; *Re Guedalla*, [1905] 2 Ch. 331.

(*g*) See Chap. LIV.

(*h*) *Re Lawley*, [1902] 2 Ch. 799: affirmed on appeal sub nom. *Beyfus v. Lawley*, [1903] A. C. 411.

(*i*) *Re Bald*, 66 L. J. Ch. 524.

(*j*) *Laing v. Cowan*, 24 Bea. 112; *Re Davies*, L. R., 13 Eq. 163; *Re Thurston*, 32 Ch. D. 508.

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Married woman.

Before the Married Women's Property Act, 1882, the question whether an appointment by a married woman made the property liable for her general engagements was a matter of doubt. Fine distinctions were drawn, or attempted to be drawn, depending on whether the married woman had a power of appointment by deed or will, or by will only, whether she had a separate life estate, and whether the property was limited to her or her representatives in default of appointment (*l*).

What were "debts."

The "general engagements" of a married woman under the old law were not "debts" in the proper sense of the word. However, in a recent case (*m*), where a married woman who had a general testamentary power of appointment over an estate, by her will directed her executors to pay her just debts, and appointed the estate in express exercise of the power, it was held by Stirling, J., that certain sums owing by her at her death were a charge upon the appointed property, apparently on the ground that in the administration action these sums had been found by the chief clerk's certificate to be debts of the testatrix.

Married W. P. Act, 1882.

The Married Women's Property Act, 1882, enacts (sect. 4) that "the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act."

As to contracts made during coverture, the section only applies to those made after 1882 (*n*), but it applies to contracts made by the testatrix while a feme sole, whether before 1883 or not (*o*).

"Debts and other liabilities" means engagements entered into by a married woman during coverture, for which her separate estate (if she had any) would be liable. Unless contracted since

(*k*) *Jenney v. Andrews*, 6 Madd. 264; *Re Guedalla*, [1905] 2 Ch. 331.

(*l*) *Vaughan v. Vanderstegen*, 2 Drew. 165, 363; *Hobday v. Peters*, 28 Bea. 354; *Blatchford v. Woolley*, 2 Dr. & Sm. 204; *Johnson v. Gallagher*, 3 D. F. & J. 494; *Shattock v. Shattock*, L. R., 2 Eq. 182; *London Chartered Bank of Australia v. Lemprière*, L. R., 4 P. C. 572; *Re Harvey's Estate*, 13 Ch. D. 216; *Hodges v. Hodges*, 20 Ch. D. 749;

Mayd v. Field, 3 Ch. D. 587; *Pike v. Fitzgibbon*, 17 Ch. D. 454 (at p. 466). See the result of the balance of the authorities stated in Farwell on Powers, 262-3.

(*m*) *Re De Burgh Lawson*, 41 Ch. D. 568.

(*n*) *Re Roper*, 39 Ch. D. 482.

(*o*) *Re Parkin*, [1892] 3 Ch. 510. See *Re Hughes*, [1898] 1 Ch. 529.

December 5, 1893 (*p*), it is necessary that she should have had separate estate at the time she contracted them (*q*). CHAP. XXIII.

An appointment is operative under this section, although it eventually fails to take effect in favour of the appointee by reason of events happening after the testatrix's death (*r*).

Where a testator exercises a general power of appointment over personal estate, his executor, or his administrator with the will annexed, is the proper person to administer and give a discharge for the appointed fund (*s*), and the same result follows even if the testator appoints the fund to special trustees and directs them to distribute it (*t*). The rule applies to married women dying before the M. W. P. Act, 1882, came into operation (*u*). Whether the property passes to "the executor as such" within the meaning of the Finance Act, 1894, is a question which has been much discussed with reference to the incidence of estate duty. There is a division of judicial opinion on the subject (*v*), but according to the latest decision (*vv*) the property does so pass (*w*). Personalty appointed under general power vests in personal representative of appointor.

In the case of a person entitled to a general power of appointment over land dying since 1897, having by will exercised the power, the land vests in his personal representative in accordance with the provisions of the Land Transfer Act, 1897, s. 1. It has been suggested that the effect of this enactment is that the land becomes legal assets for payment of debts (*x*). Land Transfer Act, 1897.

If an appointment under a general power fails to take effect (*z*), the question arises whether the property, or the part of it ineffectually appointed, devolves as in default of appointment, or as part of the testator's estate. There is no difference in this respect between Failure of appointment

(*p*) The date of the passing of the Married W. P. Act, 1893.

(*q*) *Re Fieldwick*, [1909] 1 Ch. 1, overruling *Re Ann*, [1894] 1 Ch. 549. See *Re Hughes*, [1898] 1 Ch. 529.

(*r*) *Re Hodgson*, [1899] 1 Ch. 666.

(*s*) *Re Philbrick's Trusts*, 13 W. R. 570; *Hayes v. Oatley*, L. R., 14 Eq. 1; *Re Hoskin's Trusts*, 5 Ch. 229, 6 Ch. D. 281; *Re Davies' Trusts*, L. R., 13 Eq. 163; *Re Peacock's Settlement*, [1902] 1 Ch. 552.

(*t*) *Re Peacock's Settlement*, *supra*.

(*u*) *Ibid*.

(*v*) *Re Treasure*, [1900] 2 Ch. 648; *Re Moore*, [1901] 1 Ch. 691; *Re Maddock*, [1901] 2 Ch. 372; *Re Power*, [1901]

2 Ch. 659; *Re Dixon*, [1902] 1 Ch. 248; *Re Fearnside*, [1903] 1 Ch. 250; *Re Dodson*, [1907] 1 Ch. 284; *Re Orlebar*, [1908] 1 Ch. 136; *Re Hadley*, [1909] 1 Ch. 22 (judgment of Parker, J.).

(*vv*) That of the Court of Appeal in *Re Hadley*, [1909] 1 Ch. 22.

(*w*) This argument does not apply to real estate, because at the time the Finance Act, 1894, was passed real estate did not vest in the executor. See ante, p. 64, and Chap. LIII.

(*x*) *Brickdale and Sheldon v. L. T. Acts*, 278; *Carson v. R. P. Stat.*, 402. See post, Chap. LIV.

(*z*) As to the lapse of appointments, see *infra*, p. 843.

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real and personal estate (a). The question "is one of intention, namely, whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed" (b). The cases are not quite consistent. The principal rule is that if the testator deals with the whole of the settled property as his own (e.g., by giving it to his executors (c) or trustees (d)), or if, without giving it to executors or trustees, he deals with the settled property and his own property as one mass (e), then he shews an intention to take the settled property out of the settlement for all purposes, so that if any of the dispositions of his will fail, the settled property, or so much of it as is undisposed of, devolves as part of his estate, and does not go to the persons entitled in default of appointment.

If, however, the testator merely shews an intention to appoint the settled property for a limited purpose, then any part of it which is undisposed of by the failure of the residuary gift goes as in default of appointment (f). Thus, in *Laing v. Cowan* (g), where the donee of a general power directed her debts and funeral and testamentary expenses to be paid, but did not dispose of her residuary estate, or expressly exercise the power, it was held by Romilly, M.R., that the balance of the settled fund, after payment of debts, &c., went as in default of appointment (h). In *Re Davies' Trusts* (i), the donee of a general power bequeathed the residue of her personal estate, without referring to the power, to four persons equally, two of whom died in her lifetime: Wickens, V.-C., held that the lapsed shares of the settled property went as in default of appointment, apparently on the ground that the appointment being to the legatees direct, and

(a) *Re Van Hagan*, 16 Ch. D. 18.

(b) Per Chatterton, V.-C., in *Re De Lusi's Trusts*, 3 L. R. Ir. 232, cited with approval in *Re Pinède's Settlement*, *Willoughby Osborne v. Holyoake*, and *Coxen v. Rowland*, *infra*.

(c) *Chamberlain v. Hutchinson*, 22 Bea. 444; *Brickenden v. Williams*, L. R., 7 Eq. 310. Compare *Re Scott*, [1891] 1 Ch. 298. Where there is an appointment to trustees, the testator's representatives take under the doctrine of resulting trust: *ibid*.

(d) *Lefevre v. Freeland*, 24 Bea. 403; *Wilkinson v. Schneider*, L. R., 9 Eq. 423; *Re Van Hagan*, 16 Ch. D. 18.

(e) *Re Pinède's Settlement*, 12 Ch. D. 667; *Re Ickeringill's Estate*, 17 Ch. D. 151; *Willoughby Osborne v. Holyoake*, 22 Ch. D. 238; *Re Horton*, 51 L. T. 420;

Coxen v. Rowland, [1894] 1 Ch. 406; *Re Marten*, [1902] 1 Ch. 314; *Re Keown's Estate*, Ir. R., 1 Eq. 372. The reasoning in *Hoare v. Osborne*, 33 L. J. Ch. 586, is not satisfactory, and the decision may be considered overruled.

(f) See *Easum v. Appleford*, 5 My. & C. 56, where the will was made before 1837.

(g) 24 Bea. 112.

(h) The decision in *Bristow v. Skirrow*, L. R., 10 Eq. 1, by the same judge, turned chiefly on the language of the instrument creating the power.

(i) L. R., 13 Eq. 163. According to Romer, L.J., the decision turned on the fact that the testatrix did not expressly purport to execute the power: see *Re Marten*, [1902] 1 Ch. at p. 324.

not to executors or trustees, shewed that the testatrix did not intend to make the settled property her own for all purposes. If the decision in *Re Ickeringill's Estate* (j) is right, that in *Re Davies' Trusts* seems to be wrong.

It seems that if the donee of a power makes a will which deals only with the property which is the subject of the power, and appoints an executor, this alone is not sufficient to make the property his own for all purposes (k).

The general rules above stated apply to married women (l).

If the donee of a general power expressly exercises the power by his will, and deals with his own property separately, then, if the residuary gift fails, the settled property will, as a rule, go as in default of appointment (m).

Separate
dispositions.

Re Creed (n) was a clear case. There the testatrix exercised a general power by giving 200*l.* to A., and directing that the residue of the fund should go as in default of appointment; she also bequeathed legacies; one of the persons entitled in default of appointment predeceased her: it was held that she had shewn a clear intention not to make the fund her own; consequently the lapsed share devolved as in default of appointment, and the legacies were payable only out of the testatrix's own property.

VI.—Special Powers.—(1) *Who are Objects of a Special Power.* Uncertainty. —The doctrine of uncertainty applies to powers. Thus a power to dispose of the testator's property "in accordance with my wishes verbally expressed," is void for uncertainty (o). But although a simple gift to "A. or B." is, it would seem, void for uncertainty (p), a bequest to A. or B. at the discretion of C. is good, for he may divide it between them (q).

The cases where a gift which is in terms absolute has been cut down to an estate for life, with a power of appointment among children or the like, are referred to elsewhere (r).

Absolute gift
cut down.

Where a power is apparently intended to be limited to certain classes of persons, but some of the terms used are too vague to be

Rejection of
words.

(j) *Supra*, p. 820.

(k) *Re Thurston*, 32 Ch. D. 508.

(l) See the cases cited *supra*, p. 818.

(m) *Re De Lusi's Trusts*, 3 L. Rep. Ir. 232; *Re Boyd*, [1897] 2 Ch. 232. In both these cases the learned judges professed to follow *Re Davies' Trusts*. In that case, however, the testatrix did not deal with her own property and the settled property separately. See also *Blight v. Hartnoll*, 23 Ch. D. 218, where

the testatrix dealt with the settled property separately, in such a way as to make it part of her estate.

(n) [1905] W. N. 94.

(o) *Re Helley*, [1902] 2 Ch. 866, ante, p. 474.

(p) See Chap. XVI.; ante, p. 475 n. (n).

(q) *Longmore v. Broom*, 7 Ves. 124; and other cases cited in Chap. XIV.

(r) Chaps. XXXIII, XXXIV.

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given effect to, it seems that they may be rejected. Thus a power to appoint to "friends and relations," or "relations or friends," has been construed to be a power to appoint to relations only (*s*).

Illegitimate persons, whether objects of power.

As a general rule, the objects of a power are determined by the same rules of construction as those which apply to direct gifts in similar terms. Accordingly, in a power to appoint to "children," "sons," "issue," "relations," "next of kin," or the like, the words *primâ facie* mean legitimate children, sons, issue, &c. (*t*), unless it appears from the whole will that the testator intended the power to extend to illegitimate children, sons, issue, &c. (*u*).

"Issue."

On the same principle, "issue," in a power of appointment, includes descendants of every degree (*v*), unless there is something to restrict its meaning (*w*). But "issue" may be used in the sense of "children" (*ww*). Sometimes a testator uses the terms "issue" and "children" interchangeably; in such cases "issue" may be construed as meaning "children," or "children" may be construed as meaning "issue" (*x*), whichever may best give effect to the testator's intention (*y*).

"Descendants."

A power to appoint to the "descendants" of A. does not authorize a substitutional appointment to the personal representatives of a deceased descendant, even if those representatives should happen themselves to be descendants of A. (*z*).

"Children."

A power to appoint to "children" does not authorize an appointment to grandchildren (*a*), or to the representatives of a deceased child (*b*).

"Family."

The primary meaning of the word "family," in a bequest of personal estate, as explained elsewhere (*c*), is "children," but the context may shew that the testator used it in another sense. Thus,

(*s*) *Gower v. Mainwaring*, 2 Ves. sen. 87; *Re Caplin's Will*, 2 Dr. & Sm. 527.

(*t*) *Wilkinson v. Adam*, 1 V. & B. 422; *Re Standley's Estate*, L. R., 5 Eq. 303.

(*u*) *Re Deakin*, [1894] 3 Ch. 565. In *Humble v. Bowman*, 47 L. J. Ch. 62, where there was a power to appoint to the testator's family, Hall, V.-C., said: "No doubt illegitimate children are not included under a gift to children, but . . . under the description 'family' in a power of appointment a natural child may be included."

(*v*) *Hockley v. Mawbey*, 1 Ves. jun. 143; *Farwell on Powers*, 494, citing *Donoghue v. Brooke*, Ir. R., 9 Eq. 489; *Re Howard*, 7 Ir. Ch. R. 344. See *Re Warren's Trusts*, 26 Ch. D. 208 (deed).

(*w*) *Leigh v. Norbury*, 13 Ves. 344.

(*ww*) Chap. XLI. See *Swift v. Swift*, 8 Sim. 168 (marriage articles).

(*x*) As in *Harley v. Miford*, 21 Bea. 280. See *Daltzell v. Welch*, 2 Sim. 319.

(*y*) As to the construction of a power to appoint land to issue in strict settlement, see *Bell v. Bell*, 13 Ir. Ch. R. 517.

(*z*) *Re Susanni's Trusts*, 47 L. J. Ch. 65.

(*a*) *Kennerley v. Kennerley*, 10 Hare. 160; *Reid v. Reid*, 25 Bea. 469, and other cases cited in Sugden on Powers, 664.

(*b*) *Maddison v. Andrew*, 1 Ves. sen. 58.

(*c*) Chap. XLI.; *Re Hutchinson and Tennant*, 8 Ch. D. 540; *Sinnott v. Walsh*, 5 L. R. Ir. 27, 3 L. R. Ir. 12.

a power to appoint for the benefit of a married woman and her family may authorize an appointment in favour of her husband (*d*). Again, "family" may mean "relations" (*e*) or "descendants" (*f*), and in *Snow v. Teed* (*g*), and *Lambe v. Eames* (*h*), James, L.J., seemed to think it a word of very wide meaning; in the former case he thought it included any relative, and in *Lambe v. Eames*, where the testator gave all his property to his widow, "to be at her disposal in any way she may think best for the benefit of herself and family," a gift by her to an illegitimate son of one of the testator's sons was upheld.

In *Sinnott v. Walsh* (*i*), a testator gave freeholds to his two sons, and directed that if either of them died without issue, his part of the property should fall "to whatever existing member of my family he may be disposed to will it to." It was held that "existing" meant living at the date of the will creating the power, and that the power authorized an appointment to one or more persons.

In the case of powers to appoint to the relations (*j*) of a certain person, there is a distinction between powers of distribution and powers of selection in respect of construction. If the power is non-exclusive, or a power of distribution merely, the donee is confined to the statutory next of kin (*k*), while if the power is expressly made exclusive, or a power of selection, the donee can appoint to any relations, although not within the degree of next of kin (*l*). And this rule has not been altered by the Powers of Appointment Act, 1874 (*m*).

A power to appoint to "friends and relations," or to "relations or friends," seems to be equivalent to a power to appoint to "relations" (*n*). It is not clear what construction would be placed on a power to appoint to "friends" (*o*).

(*d*) *MacLeroth v. Bacon*, 5 Ves. 159.

(*e*) *Cruwys v. Colman*, 9 Ves. 319, and other cases cited in Chap. XLI., and *Sinnott v. Walsh*, *supra*.

(*f*) *Williams v. Williams*, 1 Sim. N. S. 358.

(*g*) L. R., 9 Eq. 622. The power was given to a single woman in the event of her not marrying.

(*h*) L. R., 6 Ch. 597. The L.JJ. were disposed to think that the widow took absolutely (see Chap. XXIV.), and if so it was not necessary to decide whether the illegitimate child was an object of the power; but the point was expressly decided by Hall, V.-C., in *Humble v. Bowman*. 47 L. J. Ch. 62.

(*i*) 5 L. R. Ir. 27.

(*j*) As to powers to appoint to "relations," see the remarks of Chitty, J., in *Wilson v. Duguid*, 24 Ch. D. 251.

(*k*) *Pope v. Whitcombe*, 3 Mer. 689; *Re Patterson*, [1899] 1 Ir. R. 324.

(*l*) *Grant v. Lynam*, 4 Russ. 292; *Harding v. Glyn*, 1 Atk. 469; *Lawlor v. Henderson*, 10 Ir. R. Eq. 150; *Salisbury v. Denton*, 3 K. & J. 529.

(*m*) *Re Deakin*, [1894] 3 Ch. 565.

(*n*) *Gower v. Mainwaring*, 2 Ves. sen. 87, 110; *Re Caplin's Will*, 2 Dr. & S. 527.

(*o*) See *Coogan v. Hayden*, 4 L. R. Ir. 585, referred to in Chap. XLI.

"Existing member of my family."

"Relations."

"Friends."

CHAP. XXIII.

Class of
objects may
be impliedly
restricted.

Construction
of appoint-
ments.

Whether
power
exclusive or
non-exclusive.

Acts of 1830
and 1874.

Perpetuities
and
remoteness.

Joint
tenancy.

In *Woodcock v. Renneck* (oo), property was given upon trust for A. and B. and the survivor for their lives, and after their decease for their children, in such shares as the survivor of A. and B. should by will appoint: it was held that the only objects of the power were children living at the death of the survivor of A. and B.

The construction of appointments under special powers is considered in a subsequent part of this chapter (p).

The question whether a power is exclusive or non-exclusive is one of intention, to be collected from the instrument creating the power: "no general rule can be laid down, except, perhaps, that the words 'all and every' are mandatory, and make it necessary that each object should have a share (5 Ves. 857), and that 'such' authorises exclusion, unless a contrary intention appear" (q). In *Re Veale's Trusts* (r), a testatrix bequeathed a fund to her daughter for life, and after her death "to and amongst my other children or their issue in such parts, shares, proportions, manner, and form as my said daughter shall appoint": this was held to be an exclusive power.

Since the Illusory Appointments Act, 1830 (s), and the Powers of Appointment Act, 1874, the distinction between exclusive and non-exclusive powers has lost much of its importance, except in the case of powers to appoint to relations (t). Every power of appointment, unless so expressed as to forbid the exclusion of one or more objects, authorizes an exclusive appointment. It seems clear that each statute is retrospective; that is to say, it applies to powers existing at the time of, but executed after, the passing of the act (u).

The application of the Rule against Perpetuities and (in the case of real estate) the rule in *Whitby v. Mitchell*, to appointments under special powers, is considered elsewhere (v).

Where a person has power to appoint among several objects, in

(oo) 4 Bea. 190; 1 Ph. 72. See L. R., 2 Eq. at p. 158, and post, Chap. XLII.

(p) Post, p. 856.

(q) Farwell, 362; approved by Jessel, M.R., in *Re Veale's Trusts*, 4 Ch. D. 61 (aff. 5 Ch. D. 622); and by Hall, V.-C., in *Chamberlain v. Napier*, 15 Ch. D. 634. See also *Re Deakin*, supra, and *Re Patterson*, [1899] 1 Ir. R. 324.

(r) Supra; and see *Longmore v. Broom*, 7 Ves. 124; *Penny v. Turner*, 2 Ph. 493; and the cases of *Garthwaite v. Robinson*, 2 Sim. 43, and *Stokworthy v. Sanicroft*, 10 Jur. N. S. 762, commented on by Jessel, M.R., in *Re Veale's Trusts*.

(s) The following cases have been decided on appointments made since

this act: *Bulleet v. Plummer*, L. R., 6 Ch. 160; *Minchin v. Minchin*, 3 Ir. Ch. R. 167; *Re Capon*, 10 Ch. D. 484; *Re Stone*, Ir. R. 3 Eq. 621; *Re Crofton's Trusts*, 7 L. R. Ir. 279. The result of these decisions is that if a fund is appointed to all the objects of a non-exclusive power, a gift over, in the event of any of them dying under age, or the like, to the others, is good, independently of the act of 1874.

(t) Ante, p. 823.

(u) Farwell, 372, 374, citing *Reid v. Reid*, 25 Bea. 469. See *Moynan v. Moynan*, 1 L. R. Ir. 382; *Re Walsh*, 1 L. R. Ir. 320.

(v) Chap. X.

such shares and proportions as he thinks proper, he can, if he wishes to do so, appoint part of the fund to two or more of the objects as joint tenants (*w*).

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As a general rule, a power to appoint "in such manner and form" as the appointor thinks fit, authorizes an appointment to trustees upon trust for the objects of the power (*x*). Where one of the objects is a married woman, such a power, even under the old law, authorized an appointment to trustees for her separate use (*y*). Such a power also authorizes an appointment of the property to trustees upon trust to sell and hold the proceeds in trust for the objects of the power (*z*). In *Dowglass v. Waddell* (*zz*) a testator had power to appoint land to his sons, charged in favour of his female issue; by his will he directed the property to be sold and the proceeds divided among his sons and daughters: it was held that this was a good exercise of the power.

Appointment to trustees;

—upon trust for sale.

But the donee of a special power cannot, by a mere declaration, enlarge the range of investments authorized by the instrument creating the power (*a*).

Range of investments.

Where a power is given to a person to appoint a life interest in real or personal estate to any wife of his, although it is expressed in general terms, it may appear from the context that the power was intended to be one in the nature of a power to jointure; consequently no appointment can be made under it so as to take effect until after the donee's death (*b*).

Power to appoint life interest to wife.

The donee of a power to charge money on land by way of portions has a right to fix the rate of interest (*c*); but where the sum is charged by the settlor, and the testator has merely a power of distributing it, he has no power to fix the rate of interest (*d*).

Power to appoint portions.

(2) *Execution of Special Powers*.—"For the exercise of a special power there must be either (1) a reference to the

How intention may be shewn.

(*w*) *Alloway v. Alloway*, 4 Dr. & W. 380.

(*x*) *Thornton v. Bright*, 2 My. & Cr. 230.

(*y*) *Ibid*.

(*z*) *Long v. Long*, 5 Ves. 445, where a power to charge portions was held to be well exercised by a will directing a sale and appointing the money; see *Crozier v. Crozier*, 3 Dr. & W., at p. 371. *Kenuworthy v. Bates*, *Cowx v. Foster*, and other cases (which are referred to post, p. 856) are cited in *Re Paget*,

[1898] 1 Ch. 290, and *Re Redgate*, [1903] 1 Ch. 357.

(*zz*) 17 L. R. Ir. 384.

(*a*) *Re William Falconer's Trusts*, [1908] 1 Ch. 410.

(*b*) *Re De Hoghton*, [1896] 2 Ch. 385, where *Jamieson v. Trevelyan*, 10 Exch. 269, is explained; *Re Lindo*, 59 L. T. 462, stated shortly in Chap. XXXI.

(*c*) *Boycot v. Cotton*, 1 Atk. 552; *Lewis v. Freke*, 2 Ves. jun. 507.

(*d*) *Balfour v. Cooper*, 23 Ch. D. 472.

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power, or (2) a reference to the property subject to the power, or (3) an intention otherwise expressed in the will to exercise the power" (e).

Inaccurate
reference
to power.

In exercising a special power by express reference, an inaccurate or incomplete description of the power is sufficient, if the intention is clear (f).

Indirect
appointment.

An appointment may be made indirectly. Thus, in *Oke v. Heath* (g), a testatrix appointed a fund of 4,000*l.* to A., an object of the power, "upon condition" or "in consideration" of his paying B., another object of the power, 100*l.* a year during B.'s life. A. died in the testatrix's lifetime, so that the gift in A.'s favour lapsed, but it was held that the annuity to B. did not lapse.

Implied
intention.

Where a testator does not express an intention to exercise a special power, an intention to do so can only be inferred from the words of the will, and from the circumstances which at the time of executing it were known to the testator (h).

Appointment
by implication.

Where a person who has power to appoint to A. and B., expressly exercises it in favour of A., he may do it in such a way that "by necessary implication" he will be deemed to have exercised it in favour of B. as well (i). And if a person deals with property over which he has a special power of appointment in a way which does not of itself constitute an exercise of the power, he may shew a sufficient intention to exercise it by referring to that transaction in his will (j). But the reference must be specific (k). Again, if the donee of a power erroneously recites that he has made an appointment in favour of X., an object of the power, this is evidence of an intention to exercise the power in favour of X.; but if he recites that X. is entitled to the property, this is evidence that he supposes that X. possesses an independent title, and negatives any intention to exercise the power (l). So, if he exercises the power as to part in favour of X., and expressly states that he makes no further appointment because he wishes the rest of the property to go to Y. and Z.,

Ambiguous
or erroneous
recital.

Mistake.

(e) Per Buckley, J., in *Re Weston's Settlement*, [1906] 2 Ch. 620.

(f) *Re Wilmot*, 29 Bea. 644; *Harvey v. Stracey*, 1 Drew. 73; *Carver v. Richards*, 27 Bea. 488. See *Bruce v. Bruce*, L. R., 11 Eq. 371, post.

(g) 1 Ves. sen. 135.

(h) *Re Mills*, 34 Ch. D. 186; *Re Esther Williams*, 42 Ch. D. 93; per Romer, L.J., in *Re Hayes*, [1901] 2 Ch. 531. The doctrine laid down in *Re Morgan* (7 Ir. Ch. R. 18) by the majority of the Court cannot, it is submitted, be supported.

(i) See *Foster v. Cautley*, 6 D. M. & G. 55 (settlement).

(j) *Lees v. Lees*, Ir. R., 5 Eq. 549.

(k) *Re Walsh*, 1 L. R. Ir. 320.

(l) *L'Estrange v. L'Estrange*, 25 L. R. Ir. 399; *Pennefather v. Pennefather*, Ir. R., 7 Eq. 300, citing *Carver v. Richards*, 27 Bea. 488; *Garth v. Townsend*, L. R., 7 Eq. 220 (not testamentary appointments); *Haverty v. Curtis*, [1895] 1 Ir. R. 23; *Minchin v. Minchin*, Ir. R., 5 Eq. 178, 258 (deed); Farwell, 194. Compare the similar doctrine as to gifts by implication, Chap. XIX.

the other objects of the power, this does not operate as an appointment by implication in favour of Y. and Z. (*m*).

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And if there is a gift over in default of appointment, an intention to exercise the power will not be easily implied (*n*).

Effect of gift over.

Sometimes an intention to exercise a power may be inferred from a reference to it in another part of the will (*o*); and where a testator refers to the instrument creating the power, and makes a disposition of a nature authorised by the power, it will generally be presumed that he intended to exercise it: it is a question of intention to be collected from the whole will (*p*). In *Disney v. Crosse* (*pp*), the testatrix had a power of appointing a fund among her children; she bequeathed legacies to her children, and (in express exercise of the power) appointed the fund, "subject and charged with" the legacies, to A. B. (not an object of the power) absolutely: it was held that this operated as an appointment of the legacies out of the fund.

Indirect reference.

If a testator expressly exercises a power, but only partially, and makes a residuary disposition in terms *primâ facie* applying only to his own property, this will not operate as an exercise of the unexhausted part of the power (*q*), unless such an intention can be inferred from the whole will (*r*).

Doubts as to a testator's intention of exercising a special power arise most frequently in connection with residuary gifts. The following propositions are, it is believed, justified by the authorities.

Effect of residuary gift.

An intention to exercise a special power may appear from the use of words referring to powers generally (*s*).

Reference to powers generally.

Thus, if a testator, having a power of appointment in favour of his children, devises and bequeaths "all my real and personal estate and effects whatsoever whereof I have power to dispose," or "over

(*m*) *Re Jack*, [1899] 1 Ch. 374; *Langslow v. Langslow*, 21 Bea. 552.

(*n*) *Henderson v. Constable*, 5 Bea. 297, stated post.

(*o*) *Re Comber's Settlement*, 11 Jur. N. S. 968; *Harvey v. Stracey*, 1 Drew. 73. But if a will does not itself amount to an exercise of a power, the fact that it is made in favour of an object of the power, and that it revokes an earlier will which exercised the power, is not a sufficient indication of an intention to exercise the power; *Harvey v. Harvey*, 32 L. T. 141. In *Wrigley v. Loundes*, [1908] P. 348, the circumstances were similar, but the decision really turned on the language of the later will.

(*p*) *Hunloke v. Gell*, 1 R. & Myl. 515; *Peirce v. M'Neale*, [1894] 1 Ir. R. 118.

(*pp*) L. R., 2 Eq. 592. In *Gainsford v. Dunn*, L. R., 17 Eq. 405, a similar inference was drawn from the use of the word "residue"; but see *Re Boards*, [1895] 1 Ch. 499.

(*q*) *Buller v. Gray*, L. R., 5 Ch. 26, where there was also a reference to general powers.

(*r*) *Elliott v. Elliott*, 15 Sim. 321: in that case the specific disposition did not refer to the power, but to the subject matter.

(*s*) Compare *Maddison v. Andrew*, supra, p. 808.

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Use of word
"appoint."

which I have any power of appointment," or the like, upon trust for his children, this operates as an execution of the power (*t*). Even if he merely says "I appoint, devise, and bequeath my real and personal estate upon trust for" persons who are objects of the power, this may operate as an exercise of the power, if it appears that he has no other power (*u*). Where the testator has more than one power, other considerations arise (*infra*, p. 829).

Such a devise or bequest is not necessarily prevented from operating as an execution of the power by the fact that it includes the testator's own property (*v*), and that he gives the whole to trustees upon trust to sell and pay his debts or debts and legacies out of the proceeds (*w*), or by the fact that the testator professes to give part of the property subject to the power to persons not objects of the power (*x*), or to create interests which are illegal (*y*), or in excess of what the power authorises (*z*). But in most of the cases in which circumstances of this nature were present, the construction was assisted by the fact that the testator had no other power (*a*).

Examples of
special power
not being
exercised
by general
words.

On the other hand, the inference arising from the use of the word "appoint," or any other expressions referring to powers generally, may be rebutted by the context or by the nature of the gift. Thus, a special power to appoint an annuity to children is not exercised by a general gift of property "over which I have any disposing power" upon trust for the testator's wife for life, with remainder to his children (*b*).

And if the will contains indications that the testator either had not the power in his mind at all, or that he did not intend to exercise it, then such vague expressions as "property which I have power

(*t*) *Bailey v. Lloyd*, 5 Russ. 330, *Pidgely v. Pidgely*, 1 Coll. 255; *Cowx v. Foster*, 1 J. & H. 30; *Ferrier v. Jay*, L. R., 10 Eq. 550; *Gainsford v. Dunn*, L. R., 17 Eq. 405; *Re Swinburne*, 27 Ch. D. 696; *Re Blackburn*, 43 Ch. D. 75. *Wrigley v. Lowndes*, [1908] P. 348 ("everything I have power to will"). As to *Clogstoun v. Walcott*, 13 Sim. 523, see below, p. 829, n. (*d*). In *Re Hunt's Trusts*, 31 Ch. D. 308, the testatrix appointed part of a fund to A., a person not an object of the power, and gave "all the residue of my personal estate . . . over which I have any power of disposal by this my will" to objects of the power; it was held by Bacon, V.-C., that this operated as an appointment of the part badly appointed to A.

(*u*) *Re Milner*, [1899] 1 Ch. 563; *Re Mayhew*, [1901] 1 Ch. 677 (disapproving dictum in *Re Richardson's Trusts*, 17

L. R. Ir. 436); *Kent v. Kent*, [1902] P. 108.

(*v*) *Byrne v. Cullinan*, [1904] 1 Ir. R. 42; *Wrigley v. Lowndes*, *supra*.

(*w*) See cases in note (*t*) and (*u*) *supra*. That a special power of appointment over land authorises an appointment to trustees upon trust to sell and divide the proceeds among the objects of the power, see *Kenworthy v. Bate*, 6 Ves. 793; *Re Redgate*, [1903] 1 Ch. 356; post, p. 856.

(*x*) *Re Swinburne*, 27 Ch. D. 696; *Re Boyd*, *infra*; *Re Milner*, [1899] 1 Ch. 563.

(*y*) *Re Boyd*, 63 L. T. 92.

(*z*) *Re Teape's Trusts*, L. R., 16 Eq. 442, and cases cited *supra* n. (*t*).

(*a*) *Infra*, p. 829.

(*b*) *Sykes v. Carroll*, [1903] 1 Ir. R. 17.

to dispose of," or "appoint," or the like, will not include property over which he has a special power of appointment. Thus, in *Cooke v. Cunliffe* (c), a devise of "all my real estate over which I have any disposing power," by a testator who had real estate of his own, was held not to be an exercise of a special power, where, if it had been, it would have defeated certain interests under the settlement creating the power, which interests the testator clearly intended to take effect after his death. So if the trusts of the original settlement and of the will are inconsistent with one another, something more than a mere reference to powers generally is required to exercise the power (d).

The case of *Re Weston's Settlement* (e) is an example of what may be called cumulative indications of the absence of an intention to exercise a power. In that case the testator had a power to appoint certain leaseholds among his children, and had no other power. By his will he gave, devised, bequeathed, and appointed all the residue of his estate to trustees upon trust to convert, and out of the proceeds to pay his debts, &c., and to divide the residue among three out of his seven children; he empowered his trustees to postpone conversion, to manage his real and leasehold estates while unsold, and to invest the shares of two children who were infants: it was held by Buckley, J., that the power was not exercised.

If a testator uses words referring to powers generally, and he has a general power of appointment to which those words may refer, they will not, as a general rule, operate as an exercise of a special power (f).

Where testator has a general as well as a special power.

In most of the cases above referred to, in which a gift of property which the testator had power to dispose of or appoint has been held to be an exercise of a special power, it was proved or assumed that the testator had no other power, and this fact was referred to as the basis of the decision, or, at all events, as assisting the construction (g). But it does not appear to have been decided that the existence of another power would prevent a gift, expressed in general language, from exercising a special power. On the contrary,

Where testator has more than one power.

(c) 17 Q. B. 245.

(d) *Re Cotton*, 40 Ch. D. 41. See *Hope v. Hope*, 5 Giff. 13; *Re Blackburn*, 43 Ch. D. 75; *Re Denton*, 63 L. T. 105. In *Clogstown v. Walcott* (13 Sim. 523) there was a trust for sale and investment, and the decision turned partly on this. It was disapproved by Selborne, L.C., in *Re Teape's Trusts*,

L. R., 16 Eq. 442.

(e) [1906] 2 Ch. 620.

(f) *Re Richardson*, 17 L. R. Ir. 436. See *Re Mayhew*, supra, p. 828.

(g) This consideration does not appear to have influenced the decision in *Bailey v. Lloyd* or *Re Blackburn*, supra.

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in *Ferrier v. Jay* (*h*), where a testatrix, having a general power to appoint 500*l.*, and a special power to appoint certain property, gave all her real and personal estate which she had any power to appoint or dispose of to trustees to pay her debts, &c., and to divide the residue among the objects of the special power: it was held by Malins, V.-C., that the special power was well executed, notwithstanding the direction to pay debts, because, *reddendo singula singulis*, she meant her debts to be paid out of the property subject to the general power. In *Re Milner* (*i*), Stirling, J., after observing that the special power in question was the only testamentary power to which the testatrix was entitled, said: "This is a circumstance which has in many cases been held to afford evidence of considerable cogency of an intention to exercise such a power." Again, in *Re Sharland* (*j*), where the testatrix had two general powers of appointment, and a special power to appoint the income of certain property to her husband for life, she appointed all real and personal estate over which she might have a power of appointment to her husband absolutely, and it was held that this operated as an exercise of the special power.

In *Re Rickman* (*k*), on the other hand, the testatrix had a power of appointment among her children, and in default of children a general power. She made a will by which, "in pursuance of all powers and authorities enabling me thereto," she directed, limited, and appointed all her residuary estate to trustees upon trust as to one moiety for her son for life; all the other trusts were beyond the scope of the power: it was held that the special power was not exercised.

The principle of construction *reddendo singula singulis*, was also applied by Malins, V.-C., in the case of *Thornton v. Thornton* (*l*), where a testator had two special powers, one to appoint among his children subject to a life interest in his wife, and the other to appoint a life interest to his wife in a fund which, subject to the power, was held in trust for his children at twenty-one in equal shares. The testator, by his will, gave "all my property over which I have any disposing power" to trustees upon trust for his wife for life, and after her death for his children at twenty-one equally. The V.-C. held that both powers were well exercised.

"Beneficial"
power.

In *Ames v. Cadogan* (*m*), Fry, J., held that a special power was not

(*h*) L. R., 10 Eq. 550.
(*i*) [1899] 1 Ch. 563. See also *Re Mayhew*, [1901] 1 Ch. 677, where similar evidence was admitted: ante, p. 828.

(*j*) [1899] 2 Ch. 536.
(*k*) 80 L. T. 518.
(*l*) L. R., 20 Eq. 599.
(*m*) 12 Ch. D. 868.

exercised by a devise and bequest of all real and personal estate over which the testator had "any beneficial power of disposition." But in *Von Brockdorff v. Malcolm* (n), Pearson, J., held that the use of the word "beneficial" did not necessarily prevent such a gift from being an exercise of a special power.

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An appointment expressed to be made in exercise of every power enabling the appointor, does not extend to property which he cannot appoint without the exercise of a power of revocation, if there be other property to which the appointment can apply (o).

Power of revocation.

Formerly the question whether a special power was exercised by a general devise or bequest was governed by the same considerations as those applying to general powers, and therefore, under the old law, a devise of land operated as an exercise of a special power of appointing land, if the testator had no land of his own (p).

Effect of a general devise or bequest.

Special powers to appoint in favour of particular persons or classes, as children (q), or kindred (r), are not within sect. 27 of the Wills Act. Generally, therefore, the question whether such powers are executed by a general devise or bequest still depends on the old law. But if the question arises with regard to a special power over realty, then, inasmuch as by sect. 24 a will now takes effect, with reference to the testator's own property, as if made immediately before the death of the testator, no presumption can be raised in favour of the appointment by reason of the testator having no real estate of his own at the date of the will, however short may be the interval between the execution of the will and the testator's death.

Sect. 27 does not apply to special powers.

Accordingly, a testator who makes a general devise, though having no real estate of his own, does not thereby sufficiently indicate an intention of exercising a special power of appointing real estate, even although the person in whose favour the devise is made is the sole object of the power (s); the argument against such a construction would, of course, be even stronger if the testator included in the general devise persons who are not objects of the power (t).

(n) 30 Ch. D. 172.

(o) *Pomfret v. Perring*, 5 D. M. & G. 775. Compare the cases on general powers, *supra*, p. 804.(p) *Wallop v. Lord Portsmouth*, Sugd. Powers, 916 (8th edition).(q) *Cloves v. Audry*, 12 Beav. 604; *Pidgely v. Pidgely*, 1 Coll. 255; *Elliott v. Elliott*, 15 Sim. 321; *Cronin v. Roche*, 8 Ir. Ch. Rep. 103; *Russell v. Russell*,12 Ir. Ch. R. 377; *Doyle v. Coyle*, [1895] 1 Ir. R. 205; *Humphery v. Humphery*, 36 L. T. 91.(r) *Hawthorn v. Shedden*, 3 Sm. & Gif. 293; *Re Caplin's Will*, 2 Dr. & Sm. 527.(s) *Harvey v. Harvey*, 32 L. T. 141; *Re Esther Williams*, 42 Ch. D. 93.(t) *Re Mills*, 34 Ch. D. 186.

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Where
testator has
no property of
his own.

It sometimes happens that a testator has a special power of appointment over personal property, but has no property of his own, or property of insufficient value to satisfy his testamentary dispositions, and that those dispositions are all in favour of objects of the power, from which facts it might be inferred that he intended to exercise the power in their favour: it seems clear, however, that no such inference can be drawn (*tt*).

Married
woman.

In the case of a married woman having a power of appointment in favour of A., and making a disposition by will in his favour within the scope of the power, but not expressly referring to it, the general rule seems formerly to have been that it operated as an appointment, unless it was proved that the testatrix had separate property of her own at the date of the will; but this rule no longer exists (*u*).

Reference
to subject
of power.

If a testator has a special power over certain property, and by his will, without referring to the power, disposes of that specific property in favour of the objects of the power, it will generally be inferred that he meant to exercise the power (*v*). Thus, in *Re Davids' Trusts* (*w*), a testatrix had a power of appointment over a sum of $3\frac{1}{4}$ per cent. stock in favour of certain persons: by her will she gave 10*l.* to each of two objects of the power, and bequeathed to the remaining object "all the residue of my property in the $3\frac{1}{4}$ per cent. annuities"; the testatrix had no such stock of her own at the date of the will or subsequently, and it was held that the three gifts took effect as an exercise of the power. And if a testator manifests an intention to exercise by his will a special power, by reason of his making some gifts of property which he describes as "my" property, the words of which gift cannot be satisfied unless they pass property subject to the power, the Court will assume that he intended also to exercise the power in the case of other gifts in the will which are capable of passing other property subject to the power, although the words of gift can be satisfied by means of property belonging to the testator himself (*x*).

(*tt*) See *Humphrey v. Humphrey*, 36 L. T. 91; *Re Huddleston*, [1894] 3 Ch. 595. Such facts may however have weight if combined with other circumstances: see *Peirce v. M'Neale*, [1894] 1 Ir. R. 118.

(*u*) See *Re Herdman's Trusts*, 31 L. R. Ir. 87.

(*v*) *Davies v. Davies*, 4 Jur. N. S. 1291; *Elliott v. Elliott*, 15 Sim. 321;

Forbes v. Ball, 3 Mer. 437.

(*w*) *John. 495. Innes v. Sayer*, 3 Mac. & G. 606; *Rooke v. Rooke*, 2 Dr. & Sm. 38; *Re Gratwick's Trusts*, L. R., 1 Eq. 177, and *Fletcher v. Fletcher*, 7 L. R. Ir. 40, were similar cases. Compare the analogous cases of general powers, *Walker v. Mackie, & Co.*, *supra*, p. 803.

(*x*) *Reid v. Reid*, 25 Bea. 469; *Re Wait*, 30 Ch. D. 617.

To bring a case within this doctrine, however, the description of the property must be specific and unambiguous, so as to shew beyond a doubt that the testator has in mind the property subject to the power (y). And if he attempts to deal with the property in a manner not authorized by the power, the presumption that he intended to exercise it may be rebutted (z).

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What
description
required.

Moreover, if the testator has property of his own, which answers the description and is sufficient to satisfy the gift, it will generally be assumed that he did not mean to exercise the power (a). But an intention to do so may appear from the context : e.g., if the testator excepts from the gift a certain part of the property subject to the power (b).

Where
testator has
property
of his own
which will
satisfy gift.

In *Bruce v. Bruce* (bb) a testatrix had a special power to appoint property to A., B., and C., but she thought that under a certain deed she had a general power of appointment over the property ; by her will, not referring to the former power, but in professed exercise of the supposed general power, and of every other power enabling her in that behalf, she purported to appoint to B., C., D., and E. : it was held by Romilly, M.R., that the will operated as an exercise of the special power.

Reference to
wrong power.

How far a will can operate as an exercise of a special power created after the date of the will, is a question of some difficulty. The only case in which it has been held that a special power can be effectively exercised in this manner seems to be *Stillman v. Weedon* (c), but the decision in that case can only be supported, if at all, on the ground that the will disposed specifically of the property, which afterwards, by the testator's own act, became subject to a special power of appointment by him in favour of the persons to whom it was given by the will. The better opinion is that sect. 24 of the Wills Act has not the same effect with regard to special powers as it has in the case of general powers falling within sect. 27 (cc), and the question is therefore one of intention.

Exercise
of future
power.

(y) *Bennett v. Aburrow*, 8 Ves. 609 ; *Mattingley's Trusts*, 2 J. & H. 426 ; *Re Huddleston*, [1894] 3 Ch. 595, where the question of admitting parol evidence was discussed.

(z) *Wildbore v. Gregory*, L. R., 12 Eq. 482 ; *Re Rickman*, ante, p. 830. In *Re Gratwick's Trusts*, L. R., 1 Eq. 177, the appointment was partly to objects and partly to a stranger ; it was held good pro tanto.

(a) *Noel v. Noel*, 4 Drew. 624.

(b) *Reid v. Reid*, 25 Bea. 469.

(bb) L. R., 11 Eq. 371. The special power was exercisable by deed only, but the defective execution was aided : ante, p. 799.

(c) 16 Sim. 26.

(cc) See the operation of these sections explained by Stirling, J., in *Re Wells' Trusts*, 42 Ch. D. 656 ; infra, p. 839. See also Farwell on Powers, 226. In an article in the Solicitor's Journal, vol. liii. p. 240, it is suggested that

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In *Re Hayes* (d), a testator gave "all the residue of the property over which at the time of my death I shall have a disposing power" to trustees upon trust for sale, conversion, and investment, and directed them to pay the income to his wife for life, and subject, as aforesaid, to stand possessed of the trust estate upon trusts for his children; after the date of his will he became entitled to a power authorising him to appoint the income of certain settled funds in favour of his wife for life: it was held by Byrne, J., and by the Court of Appeal, that the language of the testator was not sufficient to shew an intention to exercise the special power in favour of his wife. The Court of Appeal expressed some doubt whether it is possible in any case to execute by anticipation a special power created after the attempted execution. It was not, however, necessary to consider this in the case in question, because the testator's dispositions clearly shewed that he did not contemplate the contingency of his becoming entitled to exercise a special power of the nature afterwards created. If a testator declares that in the event of his becoming subsequently entitled to exercise a power in favour of A., he wishes his will to operate as an appointment under it, there seems, on principle, no reason why effect should not be given to his intention, if it is in accordance with the power (e).

On principle, it seems clear that if a testator by his will expressly exercises a special power, which is subsequently destroyed and replaced by a new power, the will does not operate as an exercise of the new power (ee).

the conclusion to be drawn from the decisions in *Wilkinson v. Duncan*, 30 Bea. 111, *Von Brockdorff v. Malcolm*, 30 Ch. D. 172, and *Re Thompson*, [1906] 2 Ch. 199 (all referred to in Chapter X., ante, p. 319) is "that section 24 of Wills Act, 1837, does apply to limited powers." But it is submitted that the application of the Rule against Perpetuities does not depend on sect. 24; the general principle of the Rule was established before 1837, and the ambulatory nature of a will exercising a special power was then well settled: thus in *Crompe v. Barrow*, [1799] 4 Ves. 681, Sir R. P. Arden, M.R., said: "I do construe the will at the death of the testatrix; and I think the ultimate appointment is good."

(d) [1900] 2 Ch. 332; [1901] 2 Ch. 529, following *Doyle v. Coyle*, [1895] 1 Ir. R. 205. *Walker v. Armstrong*, 21 Bea. 284, and *Cowper v. Mantell*, 22 Bea. 223, were also cited.

(e) In *Charlton v. Charlton* ([1906] 2 Ch. 523), A. by his marriage settlement covenanted to charge all real and personal estate which might come to him from his father with a jointure of 400l. a year for his intended wife; a year afterwards the father died, having by his will given A. a power of charging certain real estate by deed or will with a jointure of 400l. for his wife: it was held that the covenant in the marriage settlement operated as a defective execution of the power to which the Court would give effect; it was treated as a question of intention.

(ee) See Farwell, 226. The decision in *Thompson v. Simpson*, ante, p. 813, seems to involve this principle, for although the power in that case was a general one, the appointment could only have operated under sect. 24. In *Airey v. Bower*, 12 A. C. 263, it was suggested by Lord Macnaghten that sect. 23 of the Wills Act applies to powers of appointment, sed quære: see post, p. 841.

A will may be made to operate as an exercise of a subsequently acquired power, if it is republished after the acquisition of the power (*f*).

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Republication.

In *Gainsford v. Dunn* (*ff*), a testatrix had power to appoint certain funds in favour of A., B., C., D., and E. By her will she gave legacies of 5*l.* each to A., B., and C., and "all the residue of my property, over which I have any power of appointment or disposition," to D. and E.: it was held by Jessel, M.R., that the legacies were payable partly out of the testatrix's own property and partly out of the appointed fund. But the principle of the decision has been questioned (*g*).

Appointment taking effect partly out of testator's own property.

Where a testator has a power of revocation and new appointment, exercisable by deed or will, and he exercises it by will, and afterwards exercises it by deed, reserving to himself a fresh power of revocation and new appointment, the will does not, by virtue of sect. 24 of the Wills Act, operate as a revocation and new appointment under the latter power (*gg*).

Power of revocation.

(3) *Ineffectual Execution*.—An intention to execute a special power may be ineffectual either for some reason applying to all testamentary gifts (*h*), or for some reason applying to special powers. The rules as to the failure of an appointment under a special power, by reason of the appointment being a fraud on the power (*i*), or exclusive (*j*), or made in favour of a person not an object of the power (*k*), or being otherwise an excessive execution of the power, or because it is a delegation of the power (*kk*), are not peculiar to testamentary powers, and are, therefore, not treated of in this work.

Failure of appointment.

The effect of the failure of an appointment under a special power is considered in a later part of this chapter (*l*).

Where there is an absolute appointment under a special power,

Absolute appointment followed by void addition.

(*f*) *Re Blackburn*, 43 Ch. D. 75; post, p. 843.

(*ff*) *L. R.*, 17 Eq. 405.

(*g*) *Re Boards*, [1895] 1 Ch. 499.

(*gg*) *Re Wells' Trusts*, 42 Ch. D. 646.

(*h*) See *Champney v. Davy*, 11 Ch. D. at p. 958. As to charitable gifts, see Chap. IX.; as to the Rule against Perpetuities, see Chap. X.; as to ademption, lapse, abatement, &c., see post, pp. 839 seq.

(*i*) As in *Re Crawshaw*, 43 Ch. D. 615.

(*j*) As in *Bulleel v. Plummer*, *L. R.*, 6 Ch. 160. See also *White v. Wilson*, 1 Dr. 298; *Re Davids' Trusts*, *Johns*, 495; *Gainsford v. Dunn*, *L. R.* 17 Eq. 405: all cases before the Powers of Appointment Act, 1874, *supra*.

(*k*) As in *Re Jeaffreson's Trusts*, *L. R.*, 2 Eq. 276; post, p. 860; *Re Hunt's Trusts*, 31 Ch. D. 308; ante, p. 828.

(*kk*) As in the case of an attempt to create a discretionary trust: Chap. XXIV.

(*l*) Post, pp. 844 seq.

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with a superadded modification which is in excess of the power, or otherwise void, the modification is rejected and the appointment stands (*ll*).

Defect in power supplied by testator's interest.

VII.—Miscellaneous Questions as to Powers.—Where a testator makes a will purporting to execute a power, and the power proves to be invalid, or to have been destroyed, or not to have arisen, or not to authorize the disposition which the testator desires to make, then if the testator has an interest in the property, it will make good the defect in the appointment (*m*).

Covenant to exercise general power.

A covenant to exercise a general testamentary power of appointment is good, and an action lies for a breach of it, but specific performance will not be decreed (*n*). It may be satisfied by the covenantee taking in default of appointment (*o*). A covenant to exercise a general power in favour of a creditor, so as to give him a first charge on the fund, followed by a will purporting to comply with the covenant, does not give him priority over the other creditors (*p*).

Release of general power.

A general testamentary power of appointment, like any other general power, may be released, or the donee may by covenant debar himself from exercising it (*q*). A married woman may by unacknowledged deed release a power given to her in respect of personal property (or, semble, in respect of real property), even if her life estate is subject to a restraint on anticipation (*r*).

Covenant to exercise special power.

If a special power of appointment is exerciseable by will only, a covenant to exercise it in a particular way is, it would seem, void (*s*), but an appointment made in accordance with such a covenant is good (*t*). And if the power is exerciseable by deed as well as by will, the covenant may operate as a defective execution of the power to which the Court will give effect (*u*).

(*ll*) Post, p. 847.

(*m*) Farwell, p. 268, citing *Mandeville v. Roe*, 1 J. & L. 371; *Cross v. Hudson*, 3 Br. C. C. 30; *Mortlock v. Buller*, 10 Ves. 292; *Sing v. Leslie*, 2 H. & M. 68; *Jones v. Southall*, 30 Beav. 187; *Re James*, [1910] 1 Ch. 157 (married woman).

(*n*) *Robinson v. Ommaney*, 23 Ch. D. 285; *Re Parkin*, [1892] 3 Ch. 510. As to married women, see *Re Ann*, [1894] 1 Ch. 549, *supra*, p. 819.

(*o*) *Thacker v. Key*, L. R., 8 Eq. 408, where the power was special, but the principle seems to be the same. Com-

pare the cases on covenants to leave a sum of money by will, *ante*, p. 28.

(*p*) *Re Lawley*, [1902] 2 Ch. 799; s. c. nom. *Beyfus v. Lawley*, [1903] A. C. 411.

(*q*) Conveyancing Act, 1881, s. 52.

(*r*) *Re Chisholm's Settlement*, [1901] 2 Ch. 82. See *Heath v. Wickham*, 5 L. R. Ir. 285.

(*s*) *Thacker v. Key*, *supra*; *Re Bradshaw*, [1902] 1 Ch. 436.

(*t*) *Coffin v. Cooper*, 2 Dr. & Sm. 365; *Palmer v. Locke*, 15 Ch. D. 294.

(*u*) *Affleck v. Affleck*, 3 Sm. & G. 394; *Charlton v. Charlton*, [1906] 2 Ch. 523.

The donee of a special testamentary power may release it, unless it is a fiduciary power, or power coupled with a duty (*v*). The rule above stated as to the release of a power by a married woman applies also to special powers (*w*). CHAP. XXIII.
Release
of special
power.

An administrative power, such as a power of sale, may be accelerated, but not a power of charging (*ww*).

A power given by will can, of course, be revoked by a codicil, or a subsequent will. In *Re Brough* (*x*), a testator gave H. a life interest in a fund, and a special power of appointment by will over the capital; by a codicil he revoked all devises and bequests "in favour of" H.: it was held that the power was revoked as well as the life interest. Revocation
of power.

Sometimes property is settled by deed, subject to a power of revocation by will; the question whether such a power can be exercised by implication has been already considered (*xx*). Power of
revocation.

A will exercising a power of appointment is only in certain cases revoked by the marriage of the testator (*y*), but with this exception the rules as to revocation of wills apply to such a will (*z*). Consequently, a general clause in a will, revoking all former wills, revokes a prior express testamentary appointment, whether the power under which it was made is general or special (*a*), and although the latter will does not execute the power (*b*). Revocation
of appoint-
ment.

The doctrine of implied revocation by a later inconsistent will or codicil also applies to appointments (*c*), so that if a testator, having a general power, makes a will containing a residuary bequest operating Implied
revocation.

(*v*) *Re Radcliffe*, [1892] 1 Ch. 227; *Re Somes*, [1896] 1 Ch. 250; *Foakes v. Jackson*, [1900] 1 Ch. 807. A covenant not to exercise a testamentary power operates as a release: *Davies v. Huguenin*, 1 H. & M. 730; *Isaac v. Hughes*, L. R., 9 Eq. 191. The principle of these cases is altogether wrong, for their effect is to enable the donee of a testamentary power to convert it into a power to appoint by deed; this view is put with great force by Neville, J., in *Re Evered*, 54 Sol. J. 83.

(*w*) *Re Chisholm's Settlement*, *supra*.

(*ww*) *Truell v. Tysson*, 21 Bea. 437.

(*x*) 38 Ch. D. 456.

(*xx*) As to general powers, *ante*, p. 804. As to special powers, *ante*, p. 831. As to the construction of a special power of revocation, see *Morgan v. Gronow*, L. R., 16 Eq. 1; *Farwell*, 210.

(*y*) *Supra*, p. 142. In *bonis Russell*, 15 P. D. 111.

(*z*) As to these rules, see *ante*, Chap. VII. In *Re Gore-Booth's Estate*, [1908] 1 Ir. R. 387, there were two powers, one to charge a sum by deed, and the other to appoint the sum by deed or will. As to the formalities required to revoke an appointment under the old law, see *Richardson v. Barry*, 3 Hagg. 249.

(*a*) *Sotheran v. Dening*, 20 Ch. D. 99; *Re Kingdon*, 32 Ch. D. 604; *Cadell v. Wilcocks*, [1898] P. 21; *Kent v. Kent*, [1902] P. 108.

(*b*) *Harvey v. Harvey*, 23 W. R. 476. Some old decisions to the contrary are, it seems, no longer law: see *ante*, p. 168.

(*c*) In *bonis McFarlane*, 13 L. R. Ir. 264.

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Special
power.Implied
revocation
pro tanto.

as an execution of the power, and afterwards makes another will containing a residuary bequest, this would, it seems, by virtue of sect. 27 of the Wills Act, operate as a revocation of the previous appointment. Whether a general residuary gift would operate as an implied revocation of an express appointment under a general power made by an earlier will, does not seem to have been decided (*d*). On principle it seems clear that it would not, the doctrine of implied revocation being based on intention. If a testatrix having a special power makes a will expressly exercising it, and makes a subsequent will by which she "gives, devises, and bequeaths" all her property, this does not operate as an implied revocation of the appointment contained in the first will (*e*). But if the second will operates as an exercise of the power (either by referring to it, or by a general gift containing the word "appoint" (*f*)), then the second will impliedly revokes the appointment made by the first (*g*).

If a testator exercises a special power of appointment in favour of some of the objects, and by a codicil, without expressly revoking the appointment, makes an appointment of part of the fund in favour of other objects, this only revokes the will to the extent to which it effectively interferes with the original appointment (*h*). In *Duquid v. Fraser* (*i*) the testatrix had a power of appointment among her husband and children; she appointed the fund to her husband and children in equal shares; one of the children predeceased her, and she made a codicil appointing his share to his children: it was held that this invalid appointment did not operate as a revocation pro tanto of the appointment by the will to the class, and that the husband and surviving children took the whole fund.

It has been held that if a testator expressly exercises a power by a special testamentary instrument of appointment (not admitted to probate), and afterwards executes a will containing a residuary bequest, the bequest operates as an exercise of the power and as a revocation of the special testamentary appointment, because to prevent this effect a contrary intention must appear from the will, and the Court cannot infer it from the terms of the special appointment (*j*). This unsatisfactory result, it seems, might have been

(*d*) See *Cadell v. Wilcocks*, [1898] P. at p. 27.

(*e*) *Cadell v. Wilcocks*, supra.

(*f*) See *Re Mayhew*, supra, p. 828.

(*g*) *Kent v. Kent*, [1902] P. 108; *In b. Tenney*, 45 L. T. 78, and other cases

cited supra, p. 828.

(*h*) *Re Walker*, [1908] 1 Ch. 560.

(*i*) 31 Ch. D. 449.

(*j*) *Re Gibbes' Settlement*, 37 Ch. D. 143.

avoided by applying to the Probate Court to allow the special appointment to be proved as part of the will. CHAP. XXIII.

In *Re Wells (k)*, the donee of a special power of appointment made a will expressly exercising the power; some years afterwards he executed a deed (not referring to the will) by which he expressly and effectually exercised the power as to four-fifths of the fund, and ineffectually exercised it as to the remaining one-fifth: it was held that the fact of the will being dated before the deed, was sufficient evidence of "a contrary intention" within sect. 24 of the Wills Act, and, consequently, that the will did not speak from the death of the testator so as to revoke the appointment by that deed. It was also held that, as to the one-fifth ineffectually appointed by the deed, the will took effect. Double appointment by will and deed.

The doctrine of dependent relative revocation applies to wills exercising powers of appointment. Consequently, if a testator makes a will exercising a power, and afterwards cancels it under the mistaken impression that in default of appointment the fund will be divided among a certain class of persons, this does not operate as a revocation, and the will stands (*l*). But as in the case of direct gifts, so in the case of appointments under powers, the doctrine is less easy of application where the revocation is effected by an express clause of revocation in a subsequent testamentary instrument. Thus, where a testator made a valid appointment in favour of his younger children, and by a codicil revoked this appointment, and made a fresh appointment which was ineffective, it was held that the revocation nevertheless took effect (*ll*). Dependent relative revocation.

A testamentary appointment has no operation until the death of the testator; there is no relation back to the date of the will (*m*). It follows that an appointment under a testamentary power may be adeemed by subsequent dealings with the settled property. And there is no distinction, in this respect, between a general and a special power (*n*). Thus, if a testator in exercise of a power appoints Blackacre to A., and Blackacre is subsequently sold and the proceeds invested in the purchase of Whiteacre, the appointment is Ademption.

(k) 42 Ch. D. 646.

(l) *Stamford v. White*, [1901] P. 46. This appears to be the effect of the decision, but the case is badly reported.

(ll) *Quinn v. Butler*, L. R., 6 Eq. 225. See *Onions v. Tyrer*, *Richardson v. Barry*, and other cases cited ante, p. 170.

(m) *Re Moses*, [1902] 1 Ch. 100, aff. s. n. *Beddington v. Baumann*, [1903] A. C. 13.

(n) *Re Dowsett*, [1901] 1 Ch. 398, approved in *Beddington v. Baumann*, supra. As to the effect of conversion, see Chap. XXII.

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adeemed, and A. takes nothing under the appointment (o). So, if part of Blackacre is sold, the appointment is adeemed pro tanto (p). In the case of personal property, such as stock, the same principle applies. But whether the property is real or personal, the appointment may be so expressed as to shew an intention to appoint whatever property may for the time being be subject to the power, and not merely the specific property which is subject to it at the date of the will. Thus, an appointment of stock may take effect notwithstanding changes in investment (q).

In *Jones v. Southall* (r), the settlement under which the testatrix professed to appoint certain investments was invalid, and the appointments appear to have operated merely as bequests: they were held to be adeemed pro tanto by reason of the testatrix having called in some of the securities and re-invested the proceeds.

In *Cooper v. Martin* (s), the testator devised an estate upon trust for sale, with power of pre-emption to his younger children, and the proceeds were to be held upon such trusts in favour of his issue as his wife should, within a prescribed period, appoint; she appointed the estate by name to the eldest son; this appointment was invalid, not being made within the prescribed period, and it was therefore unnecessary to decide whether the proceeds of sale would have passed under it: Lord Cairns thought that they would.

In *Beddington v. Baumann* (t) a testator had a power of appointment among his children over some freehold houses, of which he was tenant for life: he made a will appointing them to two sons; after the date of the will he granted leases of these houses under the Settled Land Acts, partly in consideration of premiums, and these premiums were paid to the trustees and invested by them: on the death of the testator it was held that the investments representing the premiums did not go to the appointees, but went as in default of appointment.

It has been held that where a married woman, having a power of appointment under a settlement, exercises it by will, and the settlement afterwards comes to an end, the mere fact of her obtaining a transfer to herself of the property comprised in the settlement does

Transfer of
property to
donee of
power.

(o) *Gale v. Gale*, 21 Bea. 349; *Re Dowsett*, supra. In *Collinson v. Collinson*, 24 Bea. 269, the appointment was by deed. *Gale v. Gale* and the other cases are discussed in Farwell, pp. 217 seq.

(p) *Blake v. Blake*, 15 Ch. D. 481.

(q) See *Re Johnstone's Settlement*, 14 Ch. D. 162; *Re Dowsett*, supra; *Willett*

v. Finlay, 29 L. R. Ir. 497; as to which, see *Re Moses*, supra.

(r) 32 Bea. 31.

(s) L. R., 3 Ch. 47. The case was really one of falsa demonstratio: see Chap. XXXV.

(t) [1903] A. C. 13, affirming the decision of the Court of Appeal in *Re Moses*, [1902] 1 Ch. 100.

not operate as an ademption of the appointment (*v*). But if in such a case the power is exerciseable by deed as well as by will, and the transfer professes to be made in exercise of the power to appoint by deed, this operates as an execution of the power, and the appointment by will is revoked (*w*).

In *Re Fox* (*x*), a trust fund was settled upon A. for life, with a power of appointment among four children, who were to take equally in default of appointment; there were the usual hotchpot and advancement clauses. During A.'s life 705*l.* was advanced to R., one of the children, and A., by her will, subsequently appointed an equal fourth part of the fund in favour of each of the children: it was held that R. was not bound to account for the 705*l.*

Advance-
ment.

An appointment may also be adeemed by the power under which it was expressed to be made being destroyed. And its efficacy will not, as a general rule, be restored by another equally extensive power being conferred on the testator (*y*), unless the power is a general one, and the will contains a residuary gift; this *prima facie* operates as an exercise of the power (*yy*).

Destruction
of power
and creation
of new power.

It must, however, be observed that the effect of sect. 23 of the Wills Act (*z*) on cases of this kind has not been fully considered (*a*). In *Airey v. Bower* (*b*), most of the learned lords thought that the case fell within that section, and with the same result as that produced by sects. 24 and 27. That was the case of a general power being exercised by a general bequest. Whether the same principle would apply to an appointment expressed to be made in exercise of a power, whether general or special, which is subsequently destroyed and replaced by a new power, is another matter, because an appointment of this kind depends on intention, and it seems somewhat difficult to hold that sect. 23 of the Wills Act can convert an intention to exercise power X into an intention to exercise power

Effect of
s. 23.

(*v*) *Dingwell v. Askew*, 1 Cox, 427; *Clough v. Clough*, 3 My. & K. 296. These decisions seem contrary to principle, although they probably gave effect to the testatrix's intentions.

(*w*) *Lawrence v. Wallis*, 2 Br. C. C. 319.

(*x*) [1904] 1 Ch. 480.

(*y*) *Thompson v. Simpson*, 50 L. J. Ch. 461.

(*yy*) Ante, p. 813. In *Thompson v. Simpson* the power was general, but the will contained no residuary gift.

(*z*) "No conveyance or other act

made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death."

(*a*) In *Walker v. Armstrong*, post, p. 842, the will was subject to the old law.

(*b*) 12 A. C. 263, supra, pp. 815, 834.

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Y (c). Moreover, it is by no means certain that sect. 23 applies to powers of appointment at all, for it relates only to property "comprised" in the will, and the better opinion is that property subject to a power of appointment is not "comprised" in the will of the person who exercises the power. The contrary view involves a confusion between property and power (cc).

Mistake. If by mistake a deed is so framed as to defeat a previous testamentary appointment, the Court may reform it (d).

Act done after testator's death. It is hardly necessary to say that an appointment is not admeemed by the act of a stranger after the testator's death: the contrary proposition was put forward, unsuccessfully, in the case of *Re Hodgson* (e).

Effect of republication. Under the old law, the republication of a will did not render it a good execution of a power given to the testator after the date of the will; and consequently, if a testator appointed property in exercise of a power, and the power was afterwards destroyed and replaced by a new power, the republication of the will did not make it a good execution of the new power, even if it was a general power (f). It is, of course, clear that, since the Wills Act, a general devise or bequest operates as an execution of a general power conferred on the testator since the date of the will, unless a contrary intention appears by the will (g), but the act does not seem to have made any further alteration in the law as to the execution of powers (h).

If this is so, it follows that where a testator by his will expressly exercises a power, whether special or general, in favour of A., and the power is afterwards destroyed and a new power substituted, the mere republication of the will would not make it operate as an

(c) See *Thompson v. Simpson*, 50 L. J. Ch. 461; ante, p. 834. In *Gale v. Gale*, 21 Bea. 349, Lord Romilly, M.R., thought there was a new estate and a new power in relation to it, and that the will did not operate as an exercise of the old power; but, as Lord St. Leonards points out (*Powers*, 309), there was no new power. He thought the decision "a narrow construction" of s. 23: it has, however, been treated in *Blake v. Blake*, *Re Dowsett*, and *Re Moses*, all cited supra, as laying down the correct rule on the question of ademption.

(cc) As to the meaning of "comprised" in s. 24, see per Stirling, J., in *Re Wells' Trusts*, 42 Ch. D. at p. 656:

Farwell on Powers, 226. The contrary view was expressed by Jessel, M.R., in *Freme v. Clement*, 18 Ch. D. at p. 509, but it was dissented from by the Court of Appeal in *Holyland v. Lewin*, 26 Ch. D. 266.

(d) *Walker v. Armstrong*, 8 D. M. & G. 531.

(e) [1899] 1 Ch. 666.

(f) *Holmes v. Coghill*, 7 Ves. 499, 12 Ves. 206; *Lane v. Wilkins*, 10 East, 241; *Cowper v. Mantell*, 22 Bea. 223.

(g) *Cofield v. Pollard*, 3 Jur. N. S. 1203, and the other cases cited ante, p. 813.

(h) Unless s. 23 affects the question: ante, p. 841.

execution of the power in favour of A. (i). And even if the will is expressed to be made in exercise of all powers then vested in the testator, the republication of the will does not, apparently, make it operate as an exercise of an intermediately acquired special power (j). But if a testator disposes of property in exercise of all powers which may be vested in him at the time of his death, and republishes it after he has acquired a new power, this makes the will operate as an exercise of it, even if it is a special power, provided, of course, the dispositions of the will are in accordance with the terms of the power (k).

The question whether a special power can be exercised by a will made before the power comes into existence, has been already discussed (l).

Exercise of power in anticipation.

A power given by will lapses by the death of the donee in the lifetime of the donor (m).

Lapse of power.

The question whether a power to appoint to a number of named persons lapses pro tanto by the death of one in the lifetime of the testator, is discussed in another chapter (n).

It has been suggested (o) that sect. 33 of the Wills Act might apply to powers, so that if a testator gave one of his children a power of appointment, and the child died in the testator's lifetime, leaving issue, and having made a will which in terms would be an exercise of the power, the appointment thus made would take effect. It is submitted that this is not so, because the gift of a power of appointment is not a "devise or bequest" of "real or personal estate for any estate or interest" within the meaning of sect. 33 (oo).

Appointments under powers are liable to failure by lapse if the beneficiary dies during the lifetime of the testator (p). But if an appointment is made to A. upon trust for B., or upon condition of his giving part of the benefit of the appointment to B., and

Lapse of appointment.

(i) The contrary of this proposition seems to be implied in Farwell on Powers, 226.

(j) *Hope v. Hope*, 5 Giff. 13. In this case the republication was before the Wills Act, but nothing seems to turn on this. See *Re Blackburn*, 43 Ch. D. 75.

(k) *Re Blackburn*, 43 Ch. D. 75. As to what amounts to a republication, see *Re Smith*, 45 Ch. D. 632.

(l) Ante, p. 833.

(m) *Jones v. Southall*, 32 Bea. 31; *Sharpe v. M'Call* [1903] 1 Ir. R. 179.

(n) In Chap. XLIV., in connection with *Reade v. Reade*, 5 Ves. 744.

(o) Farwell on Powers, 2nd edition, 226.

(oo) In *Griggs v. Gibson*, 35 L. J. Ch. 458, Wood, V.-C., decided that the power was not exercised, because it was determinable at the death of the donee.

(p) *Duke of Marlborough v. Godolphin*, 2 Ves. sen. 61, and *Re Susanni's Trusts*, 47 L. J. Ch. 65, ante, Chap. XIII.

A. dies in the lifetime of the testator, B.'s interest does not lapse (*q*).

The fact that an appointment is made in pursuance of a covenant does not save it from lapse (*qq*).

There are differences between general and special powers in respect of lapse. If a testator specifically executes a general power in favour of A., and A. predeceases him, the power will, as a general rule, still be executed by a residuary gift in the will, if there is one (*r*). And it seems that a testamentary appointment, under a general power, to A., in trust for B., which lapses as to the beneficial interest by B.'s death before the testator, operates as a good appointment to A., who holds the property on the same trusts as if it had been the testator's own (*s*). Again, if a testator executes a general power in favour of a child who predeceases him, leaving issue, the appointment is preserved from lapse by sect. 33 of the Wills Act (*t*). But special powers stand on a different footing, for in the case of an appointment under a special power lapsing, it will only be executed by a residuary devise or bequest if the residuary devise or bequest is within the scope of the power, and if an intention to exercise it in that way appears by the will (*u*), because, as already noticed, sect. 27 of the Wills Act does not apply to special powers (*v*). Nor are special powers within sect. 33 of the act, so that an appointment under such a power is not saved from lapse by that section (*w*); nor can the testator prevent an appointment to A. under a special power from lapsing by appointing to A.'s executors or administrators in substitution for him, because they are not objects of the power (*x*).

As to the cases in which an appointment of the "residue" or "remainder" of a fund is held to be an appointment of a specific sum, and those in which it operates as an appointment of the "residue" in the technical sense, so as to include specific appointments which fail, see post, pp. 859 et seq.

(*q*) *Oke v. Heath*, 1 Ves. sen. 135.

(*qq*) *Re Brookman's Trust*, L. R., 51 Ch. 182; see *Jervis v. Wolferstan*, L. R., 18 Eq. 18.

(*r*) See cases supra, p. 814.

(*s*) Per Wickens, V.-C., in *Re Davies' Trusts*, L. R., 13 Eq. 163, citing *Chamberlain v. Hutchinson*, 22 Bea. 444, and *Wilkinson v. Schneider*, L. R., 9 Eq. 423.

(*t*) *Eccles v. Cheyne*, 2 K. & J. 676.

(*u*) As in *Oke v. Heath*, 1 Ves. sen. 135; *Re Hunt's Trusts*, 31 Ch. D. 308, post, p. 860.

(*v*) Supra, p. 831. In *Freme v. Clement*,

18 Ch. D. 499, Jessel, M.R., held that the word "devise," in s. 25 of the Wills Act, includes an appointment under a special power, so that property appointed by an appointment which fails, would pass by the residuary devise, but this is clearly erroneous: *Holyland v. Lewin*, 26 Ch. D. 266.

(*w*) *Griffiths v. Gale*, 12 Sim. 327; *Freeland v. Pearson* L. R., 3 Eq. 658; *Holyland v. Lewin*, 26 Ch. D. 266, disapproving *Freme v. Clement*, 18 Ch. D. 499.

(*x*) *Maddison v. Andrew*, 1 Ves. sen. 57; *Butcher v. Butcher*, 1 V. & B. 79.

As to the result of the failure of a residuary devise or bequest as regards general powers of appointment, see above, pp. 819, 820.

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An appointment under a general power is like an ordinary legacy in this respect, that if it is made in discharge of a moral or legal obligation, it does not necessarily lapse by the death of the appointee in the testator's lifetime (*y*).

Appointment in discharge of obligation.

An appointment under a general power may fail *ex postfacto* in other cases besides that of lapse, as where it is made to take effect upon a contingency which does not happen. In such a case it will, as a general rule, be executed by a general devise or bequest (*z*).

Failure of appointment under general power.

An appointment under a special power may also fail in other cases besides that of lapse, and the result is, it seems, the same as if it had lapsed (*a*): the property so appointed may pass under an appointment of the "residue" of the property subject to the power, or under a residuary devise or bequest, or it may go as unappointed.

Failure of appointment under special power.

The rules as to the failure of appointments under special powers, by reason of the appointment being a fraud on the power (*b*), or exclusive, or made in favour of a person not an object of the power (*c*), or being otherwise an excessive execution of the power, are not peculiar to testamentary appointments, but form part of the general law relating to powers, and are therefore not treated of in this work (*d*).

As to the acceleration of appointments, see *ante*, p. 725.

Acceleration.

Where a testator, in exercising a special power of appointment over land, attempts to create an estate tail by purchase beyond the limits allowed by law, effect will, if possible, be given to his intention under the doctrine of *cy-près* (*dd*).

Cy-près.

The validity of appointments under special powers, with reference to the Rule against Perpetuities, is considered elsewhere (*e*).

Perpetuities.

Where a testator has a special power of appointment over property, and also has property of his own, and disposes of both properties in one mass in favour of objects of the power, upon trusts which are good as regards his own property, and void for remoteness as regards the appointed property, the fund will be apportioned (*f*).

Composite fund.

(*y*) *Stevens v. King*, [1904] 2 Ch. 30.

(*z*) *Re Elen*, 68 L. T. 816.

(*a*) Per Hall, V.-C., in *Champney v. Davy*, 11 Ch. D. at p. 958.

(*b*) As in *Re Crawshaw*, 43 Ch. D. 615.

(*c*) As in *Re Jeaffreson's Trusts*, L. R., 2 Eq. 276, post; *Re Hunt's Trusts*, 31

Ch. D. 308.

(*d*) See Sugden on Powers and Farwell on Powers, *passim*.

(*dd*) *Line v. Hall*, 43 L. J. Ch. 107, ante, p. 292.

(*e*) Chap. X.

(*f*) *Re Wright*, [1906] 2 Ch. 288.

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“ Demonstrative ”
appointment.

“ Specific ”
appointment.

Appointment
to objects
and non-
objects
in shares.

Where a testatrix, having a power of appointment in favour of her children, bequeathed pecuniary legacies to them, and appointed the settled fund, subject to those legacies, to X., it was held that the legacies were primarily payable out of the settled fund (*g*).

Where a testator has property of his own, and also a power of appointment (whether general or special) over settled property, and bequeaths sums of money to various persons, the question whether they are ordinary legacies, or whether they are appointments of the settled fund, depends on the wording of the will. The point is of importance with reference to the question of interest (*h*) as well as of ademption (*i*).

If a testator who has a special power of appointment appoints the fund to six people as tenants in common, of whom only three are objects of the power, each of them takes one-sixth, and the rest of the fund goes as unappointed. It is immaterial that the appointment is in form an appointment to a class (*j*). But if a fund is appointed to a number of persons in such a way that it is impossible to say how much goes to objects and how much to non-objects, the appointment fails altogether (*k*).

Where the appointment is to objects and non-objects as joint tenants, the rule does not seem to be settled. In accordance with the principle above stated, the appointment would be bad. But in *Alexander v. Alexander* (*l*), a testatrix, who had a power of appointment among her children, appointed a share for the benefit of her son Francis and his wife and children, and it was held by Sir T. Clarke, M.R., that Francis took the whole. The M.R. recognized the principle that where a power is so executed that “ the boundaries between the excess and execution are not distinguishable, it [the appointment] will be bad,” but he read the will as equivalent to an appointment to such of the appointees as were capable of taking. In *Re Kerr’s Trusts* (*m*), where the donee of a power to appoint among children, appointed the fund to her children E. and C., (E. being illegitimate), it was held by Jessel, M.R., that the testatrix’s obvious intention was to appoint the fund in moieties, and that

(*g*) *Disney v. Crosse*, L. R., 2 Eq. 592.

(*h*) *Davies v. Fowler*, L. R., 16 Eq. 308, and other cases cited post, p. 855.

(*i*) *Re Young*, 52 L. T. 754.

(*j*) *Sadler v. Pratt*, 5 Sim. 632; per Kindersley, V.-C., in *Harvey v. Stracey*, 1 Drew. 136-7; *Re Gratwick’s Trusts*, L. R., 1 Eq. 177; *Re Farncombe’s Trusts*, 9 Ch. D. 652.

(*k*) *Re Brown’s Trust*, L. R., 1 Eq. 74.

(*l*) 2 Ves. sen. 640. See Sugden, V. & P. 504.

(*m*) 4 Ch. D., 600, where *Humphrey v. Tayleur*, Amb. 136, is referred to. *Bruce v. Bruce*, L. R., 11 Eq. 371, seems to have been erroneously decided on this point.

consequently C. took one half and the other half went in default of appointment. The M.R. disapproved of the decision in *Alexander v. Alexander*, which is, indeed, clearly bad law.

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The doctrine laid down in *Lassence v. Tierney* (n) and other cases—namely, that if there is an absolute gift, followed by directions or conditions which are void, the absolute gift takes effect—applies to appointments under powers; and consequently, if a testator makes an absolute appointment, and adds some direction or condition which is void (whether because it infringes the Rule against Perpetuities, or is in excess of the power, or for any other reason), the absolute appointment takes effect (o). But if the condition is not severable from the appointment, the latter is void in toto (p).

Rule in
Lassence v.
Tierney.

If the testator makes an appointment in favour of an object, subject to conditions which are void, and then goes on to provide that if the conditions cannot take effect, he appoints the fund to X., an object of the power, this latter appointment takes effect (pp).

Alternative
appointment.

If the testator makes an appointment in favour of a person who is not an object of the power, and subject thereto appoints to objects, the latter appointment takes effect (q).

Invalid,
followed
by valid,
appointment.

So a valid appointment made by will is not impliedly revoked by an invalid appointment made by codicil (r).

Valid,
followed by
invalid,
appointment.

As a general rule, where a testator appoints a specific part of a fund to A. and makes no substitutional or residuary appointment which can apply to it, and the appointment fails to take effect in favour of A., the appointed sum goes to the persons entitled in default of appointment. To this rule there seems to be an exception in cases where the testator has made a mistake as to the amount of the fund. Thus, in *Eales v. Drake* (s), the testator thought he had a power of appointing 10,000*l.*, and he accordingly appointed various specific sums, amounting in all to 10,000*l.*, to various objects

Mistake
of testator
as to amount
of fund.

(n) 1 Mac. & G. 551. See Chap. XXXIII.

(o) *Thornton v. Bright*, 2 My. & C. 230; *Fry v. Capper*, Kay 163; *Re Jeaffreson's Trusts*, L. R., 2 Eq. 276; *Douglass v. Waddell*, 17 L. R. Ir. 384. *Churchill v. Churchill*, L. R., 5 Eq. 44; *Cooke v. Cooke*, 38 Ch. D. 202; *Re Boyd*, 63 L. T. 92; *Stephens v. Gadsden*, 20 Bea. 463; *Gerrard v. Butler*, 20 Bea. 541; *Re Lord Sondes' Will*, 2 Sm. & G. 416; *Woolridge v. Woolridge*, Johns. 63; *Webb v. Sadler*, L. R. 8 Ch. 419.

(p) *Re Perkins*, [1893] 1 Ch. 283,

where *Sadler v. Pratt*, 5 Sim. 632, and *Watt v. Creyke*, 3 Sm. & G. 362, are commented on.

(pp) *Re Crawshay*, 43 Ch. D. 615.

(q) *Carr v. Atkinson*, L. R., 14 Eq. 397; *Williamson v. Farwell*, 35 Ch. D. 128, where the earlier authorities are examined. Compare *Re Crawshay*, supra.

(r) *Duguid v. Fraser*, 31 Ch. D. 449; *Re Wells' Trusts*, 42 Ch. D. 646.

(s) 1 Ch. D. 217. Compare the rules as to abatement in cases where the fund is insufficient, *infra*, p. 848.

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of the power; he really only had power to appoint 7,000*l.* One of the appointees predeceased him. It was held by Jessel, M.R., that the surviving appointees, and not the persons entitled in default of appointment, took the benefit of the lapse. It is not easy to justify the exception on principle, but no doubt it works substantial justice.

Implied gift to objects.

The cases where a gift to the objects of a power is implied in default of appointment are referred to in another chapter (*t*).

Effect of appointment.

An act or default on the part of a person, in respect of a share or interest to which he is entitled in default of appointment is, as a general rule, overridden by a subsequent exercise of the power by the donee (*u*).

Death of one tenant in common.

The doctrine of Lord St. Leonards, that where one of several persons to whom property is given in default of appointment dies in the lifetime of the testator, this defeats the power *pro tanto*, is discussed elsewhere (*v*).

Abatement.

Appointments are subject to abatement. Thus, if a testator appoints 9,900*l.* to A. and 10,000*l.* to B., having, in fact, only power to appoint 10,000*l.* in all, that sum is divided between A. and B. in the proportion of 99 to 100 (*w*).

Whether residue of fund abates.

If a testator appoints specific sums out of a fund to A. and B., and the "residue" to C., and the fund realizes less than the testator contemplated, the question whether the three abate rateably, or whether the deficiency falls primarily on the "residue" appointed to C., depends on whether the testator used the word "residue" (or some equivalent word) in the technical sense (*x*). A similar question arises when there is no appointment of the residue. These questions are discussed later (*y*).

Augmentation.

Conversely, an appointment of a specific sum out of a fund may operate to give the appointee a larger sum if the fund increases in amount (*z*).

Limitations in default of appointment.

Limitations in default of appointment, following a power which is void for remoteness, are not invalid unless they themselves contravene the Rule against Perpetuities (*a*). So a limitation in

(*t*) Chap. XIX.

(*u*) *Re Vizard*, L. R., 1 Ch. 588; *De Serre v. Clarke*, L. R., 18 Eq. 587; *Re Maddy's Estate*, [1901] 2 Ch. 820. See *Lord v. Bunn*, 2 Y. & C. C. C. 98; *Chambers v. Smith*, 3 A. C. 795.

(*v*) Chap. XLIV.; *Reade v. Reade*, 5 Ves. 744.

(*w*) *Laurie v. Clutton*, 15 Bea. 65.

(*x*) *Petre v. Petre*, 14 Bea. 197; *Harley v. Moon*, 1 Dr. & Sm. 623; *Miller v. Huddleston*, L. R., 6 Eq. 65; *De Lisle v. Hodges* (appointment by deed), L. R., 17 Eq. 440; *Re Currie*, 36 W. R. 752.

(*y*) P. 859.

(*z*) See *Re Cruddas*, [1900] 1 Ch. 730, stated *infra*, p. 859.

(*a*) *Re Abbott*, [1893] 1 Ch. 54.

default of appointment may be good, although the power itself cannot be exercised, or fails by reason of the death of the donee in the testator's lifetime (b). CHAP. XXIII.

In some cases a question arises whether a proviso following a gift in default of appointment, is intended to limit the power, or only to apply in default of appointment (c). Effect of
proviso.

"There is, it seems," says Mr. Jarman (d), "no necessary inference that the testator intends that a qualification, applied by him exclusively to the objects of the power, should be extended to the objects of the gift, expressly limited in default of appointment to a class of objects identical in other respects with that of the power." Thus, where (e) the devise was to A. for life, with remainder to such child and children of A. and him surviving, who should be educated as a member of the Church of England, in such parts and proportions, &c., as A. should appoint, and in default of such appointment, to the first son of A. who should be educated as aforesaid and the heirs of the body of such son, with divers remainders over: it was contended that as the power of appointment was restricted to "surviving" children, the gift over was to be construed with a like limitation; but Sir J. Leach, M.R., held that such a construction would be contrary to the force of the expressions used, and was not warranted by necessary or rational inference. Restriction
of gift in
default of
appointment.

In considering whether an appointment by will in exercise of a special power is good within the Rule against Perpetuities, the test is to place the appointment in the instrument creating the power, in lieu of the power itself (f), and it is, therefore, sometimes said that a will executing a special power is to be read into the instrument creating it. But this is not true for all purposes; in questions of lapse and ademption, for example, events subsequent to the execution of the will must be considered (g). Effect of
subsequent
events.

Where a testator, having a special power, appoints to the uses or trusts of an existing settlement, or "such of them as are capable Appointment
by reference.

(b) *Edwards v. Saloway*, 2 Ph. 625, and other cases cited in Chap. XIII. *Webb v. Sadler*, L. R., 8 Ch. 419, and *Williamson v. Farwell*, 35 Ch. D. 128, were both cases on settlements, but the principle appears to be the same.

(c) *Re Simmons*, 87 L. T. 594.

(d) First ed. p. 486.

(e) *Smith v. Death*, 5 Madd. 371. Mr. Jarman's citation of the case is not

quite accurate.

(f) Sugden, Powers, 396. The rule as so stated is somewhat misleading, for it may be necessary to regard the state of facts at the time the appointment takes effect: ante, p. 318.

(g) *Re Dowsett*, [1901] 1 Ch. 398. The appointment does not relate back in point of time to the creation of the power: *Farwell*, 278.

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of taking effect," these words may be construed as meaning what the law allows to take effect (*gg*). The question is considered in Chapter XX.

Doctrine of election.

It is clear that the doctrine of election is applicable to cases of appointment under a power, so that if one having a special power by his will gives benefits out of his own property to the objects of the power, and appoints the subject of the power to strangers, or to an object of the power charged in favour of strangers, the former will be obliged to elect in favour of the latter (*h*). And a similar rule applies where the testator purports to exercise a power which he erroneously supposes himself to possess (*i*). But the doctrine of election may be excluded if the testator shews that he is aware that the appointment is of doubtful validity (*j*). And in cases where the appointment is made to the objects of the power absolutely, and the donee superadds a proviso or condition in favour of strangers to the power, though the proviso is void, no case of election arises. The Court reads the will as if all the passages in which such attempts are made were swept out of it, for all purposes; that is, not only so far as they attempt to regulate the quantum of interest to be enjoyed by the appointee, but also so far as they might otherwise have been relied upon as raising a case of election (*k*).

Where doctrine does not apply.

Where appointment is void for remoteness and there is a residuary appointment.

A residuary appointment that carries an ill-appointed portion of the fund is, in this respect, undistinguishable from an absolute appointment with ineffectual modifications. Thus, where the donee of a special power appointed part of the fund upon trusts that were void for remoteness, and the residue to A. and B., to whom also he bequeathed part of his own estate, it was held, first, that the ill-appointed part did not pass as in default of appointment, but

(*gg*) *Re Finch and Chew's Contract*, [1903] 2 Ch. 486.

(*h*) *Whistler v. Webster*, 2 Ves. jun. 367; and see *Kater v. Rogel*, 4 Y. & C. 18; *Prescott v. Edmunds*, 4 L. J. (O. S.) Ch. 111; *Fearon v. Fearon*, 3 Ir. Ch. 19; *Reid v. Reid*, 25 Beav. 469; *Tomkyns v. Blane*, 28 Beav. 422; *Cooper v. Cooper*, L. R., 6 Ch. 15, 7 H. L. 52; *White v. White*, 22 Ch. D. 555; *Re Wheatley*, 27 Ch. D. 606; *King v. King*, 13 L. R. Ir. 531.

(*i*) *Re Brooksbank*, 34 Ch. D. 160.

(*j*) Post, p. 853.

(*k*) *Carver v. Bowles*, 2 R. & My. 301; *Church v. Kemble*, 5 Sim. 525; *Blacket v. Lamb*, 14 Beav. 482; *Woolridge v. Woolridge*, Johns. 63; *Churchill v.*

Churchill, L. R., 5 Eq. 44; *King v. King*, 15 Ir. Ch. 479. See this class of cases distinguished, 22 Ch. D. at p. 559. The doubts expressed in *Moriarty v. Martin*, 3 Ir. Ch. 26, whether this is law except in cases where the proviso is in terms "so far as lawfully may be" (as in *Carver v. Bowles*) have not prevailed. And see the doctrine recognised in *Roach v. Trood*, 3 Ch. D. 444, where, however, it was excluded by the appointee having executed the appointment (which was by deed) and so accepted the proviso. As to the question whether the appointment is in the first instance absolute, vide ante, pp. 361 seq. Mr. Gray does not approve of the doctrine (Perp. §§ 557 seq.).

fell into the residue, and, secondly, that A. and B. were not bound to elect in favour of the remote objects. James, V.-C., collected from the authorities that: "The rule as to election is to be applied as between a gift under a will and a claim dehors the will and adverse to it, and is not to be applied as between one clause in a will and another clause in the same will" (l). It has been held that the same rule applies where the ill-appointed property goes as in default of appointment. Thus, in *Re Warren's Trusts* (m), a testatrix made an appointment which was void for remoteness, and bequeathed property of her own to the persons entitled in default of appointment, and it was held that they were not bound to elect. It is true that in *Re Bradshaw* (n) a different rule was applied. There the testator made an appointment which was void for remoteness, and bequeathed property of his own to A. E. B., one of the persons entitled in default of appointment, and it was held by Kekewich, J., that A. E. B. was bound to elect. The learned judge said that he did not see any difference in principle between an appointment which is void for remoteness and one which is void because it is made to persons who are not objects of the power. But this decision was disapproved by Farwell, J., in *Re Oliver's Settlement* (o), on the ground that the Rule against Perpetuities is a rule of public policy, and that the Court will not apply the doctrine of election in order to enable a testator to evade it. It is difficult to see why an attempt to evade the Rule against Perpetuities should be treated with greater severity than an attempt by a testator to give away property which does not belong to him. However, the principle thus laid down was acted on by Warrington, J., in *Re Beale's Settlement* (p), by Buckley, J., in *Re Wright* (q), and by Eve, J., and the Court of Appeal, in *Re Nash* (r),

Where appointment is void for remoteness and property goes as in default of appointment.

(l) *Wollaston v. King*, L. R., 8 Eq. 165; *Wallinger v. Wallinger*, L. R., 9 Eq. 301; *Burton v. Newbery*, 1 Ch. D. 242; *Bizzey v. Flight*, 3 Ch. D. 274.

(m) 26 Ch. D. 208; *Re Hancock's Trusts*, 23 L. R. Ir. 34.

(n) [1902] 1 Ch. 436.

(o) [1905] 1 Ch. 191.

(p) [1905] 1 Ch. 256.

(q) [1906] 2 Ch. 288.

(r) [1909] 2 Ch. 450; [1910] 1 Ch. 1. The doctrine of election in cases of appointments under powers is not very consistent or satisfactory. Mr. Gray (Perp. §§ 561 seq.) has some remarks on the cases which are well worth reading.

He approves of the decision in *Re Bradshaw*. Mr. Gray is a staunch defender of the modern Rule against Perpetuities, and his protest against the tendency of our courts to regard the Rule as so sacro-sanct that a conscious or unconscious attempt to evade it is something morally wrong, is therefore of especial weight. Mr. Theobald also has some excellent remarks on the decisions in *Re Warren's Trusts*, *Re Bradshaw*, and *Re Oliver*, in the preface to the 7th ed. of his treatise on Wills; they did not, however, commend themselves to the Court of Appeal in *Re Nash*.

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Express appointment by way of substitution.

There must be an actual disposition of property belonging to the person who is to be put to his election.

Whether married woman can raise case of election.

There must also be property of the testator to compensate the disappointed devisee.

Doubtful intention.

where the appointment was bad under the rule in *Whitby v. Mitchell* (q).

In *Re Swinburne* (r), a testatrix having a special power of appointment, by her will appointed part of the fund to persons who were, and part to persons who were not, objects of the power, and she declared that in case of the failure of any of the trusts therein-before declared, the parts as to which the trusts should fail should be held upon the trusts declared of the parts as to which the trusts should not fail : it was held that no case of election arose.

Where a person having a testamentary power of appointment over a fund which in default of appointment belongs to A., makes his will and thereby expressly declares that he abstains from making any appointment, on the ground that the fund will devolve (as he supposes) to B., and gives A. certain benefits by his will ; A. is not put to his election, since by taking both he disappoints no actual disposition of the testator : all that can be said is that the testator was mistaken (s).

The question whether a married woman can raise a case of election against her husband, next of kin, or other persons, by exercising a power of appointment, is discussed in Chapter XVI.

A case of election arises where a testator, whether under a power or not, gives property which belongs to one person to another, and gives to the former some property of the testator ; but there must be some " free disposable property " given to the person who is put to his election, which, if he elects to take against the will, may be laid hold of to compensate the disappointed beneficiary (t). The doctrine is therefore inapplicable where the will deals only with property subject to special powers of appointment. Thus, where a man had an exclusive power of appointing an estate to his children and grandchildren, and an exclusive power of appointing a fund to his children only ; and appointed the estate to some of his children, and the fund to his children and to a grandchild. It was held that the children were not bound to elect between giving effect to the appointment of a share in the fund to the grandchild and rejecting the estate appointed to them under the first power (u).

Where a testator purports to exercise a power of appointment in favour of persons who are not objects of it, and gives his own

(q) Ante, p. 284. See Addenda, where *Re Nash* is referred to.

(r) 27 Ch. D. 696.

(s) *Langslow v. Langslow*, 21 Beav. 552 ; see also *Boz v. Barrett*, L. R., 3

Eq. 244 ; *Re Jack*, [1899] 1 Ch. 374.

(t) Per Lord Loughborough, *Bristow v. Warde*, 2 Ves. jun. 350.

(u) *Re Fowler's Trusts*, 27 Beav. 362 ; *Re Aplin*, 13 W. R. 1062.

property to the persons entitled in default of appointment, the doctrine of election is excluded if the testator appoints "so far as he lawfully can," or provides for the case of the appointment failing (*v*). CHAP. XXIII.

Questions of election may also arise in cases where a testator having a power of appointment does not dispose of his own property in favour of the objects of the power. Thus, in *Re Wells' Trusts* (*w*), there was a marriage settlement under which several appointments by deed and will were made: in the result the eldest son of the marriage took the settled real estate by title paramount, adversely to the settlement, and also took part of the settled personalty under the appointments made by deed: it was held that the terms of the appointments shewed that the benefits thereby appointed to the son were intended to be in addition to the real estate, and that he was not bound to elect between them (*x*). One of the appointments, however, was made in favour of persons not objects of the power, and this share consequently passed by the will of the appointor, by which the residue of the settlement funds was appointed to the eldest son: it was held that he was bound to elect between the real estate and the appointed residue. Other cases of election.

Where there is a power to appoint to a class, and a gift to the class in default of appointment, and the will creating the power contains a provision directing that members of the class to whom the testator has made advances during his lifetime shall bring them into account, this operates only on such part of the fund, if any, as remains unappointed (*y*). Hotchpot.

A hotchpot clause will not, as a general rule, be implied, either in the will creating the power or in the will by which it is exercised, the result being that if part of the fund is appointed to one of the class, and the rest of the fund is unappointed, the appointee is entitled to share in the unappointed part without bringing the appointed part into hotchpot, even if the appointor expressly says that he makes no appointment of the unappointed part in order that it may pass directly to the other members of the class (*z*). In the case of appointments by deed, an appointment to a member

(*v*) *Church v. Kemble*, 5 Sim. 525; *Re Swinburne*, 27 Ch. D. 696. Compare *Re Wells' Trusts*, 42 Ch. D. 646.

(*w*) 42 Ch. D. 646.

(*x*) A question also arose whether s. 24 of the Wills Act had the effect of making the appointment by will revoke

one of the appointments by deed. As to this, see ante, p. 839.

(*y*) *Brocklehurst v. Flint*, 16 Bea. 100.

(*z*) *Re Jack*, [1899] 1 Ch. 374; *Langslow v. Langslow*, 21 Bea. 552. As to the time for valuing the appointed share, see *Re Kelly's S. T.* [1910] 1 Ch. 78.

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of the class "as his share" does not imply a hotchpot clause (a). But whether the appointment is made by deed or will, the appointor may, of course, shew, expressly or impliedly, an intention to exclude an appointee from sharing in the unappointed part; in other words, this operates as an implied appointment to the other objects (b).

In *Re Buckley's Trusts* (bb) a testator who had a power of appointment among his children, with a limitation in default to the children equally (but no hotchpot clause), appointed real estate unequally among his children, and provided that if any of his children should die in his lifetime leaving issue living at his death, then no child taking under the appointment should be entitled to any share "so lapsing," without bringing his or her appointed share into hotchpot; one of the daughters died in the testator's lifetime, and it was held by Kekewich, J., that the hotchpot clause was operative, and that her heir at law was entitled to a share.

Satisfaction.

Where a person has a power of appointment by deed or will, and he makes one appointment by deed and another by will to the same person, the question may arise whether either of the appointments revokes the other (c). Another question which also sometimes arises is whether the appointments are cumulative or substitutionary, or whether one operates as a satisfaction or ademption of the other (d). Where the testator is the father of or stands in loco parentis towards the appointee, it seems that the rule against double portions applies (e): in other cases it is a question of intention (f). In *Re Ashton* (g), the donee of a special power made a will by which she directed the trustees to divide the fund equally between her three children; by irrevocable deeds-poll executed after the will she appointed a third to one of the children: it was held by Stirling, J., that the child to whom the appointment was made by deed was entitled to share equally with the other children under the will. On appeal, evidence was adduced to shew that the child in question (a married woman) had in the lifetime of the

Double portions.

(a) *Wilson v. Piggott*, 2 Ves. jun. 351; *Wombwell v. Hanrott*, 14 Bea. 143. See *Walmsley v. Vaughan*, 1 De G. & J. 114.

(b) *Alloway v. Alloway*, 4 Dr. & War. 380, where *Fortescue v. Gregor*, 5 Ves. 553, is referred to. See *Foster v. Cautley*, 6 D. M. & G. 55; *Chune v. Apjohn*, 17 Ir. Ch. 25; *Armstrong v. Lynn*, Ir. R., 9 Eq. 186.

(bb) [1893] W. N. 95.

(c) *Re Wells' Trusts*, ante, p. 839.

(d) As to the distinction between ademption and satisfaction, see Chap. XXXII.

(e) *Montague v. Montague*, 15 Bea. 565.

(f) *Re Tancred's Settlement*, [1903] 1 Ch. 715, explaining *England v. Lavers*, L. R., 3 Eq. 63.

(g) [1897] 2 Ch. 574, [1898] 1 Ch. 142.

testatrix accepted the third appointed to her by the deeds-poll in prepayment or anticipation of the third appointed to her by the will, and the Court of Appeal held that she had done so (*h*).

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A sum appointed by will out of a trust fund under a general power of appointment, is looked upon as the same thing as an ordinary legacy, and only carries interest from the expiration of a year from the testator's death (*i*), unless it is payable at a time fixed by the will, in which case it carries interest from that time (*j*); or unless it is directed to be severed from the rest of the fund immediately after the death of the testator, in which case it carries interest from that time (*k*); or unless it is payable out of a reversionary fund, in which case it carries interest from the time when the fund falls into possession (*l*). And where a testatrix, having a general power of appointment over a sum of 5,000*l.* and certain stocks, appointed to A. and B. the 5,000*l.* and such portion of the stocks as would make up 9,000*l.*: it was held that both appointments, that of the 5,000*l.* and that of the stocks to be appropriated to make up the 9,000*l.*, were specific, and that consequently the whole 9,000*l.* carried the income from the death of the testatrix (*m*).

Interest on appointed sum.

A contingent appointment of a sum of money under a special power does not, as a general rule, carry interest. Consequently, where a fund is given subject to a special power of appointment in favour of the donee's children, and in default in trust for all the children who attain twenty-one, and the donee appoints part of the fund to a child under age contingently on its attaining twenty-one, the income of that part, during the minority of the child, goes to the children who have attained twenty-one (*n*).

Contingent appointment under special power does not carry interest.

In *Long v. Ovenden* (*o*), the testatrix had a special power of appointment among her children; she appointed a share to her son A. for life, and "from and after" his death to her grandson B. (not an object of the power) as and when he should attain the age of twenty-one years, and if he should die under that age then to the testatrix's daughter C. The son survived the testatrix, and

Intermediate income.

(*h*) Compare the rule where part of the fund is unappointed, ante, p. 853.

(*i*) *Tatham v. Drummond*, 2 H. & M. 262.

(*j*) *Gibbon v. Chaytor* (*Re Gyles*), [1907] 1 Ir. R. 65.

(*k*) *Dundas v. Wolfe Murray*, 1 H. & M. 425.

(*l*) *Re Ludlam*, 63 L. T. 330. Compare *Lord v. Lord*, L. R. 2 Ch. 782, where

the appointed sums were not payable until certain litigation should terminate.

(*m*) *Re Marten*, [1901] 1 Ch. 370; *Davies v. Fowler*, L. R., 16 Eq. 308.

(*n*) *Gotch v. Foster*, L. R., 5 Eq. 311. As to interest on contingent legacies, see Chap. XXX.

(*o*) 16 Ch. D. 691. See *Re Clements* [1894] 1 Ch. 665.

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died before B. attained twenty-one. It was held by Jessel, M.R., both on principle and by reason of the words "from and after," that if the appointment to B. had been valid he would have been entitled to the intermediate income on attaining twenty-one, and that consequently, in the event of his dying under that age, C. would be entitled to it.

Special
power
exercised by
appointment
to trustees.

Where a person having a special power over property vested in trustees, appoints it to other trustees for the objects of the power, the question whether the original trustees ought to transfer the property to the trustees appointed by the donee of the power, depends to a great extent on the terms of the instrument creating the power: if it shews an intention that the original trustees should execute the trust, they are bound to do so (*q*).

If the donee of a special power of appointment over real estate appoints it to trustees upon trust to sell and hold the proceeds upon trust for the objects of the power, this vests the legal estate in them, and they will be the proper persons to sell, although the trustees of the instrument creating the power may have an express power of sale (*r*). The same principle applies where the limitations are equitable (*s*).

Costs and
expenses.

Where appointments of specific sums, parts of a trust fund, are made, and the residue of the fund is then appointed, the probate or estate duty, and the expenses of administering the fund, ought, as a general rule, to be borne rateably by all the appointees (*t*). But, of course, if an appointment is made of a "clear" sum, or a sum to be paid "without any deduction," the expenses must be paid out of the other part of the fund (*u*).

The same rule applies, in general, to the appointed and unappointed parts of a fund (*v*).

Law of
domicil.

VIII.—Construction of Appointments.—The general principle, that a will is construed in accordance with the law of the

(*q*) *Busk v. Aldam*, L. R., 19 Eq. 16; *Von Brockdorff v. Malcolm*, 30 Ch. D. 172; *Scotney v. Lomer*, 31 Ch. D. 380; *Re Tyssen*, [1894] 1 Ch. 56.

(*r*) *Re Paget*, [1898] 1 Ch. 290, following *Kenworthy v. Bate*, 6 Ves. 793, and *Cowx v. Foster*, 1 J. & H. 30.

(*s*) *Re Redgate*, [1903] 1 Ch. 356; *Re Adams' Trustees and Frost*, [1907] 1 Ch. 695.

(*t*) *Re Chisholm*, [1902] 1 Ch. 457;

Re Saunders, [1898] 1 Ch. 17; *Re Coxwell's Trusts*, [1910] 1 Ch. 63; *Warren v. Postlethwaite*, 2 Coll. 108; *Re Shaw*, [1895] 1 Ch. 343.

(*u*) *Ibid.* See also *Re Currie*, 36 W. R. 752, and *Davies v. Fowler*, L. R., 16 Eq. 308, where the words of the will were treated as special.

(*v*) *Trollope v. Routledge*, 1 De G. & Sm. 662; *Moore v. Dixon*, 15 Ch. D. 566; *Re Lambert*, 39 Ch. D. 626.

testator's domicile, cannot always be strictly applied to testamentary appointments, because many foreign systems of law do not recognize powers as distinct from ownership. It has accordingly been decided that sect. 27 of the Wills Act does not apply to the will of a person domiciled abroad, unless it contains words introducing the statutory rule of construction (*vv*). If possible, therefore, the will of a domiciled foreigner, who has a testamentary power of appointment over a trust fund, subject to the jurisdiction of the English courts, will be construed according to English law (*w*).

General
rules of
construction.

As a general rule, the same canons of construction apply to an appointment under a power as if it were a direct gift (*x*), so that (for example) such questions as whether the property subject to the power is described with sufficient accuracy in the appointment (*y*); or whether an appointee takes a vested or a contingent interest (*z*); or whether a contingent remainder created by appointment is a legal limitation and therefore bad for want of an estate of freehold to support it (*a*); or how a class should be ascertained (*b*); or whether appointees take per capita or per stirpes (*c*), are governed by the ordinary rules of construction. And the question whether an appointment in fee is defeated by an executory limitation which fails to take effect, is decided in the same way as if the limitations were created by direct devise (*d*). The doctrine of *cy-près* applies to appointments of land by will (*e*). And the presumption in favour of the vesting of portions applies to appointments of settled funds to children (*f*).

But there is a difference between a direct gift and an appointment under a special power in this respect, that if a particular

(*vv*) *Re D'Este*, [1903] 1 Ch. 898. The decision in *Re Scholefield*, [1905] 2 Ch. 408, was appealed against, but the case was compromised, [1907] 1 Ch. 664.

(*w*) See *Re Harman*, [1894] 3 Ch. 607; *Re Price*, [1900] 1 Ch. 442, ante, p. 801.

(*x*) *Oke v. Heath*, 1 Ves. sen. 135; *Easum v. Appleford*, 5 My. & Cr. 56. *Freme v. Clement*, 18 Ch. D. at p. 504.

(*y*) The question often arises whether an appointment of real estate by a generic or specific description, passes real estate subject to a trust for sale, the testator having a power of appointment over the proceeds; and conversely, whether a gift of personal property passes money which is subject to a trust for investment in land: see *Adams v. Austen*, 3 Russ. 461; *Stead v. Newdigate*, 2 Mer. 521; *Gillies v.*

Longlands, 4 De. G. & S. 372 and other cases cited in Chap. XXII; *Re Lowman*, [1895] 2 Ch. 348; *Cooper v. Martin*, L. R., 3 Ch. 47, and other cases cited in Chap. XXXV.

(*z*) *Doe d. Vessey v. Wilkinson*, 2 T. R. 209; *Re Shuckburgh's Settlement*, [1901] 2 Ch. 794.

(*a*) *Cunliffe v. Brancker*, 3 Ch. D. 393, post, Chap. XXXVIII. *Whitby v. Mitchell* (ante, p. 284) was the case of an appointment by deed.

(*b*) *Harvey v. Stracey*, 1 Drew. 73, post, p. 859.

(*c*) *Baker v. Baker*, 6 Ha. 269.

(*d*) *Doe v. Eyre*, 5 C. B. 713. See Chap. XXXVIII.

(*e*) *Line v. Hall*, 43 L. J. Ch. 107.

(*f*) *Re Crofton's Trusts*, 7 L. R. Ir. 279.

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interest is appointed to a stranger, the interests in remainder are not accelerated, unless the testator shews an intention to that effect (z).

“Capable of taking effect.”

And where an appointment under a special power is made by reference to such of the provisions of an existing settlement as are “capable of taking effect,” this shows an intention to conform to the rules of law applying to appointments under special powers (a).

“Specific” and “demonstrative” appointments.

The question whether a gift of money or stock by will is a general legacy, or is payable out of a fund over which the testator has a power of appointment, so as to have the nature of a specific or demonstrative legacy, has been already referred to (b).

Whether intention to appoint can be implied.

There seems, moreover, to be a difference between an appointment and a direct gift in this respect, that where a testator has a power of appointment, with a gift over in default, an intention to exercise the power will not be implied in cases where a gift would be implied if the property were the testator's own. Thus in *Henderson v. Constable* (c), a testatrix who had a special power of appointment over a fund of 2,500*l.* appointed several sums amounting to 1,630*l.* to certain persons, and a further sum of 670*l.* to A., and then directed that the said sums should be paid at the decease of A., except the sum appointed to him, which was to be paid at the testatrix's decease: it was held that A. was not entitled to a life interest in the 1,630*l.* by implication, but that the income of it during his life went as in default of appointment. Lord Langdale remarked: “There is a gift to persons in default of appointment, and there must be a distinct appointment to defeat the gift over.”

Construction of appointment not affected by terms of power.

In *Re Adams* (d), a person had power to appoint real estate to his sons for an estate not exceeding a life estate with remainder to their issue in tail; by a codicil referring to the power he appointed to “E. R. A. and his issue,” E. R. A. being one of his sons: it was held that the appointment could not be construed so as to take effect in accordance with the power, and that it failed except so far as it gave E. R. A. a life estate.

If property is settled upon trust for A. for life, and after his death upon trust for such of his children living at the death of B. as B. shall appoint, and B. by will appoints to the children of A. generally, the Court is bound to construe the appointment in the same manner

(z) *Crozier v. Crozier*, 3 Dr. & W. 353; *Craven v. Brady*, L. R., 4 Eq. 209.

(a) *Re Finch and Chew's Contract*, [1903] 2 Ch. 486.

(b) Ante, p. 812.

(c) 5 Bea. 297.

(d) 94 L. T. 720 (C. A., reversing Buckley, J., 54 W. R. 42).

as if it were a bequest of the testator's own property ; it cannot put a different construction on the words in order to make them fit the terms of the power (e).

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But where the testator's language is ambiguous, it seems that the construction of an appointment may be affected by the terms of the instrument creating the power. Thus in *Re Crofton's Trusts* (f) the testator had a power of appointment among his issue, and in default of appointment the fund was to go to issue who attained twenty-one or (being daughters) married ; he appointed the fund to his daughters, with a gift over "in case any of them die" : this was construed as meaning "if any of them die under twenty-one or without having been married." So if A. has power to appoint so much of certain trust funds as he may be "entitled or presumptively entitled to," an appointment by him of his "share" may, it seems, carry a share which accrues after his death (g).

Construction affected by instrument creating power.

A will exercising a special or general power of appointment must be construed according to the rules of law applicable to wills at the time of its execution, although the power may have been created before, but exercised after, an alteration in the law as to the construction of wills (h).

Alteration in law.

An appointment of a "clear" or "net" sum, whether under a general or a special power, entitles the appointee to have the legacy or succession duty and other expenses paid out of the balance of the fund (j).

"Clear" or "net" sum.

If a person having a power of appointing a fund of 30,000*l.*, appoints "the sum of 6,000*l.*, part of the said sum of 30,000*l.*," to A., and various other sums, exhausting the whole amount, to other persons, the last being described as "the remainder of the said sum of 30,000*l.*," this is equivalent to appointing the fund in aliquot shares, so that if the investments representing it are worth more than 30,000*l.*, each appointee takes proportionately more than the nominal amount allotted to him (k).

Where "sum" means an aliquot share.

If a testator has a power of appointment over three settled estates, A., B., and C., and appoints the A. estate to X., and "all other the hereditaments comprised in the settlement" to Y., the

Specific and residuary appointments, &c.

(e) *Harvey v. Stracey*, 1 Dr. p. 126. As to the effect of the appointment in that case, see *supra*.

(f) 7 L. R. Ir. 279.

(g) *Re Denton*, 63 L. T. 105. The decision is not conclusive, because the accrued share would in any case have

passed under the residuary bequest.

(h) *Freem v. Clement*, 18 Ch. D. 499.

(j) See the cases cited *supra*, p. 856, notes (t) and (u).

(k) *Re Cruddas*, [1900] 1 Ch. 730. See *Butler v. Blackall*, [1907] 1 Ir. R. 405.

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latter appointment is specific and not residuary, so that if the appointment of the A. estate to X. fails, it goes as unappointed (*l*). So if a testator has a power of appointing a specific fund, say 1000*l.*, and appoints 200*l.* to A. and 200*l.* to B., and the residue," or "rest," or "remainder," or "balance," or "surplus" to C., this is *prima facie* an appointment to C. of the specific sum of 600*l.* (*m*). If, therefore, the appointment to A. fails, C. cannot claim the 200*l.* (*n*).

Use of
"residue,"
&c., in
technical
sense.

But it may appear from the context that the testator uses "residue" in the technical sense, so as to include specific appointments which fail (*o*), or he may appoint the residue of the fund "after payment of," or "subject to," the appointments of specific sums, and then any of these which fail will, as a general rule, pass to the residuary appointee (*p*), unless the Court can find some indication of a contrary intention (*q*). The case of *Re Jeaffreson's Trusts* (*r*) illustrates the distinction. There the donee of a special power appointed 100*l.*, part of the fund, to a stranger, and other sums to objects of the power, and appointed the balance, amounting to 260*l.*, to pay her own debts, and "should any surplus remain" she gave it to E., one of the objects of the power: it was held that the 100*l.* was unappointed and did not pass to E., but that the balance of 260*l.* was well appointed to E., free from the charge of debts (*s*). So if a testator gives all his residue, including property over which he has any power of disposal, to persons who are objects of a special power, this will include such part of the property subject to the power as is comprised in an appointment which has failed (*t*).

(*l*) *Re Broun*, 1 K. & J. 522. See *Re Mason*, [1901] 1 Ch. 619; *Mason v. Ogden*, [1903] A. C. 1, and other cases cited post, Chap. XXV.

(*m*) Per Kindersley, V.-C., in *Harley v. Moon*, 1 Dr. & Sm. p. 626; approved by Wood, L. J., in *Baker v. Farmer*, L. R., 3 Ch. p. 540. Compare the cases on bequests of specific parts of a fund in Chap. XXX.

(*n*) *Easum v. Appleford*, 10 Sim. 274, 5 Myl. & Cr. 56; *Re Jeaffreson's Trusts*, L. R., 2 Eq. 283; *Ratcliffe v. Hampson*, 1 Jur. N. S. 1104. *Lakin v. Lakin*, 11 Jur. N. S. 522, was an appointment by deed. In *Champney v. Davy*, 11 Ch. D. 958, Hall, V.-C., said that in his opinion the construction of a particular residuary gift is not affected by the presence or absence of a general residuary gift.

(*o*) *Carter v. Taggart*, 16 Sim. 423; *Re Meredith's Trusts*, 3 Ch. D. 757.

(*p*) *Re Harries' Trust*, Johns. 199. In

that case the construction was aided by the fact that the fund was not definite.

(*q*) See *Miller v. Huddleston*, L. R., 6 Eq. 65, decided by Malins, V.-C., on the assumption of what the testatrix would have intended if she had known that the fund would prove insufficient.

(*r*) L. R., 2 Eq. 276; followed in *Douglass v. Waddell*, 17 L. R. Ir. 384.

(*s*) In *Re Bringloe*, 26 L. T. 58, a testator had settled part of a fund upon trust for A. for life, then for such persons as the testator should appoint, and in default for his next of kin; by his will he confirmed the settlement, and gave the residue of the fund to X.: it was held that this did not exercise the power of appointment over the settled fund.

(*t*) *Re Hunt's Trusts*, 31 Ch. D. 308. referred to ante, p. 828, *u*. (*t*). *Oke v. Heath*, 1 Ves. sen. 135, is usually cited on this point, but on examination of

Again, the general rule of construction above stated does not apply if the fund is of unascertained amount, or is so treated by the testator. Thus, in *Falkner v. Butler* (*u*), where a testatrix, having under her deceased husband's will special power to appoint the residue of his personal estate, appointed several legacies, including one to a stranger, and then appointed "the residue of her husband's estate after payment of the legacies": it was held that the residue carried the ill-appointed legacy. It is to be observed that here, although when the testatrix made her will her husband's estate may have consisted of an ascertained sum, she did not so refer to it. The material circumstance was, therefore, wanting to show that she was parcelling out a fixed sum in definite proportions.

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Effect of gift of fund of unascertained amount.

And in *Petre v. Petre* (*v*), where a testator, having a general power over a sum of 7,100*l.* stock, gave certain money legacies thereout, and the residue, after deducting the legacies, to his son; the fund having by the appointment become subject to debts, and the amount it would produce by a sale being uncertain till it was sold, Sir J. Romilly held the gift of the residue to be not specific, but merely residuary, and subject to all the incidents of a common residue. After adverting to the rule in *Page v. Leapingwell*, he continued: "In this case, so far from knowing the amount of the fund, the testator could have no conception of it; for it was impossible to ascertain the amount until the fund had been realized by a sale, and the charges on it known. If, in this case, the testator thought he was dealing with 7,100*l.* sterling, and he had divided it into different proportions, the loss would then fall on all the persons interested in proportion to their shares, although the last portion was called 'the residue,' but that is not the case here" (*w*).

Where ascertained fund is subject to unascertained charges.

An express charge of debts on the fund shews that the testator does not mean the legatee of "residue" to take a definite proportion of the fund, the debts being of altogether uncertain amount (*x*). But it does not appear that the charge of debts which, by a rule of law only, and not by express provision, attached to the fund in *Petre v. Petre*, was essential to the decision in that case, even if it could

Charge of debts.

R. L. 1748 B., fo. 215, it appears not to be in point, inasmuch as the will contained a general residuary bequest, under which, and not under any gift of particular residue, the lapsed fund passed. Compare *Wright v. Weston*, 26 Bea. 429.

(*u*) Amb. 514. See the remarks of Wood, V.-C., on this case in *Re Harries'*

Trust, Johns. p. 206.

(*v*) 14 Bea. 197.

(*w*) See *Page v. Leapingwell*, and the other cases on gifts of a particular residue, post, Chap. XXIX. Compare *Re Currie*, 36 W. R. 752.

(*x*) *Harley v. Moon*, 1 Dr. & Sm. 623; *Baker v. Farmer*, L. R., 3 Ch. 537; *Champney v. Davy*, 11 Ch. D. 949.

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properly be permitted to weigh. In the case put by the M.R. at the close of the remarks cited above from his judgment, the debts would still have been a charge on the fund ; yet, he said, in that case the residue would have borne only a proportion of the loss. Hence it would seem that wherever there is a gift of money legacies to be raised and paid out of a specified sum of stock, followed by a gift of the " residue," this will be a true residue, the amount of it being necessarily uncertain until the stock is actually sold (y). The intention is placed beyond doubt if, to a proper description of the fund, the testator adds " or other the stocks or securities in which the same may hereafter be invested " (z).

The rules above stated apply both to general and to special powers (a). In the case of general powers it will be remembered that if a specific appointment out of a fund fails, and does not pass by an appointment of the " residue " of the fund under the rule stated by Kindersley, V.-C., in *Harley v. Moon* (supra), it will pass by the general residuary bequest, if any, contained in the will.

Where there
is no
appointment
of the
residue.

In *Booth v. Alington* (b), a person had a power of appointing a sum of 120,000*l.* ; she appointed 30,000*l.*, " part of the said sum of 120,000*l.*," to A., and made no appointment of the residue ; the estate of the donor of the power was insufficient to provide the whole of the 120,000*l.*, and it was contended that A.'s 30,000*l.* ought to abate rateably with the 90,000*l.* which went in default of appointment : it was held that this was not so, and that the words " part of the said sum " were merely meant to designate the fund out of which the 30,000*l.* was to be paid ; they indicated a definite sum, and not an aliquot share of the fund.

In *Barry v. Barry* (c), a different construction prevailed. There the testator had a non-exclusive power of appointing among his children a sum of money secured by a policy ; he made a will by which he recited the power and the amount payable under the policy, and appointed portions of it to all the objects of the power except one child, X., leaving a small part unappointed. At the date of the will he had wrongfully pledged the policy to secure a

(y) See *Vivian v. Mortlock*, 21 Beav. 252 ; *Carter v. Taggart*, 16 Sim. 423 ; *Re Currie*, 36 W. R. 752.

(z) *De Lisle v. Hodges*, L. R., 17 Eq. 440.

(a) See per Hall, V.-C., in *Champney v. Davy*, 11 Ch. D. at p. 958 ; per Rigby, L.J., in *Re Mason*, [1901] 1 Ch. at p. 625. In Farwell on Powers (p. 247)

a doubt is expressed whether special powers resemble general powers in this respect.

(b) 6 D. M. & G. 613, where *Chambers v. Chambers*, Mose. 333, is commented on. Compare the cases on specific legacies out of a fund. Chap. XXX.

(c) Ir. R., 10 Eq. 397.

debt due by him, and in the result the amount recovered under the policy was insufficient to satisfy the appointments. It was held that the appointments were good, apparently on the ground that the residue left unappointed was to be treated as if the testator had specifically appointed it to X., so that it abated rateably with the sums expressly appointed. The decision seems correct (*d*).

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(*d*) Compare *Walpole v. Aphorp*, L. R., 4 Eq. 37.

CHAPTER XXIV.

TRUSTS AND TRUSTEES (a).

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Conditional
appointment.

I.—Appointment of Trustee.—A person may be appointed trustee contingently, or subject to a condition; as, for example, “if and when he” (being abroad) “shall return to England”: it was held in a case of this kind, that residence in England for six months fulfilled the condition (b).

Trustees of
another trust.

It sometimes happens that a testator appoints as his trustees “the persons who shall at my death” be the trustees of some other trust: in such a case it seems that the persons who are acting as trustees of that trust answer the description, although not formally so appointed (c).

Corporation.

A corporation can be a trustee, if its powers authorize it to accept the office; and it can be one of several trustees (d).

Judicial
trustee.

It may be noted that under the Judicial Trustees Act, 1896, the Court has power to appoint a person (called a judicial trustee) to be trustee jointly with any other person, or as sole trustee, either in addition to or in substitution for any existing trustees, and that the executor of a deceased person is a trustee within the meaning of the act.

There are various kinds of public or official trustees.

(a) This chapter is new, except so far as it incorporates part of the chapter on “Gifts void for Uncertainty,” which in previous editions included the subject of precatory trusts. Resulting trusts are treated of in Chap. XXI.

(b) *Re Arbib and Class*, [1891] 1 Ch. 601.

(c) *Re Waidenis*, 77 L. J. Ch. 12. As to this case, see post, p. 935, n.

(d) Bodies Corporate (Joint Tenancy) Act, 1899.

Under the Charitable Trusts Acts, 1855 and 1887, the secretary of the Board of Charity Commissioners is a corporation sole, under the name of the "Official Trustee of Charity Lands," for the purpose of holding lands directed to be vested in him by an order of the Court or of the Board, in accordance with the provisions of the acts. There are also "Official Trustees of Charitable Funds," who are a corporation aggregate for the purpose of holding stocks, shares, &c., belonging to charities. The Official Trustees deal with the property vested in them in such manner as the Board direct.

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Official
trustees of
charity
lands, &c.

The office of Public Trustee has been established by the Public Trustee Act, 1906. The Public Trustee may be appointed by a testator to be an ordinary trustee, or to be a "custodian trustee." In the latter case the trust property is vested in him, but the management of the trust remains vested in the other trustees (the "managing trustees"). The Public Trustee is also authorised to accept probates of wills (*b*), but not any trust exclusively for religious or charitable purposes.

Public
Trustee.

The Charitable Trusts Acts expressly declare that the Official Trustee of Charity Lands has power to take and hold land, but the Public Trustee Act contains no such provision. A licence in mortmain has, however, been granted to him (*c*).

II.—What Words will create a Trust.—(1) *Preliminary.*—A trust, like any other testamentary disposition, may be void for uncertainty (*d*).

Uncertainty.

Although a testator can create a trust without setting out the terms of it in his will (*e*), yet if he gives property to A. upon the trusts "declared by my will" or "to be declared by a codicil," and no trusts are, in fact, so declared, the gift fails (*f*); so if he gives property to A. upon such trusts as he (the testator) may declare by some existing or future document the gift fails, unless the writing is duly executed as a testamentary document or is so referred to as to be incorporated in the will (*g*).

Unfulfilled
intention to
declare trusts.

(*b*) Public Trustee Rules, 1907.

(*c*) This licence is dated 1st January 1908, the day on which the act came into operation, but it appears that the actual grant was not made until about six months later, and the question has been raised whether land devised or conveyed to him in the interval has not been forfeited to the Crown: Law Quart. Review, xxv. 125.

(*d*) See Chap. XIV., ante, p. 481.

(*e*) Post, "Undisclosed Trusts."

(*f*) *Corporation of Gloucester v. Wood*, 3 Ha. 131, 1 H. L. C. 272; *Aston v. Wood*, L. R., 6 Eq. 419.

(*g*) *Smart v. Prujean*, 6 Ves. 560; *University College of North Wales v. Taylor*, [1907] P. 228, [1908] P. 140; *Re Thistlethwaite*, 11 T. L. R. 206; ante, p. 134. These cases must be

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Where intended trust is secondary purpose of gift.

On the other hand, the testator may so express himself as to shew an intention to give property to a person beneficially, subject to any trust which the testator may hereafter impose, he not having made up his mind whether he will do so or not. Thus in *Fenton v. Hawkins* (*h*), the testator gave his residue to A., B., and C. as tenants in common, subject, however, to such disposition thereof as he might by any deed or writing duly executed thereafter direct: he made no such disposition, and it was held that A., B., and C. took beneficially.

Resulting trust.

Where the gift is complete on the face of the will, and it appears from it that the testator intended the property to be held on trust, the effect in any case is to prevent the devisee or legatee from taking beneficially; if therefore the trust which the testator intended to create is void ab initio, or fails by reason of lapse or otherwise, there is a resulting trust (*a*).

Whether gift is beneficial or fiduciary.

The question whether a gift is intended to be beneficial or fiduciary is often extremely difficult to decide, and the authorities, as might be expected, are not altogether harmonious.

The fact that property is given to a person "absolutely," or "in the most absolute manner," although it *primâ facie* imports a beneficial gift (*b*), does not necessarily prevent the inference, from the context, that he was intended to be a trustee. Thus in *Bernard v. Minshull* (*c*) a testatrix appointed a fund to her husband "absolutely," and went on to request that after reserving out of it for himself certain specified benefits, he would make such disposition of the remainder "as he may deem most desirable to carry out my wishes often expressed to him by word"; it was held that he was excluded from all benefit in the remainder of the fund.

Disposition at discretion of donee.

Where property is given to a person for such purposes as he thinks fit, or to be disposed of as he thinks right, or the like, this is *primâ facie* a beneficial gift (*cc*). And even if the devisee or legatee holds a public or official position, such a gift does not necessarily give rise to the inference that he takes as a trustee (*d*).

distinguished from those in which the testator makes a complete gift, and accompanies it by the expression of an intention to impose regulations or conditions, which intention he fails to carry out: *Yates v. University College*, L. R., 7 H. L. 438; *supra*, pp. 226 seq.

(*h*) 9 W. R. 300.

(*a*) Chap. XXI., ante, pp. 704 seq.; post, p. 880. So if the trust fails for uncertainty; ante, p. 481.

(*b*) Ante, pp. 716-17, where also the effect of such words as "for their own

use and benefit" is discussed.

(*c*) Johns. 276; *Gray v. Gray*, 11 Ir. Ch. R. 218, *infra*. In *Bernard v. Minshull* the husband took the remainder of the fund as residuary legatee.

(*cc*) *O'Brien v. Condon*, [1905] 1 Ir. R. 51.

(*d*) *Re Harbison* (*Morris v. Larkin*), [1902] 1 Ir. R. 103, stated post, p. 897. This case is near the line. Compare the cases of charitable gifts, ante, pp. 223 seq.

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If a testator bequeaths his residuary personal estate to persons who are his executors, the question whether they take beneficially or not is a question of construction on the whole will (*e*). And the same rule applies to devises of real estate (*f*). But if a testator gives his residuary personalty to his executors for such purposes as they think fit, they hold it as trustees for the next of kin (*g*).

Gift to executors.

In other cases, where property is given to a person subject to the performance of certain trusts, or for purposes which do not exhaust the beneficial interest, the question whether he is a trustee, or whether he takes beneficially subject to the performance of those trusts or purposes, is one of construction (*h*).

Gift for specified purposes.

“Technical language,” as Mr. Jarman points out (*i*), “is not necessary to create a trust. It is enough that the intention is apparent.” Thus, if a testator gives property to his executors, “in and for the consideration” of paying the rents and profits to his wife for life, this shews that it is given to them in trust and not beneficially (*j*). And if a testator devises land “for this intent and purpose and upon this condition,” these words are sufficient to create a trust (*k*). Similarly a bequest to a married woman for her sole and separate use, and to be appropriated by her amongst her children in such shares as she shall think proper, creates a trust in favour of the children (*l*). So if a gift of property to A. and B., “in the most absolute manner,” is followed by a declaration of the testator’s intention that they shall at their discretion allocate the property to certain persons, this will create a trust (*m*).

Technical words not required.

And as a trust can be created without the use of the word “trust,” so a trust will not be created by the word “trust” if it appears from the whole will that the testator did not intend the word to have that effect. Thus, in *Hughes v. Evans* (*n*), a testator devised all his estates to E. E. “upon the trusts and for the uses following,” but did not declare any use or trust except as to one

Effect of word “trust.”

(*e*) Ante, p. 715.

(*f*) Ante, p. 707.

(*g*) Ante, p. 717.

(*h*) Ante, pp. 705 seq., 707 seq.

(*i*) First edition, p. 334.

(*j*) *Bird v. Harris*, L. R., 9 Eq. 204. Compare *Barrs v. Fewkes*, 2 H. & M. 60 (gift to executor to enable him to carry into effect the purposes of the will), and other cases cited in Chap. XXI.

(*k*) *Merchant Taylors’ Co. v. Att.-Gen.*, L. R., 6 Ch. 512; *Att.-Gen. v. Wax Chandlers’ Co.*, L. R., 6 H. L. 1. As to the import of the word “purpose,” see

Stubbs v. Sargon, 3 My. & C. 507, and *Corporation of Gloucester v. Wood*, 3 Ha. 131; 1 H. L. C. 272, both stated ante, p. 481; and compare *Aston v. Wood*, L. R., 6 Eq. 419, where the language was sufficient to shew that a trust of some kind was intended.

(*l*) *Re Haly’s Trusts*, 23 L. R. Ir. 130. *Re Delahunty*, [1907] 1 Ir. R. 507 (gift to husband to be applied by him to maintenance and education of children).

(*m*) *Gray v. Gray*, 11 Ir. Ch. R. 218.

(*n*) 13 Sim. 496.

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of his estates, which he devised upon trust for O. for life ; it was held, on the context of the will and a codicil thereto, that subject to the devise in favour of O., E. C. took the whole of the estates beneficially. *Williams v. Roberts* (o), and *Clarke v. Hilton* (p), are to the same effect. So if a testator gives his property to trustees upon the usual trusts for conversion and payment of debts, and directs them to hold the residue, subject to payment of pecuniary legacies, upon certain trusts, this does not make them trustees of the legacies, so as to prevent the operation of the Statute of Limitations (q).

Trust
created by
informal
expressions.

In considering the question what expressions, though informal, are sufficient to manifest an intention to create a trust, it will be convenient to deal separately with the cases on precatory trusts, and those on words purporting to declare the purpose of the gift.

Precatory
trusts.

(2) *Precatory Trusts*.—The doctrine of precatory trusts has undergone a gradual change since the early part of the eighteenth century. In former days the judges held that almost any expression of wish or expectation by a testator, however vague, was sufficient to create a trust, provided the subject and object were certain. At the present day the tendency is the other way : the Courts consider every will by itself, and do not allow vague and informal words to create a trust, if they think it improbable, taking the will as a whole, that the testator intended them to have that effect.

Doctrine laid
down in the
older cases.

Mr. Jarman states the doctrine thus (qq) : “ It has been long settled, that words of recommendation, request, entreaty, wish or expectation, addressed to a devisee or legatee, will make him a trustee for the person or persons in whose favour such expressions are used ; provided the testator has pointed out, with sufficient clearness and certainty, both the subject-matter (r) and the object or objects of the intended trust ” (s).

(o) 4 Jur. N. S. 18.

(p) L. R., 2 Eq. 810. See also the cases of *Cunningham v. Mellish*, Pr. Ch. 31 ; *Dawson v. Clarke*, 18 Ves. 247 ; *Mapp v. Elcock*, 2 Ph. 793, cited in Chap. XXI.

(q) *Re Barker*, [1892] 2 Ch. 491.

(qq) First ed. p. 334.

(r) See *Re Pinckard's Trust*, 4 Jur. N. S. 1041, 27 L. J. Ch. 422 ; *Reeves v. Baker*, 18 Beav. 372 ; *Macnab v. Whitbread*, 17 ib. 299 ; *Smith v. Smith*, 2 Jur. N. S. 967 ; *Hood v. Oglander*, 34 Beav. 513.

(s) See also the rule as laid down by

Sir R. Arden in *Malim v. Keighley*, post, p. 869. This “ arbitrary rule ” was disapproved by the Court of Appeal in *Re Hamilton*, [1895] 2 Ch. 370, where the modern doctrine is explained. See also the passage in Lord St. Leonards's Law of Prop. 375, quoted in *Re Williams*, [1897] 2 Ch. at p. 21.

In *Willis v. Kymer* (7 Ch. D. 181) a testatrix bequeathed various legacies, including a legacy of 3,000*l.* to J. K. for life, the principal to be divided at his death between his children, J., S., and A. By a codicil she gave to her sister, E. K., “ all I possess, requesting at her

Among the older cases one of the most important is *Massey v. Sherman* (t), where a testator devised copyholds to his wife, "not doubting but that" she would dispose of the same to and amongst his children as she should please; this was held to be a trust for the children, as the wife should appoint. CHAP. XXIV.
"Not doubting."

So, in *Prevost v. Clarke* (u), a testatrix gave the residue of her property equally between her sons and daughter; and, after directing the share of the daughter to be invested in public securities, &c., added, "Convinced of the high sense of honour, the probity and affection of my son-in-law, E. C., I entreat him, should he not be blessed with children by my daughter, and survive, that he will leave at his decease, to my children and grandchildren the share of my property I have bestowed on her." Sir J. Leach, V.-C., was clearly of opinion that these words created a contingent trust (subject to the power of selection) in favour of the children and grandchildren. "Convinced."

Again, in *Malim v. Keighley* (v), where a testator in certain events and subject to certain trusts, bequeathed the residue of his personal estate to his surviving daughter, and such bequest was followed by these words: "hereby recommending to such daughter to dispose of the same after her own death, and the determination of the several trusts aforesaid, unto and among the children of my daughter A. and my nephew I., desiring that his reputed daughter C. may be considered as one of his children." The surviving daughter died without exercising the power, and Sir R. P. Arden, M.R., and Lord Loughborough held, that a trust was created in favour of the children of the daughter and nephew. "Recommending."

In *Foley v. Parry* (w), the testator gave property to his wife for life, with remainder to his nephew for life, and then stated it to be "Wish and request."

death she will leave the sums as I have directed heretofore." E. K. made a will by which she confirmed the bequests made by her sister's will, and gave various legacies out of her own property, and declared that all legacies to married women should be for their separate use. It was held by Jessel, M.R., that E. K. had power to bequeath a share of the 3,000*l.* to J. K.'s married daughter S. for her separate use. It is submitted that the decision is not in accordance with principle: it implies that a precatory trust differs in its effect from a direct trust.

(t) Amb. 520; s.c. nom. *Macey v. Shurmer*, 1 Atk. 389. See also *Wynne v. Hawkins*, 1 Br. C. C. 179; *Parsons v. Baker*, 18 Ves. 476; *Malone v. O'Con-*

nor, 2 Ll. & Go. 465.

(u) 2 Mad. 458.

(v) 2 Ves. jun. 333, 529; see also *Paul v. Compton*, 8 Ves. 380; *Ford v. Fowler*, 3 Beav. 146; *Knott v. Cottee*, 2 Phil. 192; *Cholmondeley v. Cholmondeley*, 14 Sim. 590. Under the circumstances in *Meggison v. Moore*, 2 Ves. jun. 630, "recommend" was held not to create a trust; and as to the proper meaning of the word see *Johnston v. Rowlands*, 2 De G. & S. 356.

(w) 5 Sim. 138, 2 My. & K. 138. See *Broad v. Bevan*, 1 Russ. 511, n. See also *Wilson v. Bell*, L. R., 4 Ch. 581, where the devise was to the son for life, with a direction that his sister should reside with and be maintained by him.

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Other cases
of doubtful
words
creating a
trust.

his particular wish and request, that his wife, and another person who took nothing under the will, should superintend and take care of the education of the nephew, so as to fit him for any respectable employment; and it was decided by Lord Brougham, affirming the decision of Sir L. Shadwell, that the nephew was entitled to be educated and maintained out of the income of the property given to the widow till he attained the age of twenty-one: the duty was to be performed by means of the fund given.

Trusts, or powers in the nature of trusts, have also been held to be created by the following expressions: "I desire him to give" (x); "I hereby request" (y); "I beg" (z); "it is my dying request" (a); "empower and authorise her to settle and dispose of the estate to such persons as she shall think fit by her will, confiding in her not to alienate the estate from my nearest family" (b); "in the full belief" (c); "advise him to settle" (d); "this is my last wish" (e); "my dying wish" (f); "require and entreat" (g); "trusting" (h); "recommend" (i); "trusting that he will preserve the same, so that after his decease it may go and be equally divided, &c." (j); "well knowing" (k); "under the conviction that she will dispose, &c." (l); "to be at her disposal to apply the same" (m); and by a direction to trustees to convey to the eldest son at twenty-one, "but so that the settler's wish and desire may be observed, which is hereby declared, that the other children may be allowed to participate" (n).

Owing to the change in the principles of construction applicable to precatory trusts, many of the cases above referred to would

(x) *Mason v. Limbury*, cited in *Vernon v. Vernon*, Amb. 4; *Harding v. Glym*, 1 Atk. 469. See *Medlicot v. Bowes*, 1 Ves. sen. 207.

(y) *Nowlan v. Nelligan*, 1 Br. C. C. 489; *Eade v. Eade*, 5 Madd. 118; *Shelley v. Shelley*, L. R., 6 Eq. 540.

(z) *Corbet v. Corbet*, Ir. R., 7 Eq. 456.

(a) *Pierson v. Garnet*, 2 Br. C. C. 38, 226; and see *Re O'Bierne*, 1 J. & Lat. 352.

(b) *Griffiths v. Evan*, 5 Beav. 241. The devise to the donee of the power was in tail; if it had been in fee, a trust would scarcely have been created without the word "confiding"; see *Brook v. Brook*, 3 Sm. & Gif. 280; *Alexander v. Alexander*, 2 Jur. N. S. 898.

(c) *Fordham v. Speight*, 23 W. R. 782.

(d) *Parker v. Bolton*, 5 L. J. N. S. Ch. 98. But in *Teasdale v. Braithwaite* (5 Ch. D. 630) a declaration by the testator of a wish that his daughter should

settle property on herself was held not to be binding on her; and compare *Re Crawshay*, 43 Ch. D. 615.

(e) *Hinxman v. Poynder*, 5 Sim. 546.

(f) *Godfrey v. Godfrey*, 11 W. R. 554.

(g) *Taylor v. George*, 2 V. & B. 378.

(h) *Pilkington v. Boughey*, 12 Sim. 114.

(i) *Tibbits v. Tibbits*, 19 Ves. 656. *Jac.* 317.

(j) *Baker v. Mosley*, 12 Jur. 740.

(k) *Briggs v. Penny*, 3 De G. & S. 539, 3 M. & Gord. 546; per Wood, V.-C., Johns. 289. *Briggs v. Penny* was dissented from in *Stead v. Mellor* (5 Ch. D. 225) and *Clancarty v. Clancarty*, 31 L. R. Ir. 530.

(l) *Barnes v. Grant*, 26 L. J. Ch. 92, But see post, pp. 873, 874.

(m) *Salisbury v. Denton*, 3 K. & J. 529.

(n) *Liddard v. Liddard*, 28 Bea. 266.

probably not be followed at the present day. But before dealing with the recent cases it may be convenient to refer to some rules, restricting the creation of precatory trusts, which are to be found even in the older decisions. CHAP. XXIV.

For example, if the testator's language amounts merely to a general expression of goodwill towards the objects in question, and does not intimate any definite disposing intention in their favour, as where he adds, "I have no doubt but A. B. (the legatee) will be kind to my children," such words are inoperative to qualify the legatee's interest (*o*). Mere expressions of kindness not sufficient.

Another rule is that a precatory trust will not be created unless its objects are pointed out by the testator with sufficient certainty. "Vagueness in the object is regarded as evidence that no trust was intended to be created" (*p*). In cases of this kind the question sometimes arises whether property which is given to A. is intended (i.) to be held by A. for his absolute benefit, unfettered by any trust (*q*); or (ii.) to be held upon trust for other persons, exclusive of A. (*r*); or (iii.) upon trust for A. and other persons. The last question generally arises where the testator states the motive or purpose of the gift; as where property is given to A. in order to maintain or provide for some other person or persons. The cases are discussed in a subsequent part of this chapter (*s*). Reference is also made to the important difference between those cases in which uncertainty in the object prevents a precatory trust from being created, and those in which a trust is created, but cannot take effect in the way intended by the testator by reason of the objects not being defined with sufficient certainty (*t*). Certainty in the object.

On the principle above stated, namely, that vagueness in the object is an indication that no trust was intended to be created, a suggestion that the legatee's family or relations should benefit by the gift, is not sufficient to create a trust (*u*).

The question was much discussed in the case of *Wright v. Atkyns* (*v*), where the testator devised freehold and leasehold property to his mother and her heirs for ever, "in the fullest confidence" that *Wright v. Atkyns.*

(*o*) *Buggens v. Yeates*, 8 Vin. Abr. 72, pl. 27; *Pope v. Pope*, 10 Sim. 1; *Greene v. Greene*, Ir. R., 3 Eq. 629; ("deal justly and properly"); *Ellis v. Ellis*, 23 W. R. 382 ("do justice to").

(*p*) Per Lord Truro in *Briggs v. Penny*, 3 Mac. & G., at p. 555. See also *Bernard v. Minshull*, John. 276; *Harland v. Trigg*, 1 Br. C. C. 142 ("hoping he will continue them in the family").

(*q*) *Infra*, p. 895.

(*r*) As in *Massey v. Sherman*, *supra*, p. 869.

(*s*) *Infra*, p. 892.

(*t*) *Infra*, p. 880.

(*u*) *Harland v. Trigg*, 1 Br. C. C. 142, and cases cited in note (*k*) *infra*.

(*v*) 17 Ves. 255, 19 Ves. 299; T. & R. 143; Sugden's Law of Prop., 376. The case was referred to in detail in *Re Williams*, [1897] 2 Ch. 12.

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after her decease she would devise the property to his family, but owing to the form which the litigation took, the question whether these words created a trust, and if so in whose favour, was never decided.

Wishes of testator not clearly expressed.

On the same principle, where a testator gives property to A. "having confidence" that he will dispose of it in accordance with his wishes, and the testator does not communicate any wishes of a definite nature, no trust is created (*w*).

Certainty in the subject.

There must also be a definite subject. Thus, in *Re Moore* (*x*) a testator gave a fund in trust for his three sisters, adding: "They are hereby enjoined to take care of my nephew J. as may seem best in the future": it was held by Kay, J., that these words were too indefinite to create a trust in favour of the nephew; if there had been a direction to maintain him, the case might have been different (*y*). So if a testator gives property to A. absolutely, with a direction that he will at his death leave the "bulk" or "remainder" of it to B.: this direction is too vague to create a precatory trust (*z*). Other instances of trusts being void for uncertainty in the subject are referred to elsewhere (*a*). The doctrine was recognized in *Horwood v. West* (*b*), where a testator recommended his wife to give by her will what she should die possessed of under his will in a certain manner; Sir J. Leach, V.-C., assumed that if these words had been uncontrolled by the context, the trust must have been void for uncertainty; but he thought that it was evident, from a direction in the will to the wife to secure to herself, on a second marriage, whatever she should possess by virtue of his will, that the testator intended the trust in question to be co-extensive with such direction, i.e., to extend to all the property the wife derived from the testator.

Doubtful expressions explained by context.

Expressions sufficient per se to create a trust may be deprived of their effect by a context expressly declaring (*c*), or by implication showing, that no trust was intended. Thus, where a testator gave his property to A. and declared express trusts of part of it, and requested that the residue should be applied in a certain way, it

(*w*) *Reid v. Atkinson*, Ir. R., 5 Eq. 373; *Creagh v. Murphy*, Ir. R., 7 Eq. 182. As to the creation of a power to carry out the wishes of a testator, see *Re Helley*, [1902] 2 Ch. 866, cited in Chap. XXIII.

(*x*) 55 L. J. Ch. 418.

(*y*) See *Broad v. Bevan*, post, p. 876, n. (*e*).

(*z*) *Lechmere v. Lavie*, 2 My. & K. 197, referred to below, p. 877; *Eade v. Eade*, 5 Madd. 118; *Palmer v. Sim-*

monds, 2 Dr. 221; *Parnall v. Parnall*, 9 Ch. D. 96; *Mussoorie Bank v. Raynor*, 7 A. C. 321.

(*a*) *Hudson v. Bryant*, 1 Coll. 681; *Flint v. Hughes*, 6 Bea. 342; *Cowman v. Harrison*, 22 L. J. Ch. 993; *Bland v. Bland*, 2 Cox, 349, and other cases cited supra, p. 462.

(*b*) 1 Sim. & St. 387.

(*c*) *Young v. Martin*, 2 Y. & C. C. C. 582.

was held that this expression of wish did not create a trust (*d*). So if a testator, after settling a fund on his daughters and their children, by codicil revokes that bequest on account of the inconvenience of having the money tied up, and leaves the property "to be disposed of by the husbands for the good of their families": no trust will be created in favour of the wives and children; otherwise the inconvenience complained of would continue (*e*).

Again, the idea of a trust may be excluded if the donee is given a wide discretion as to the disposition of the property (*f*). Discretion.

And where the words of a gift expressly point to an absolute enjoyment and power of disposition by the donee himself (*g*), the natural construction of subsequent precatory (*h*) words is that they express the testator's belief or wish without imposing a trust.

Where the gift is absolute, precatory words do not create a trust.

Thus, in *Meredith v. Heneage* (*i*), where the testator, after having given his real and personal estate in the fullest terms to his wife, declared that he had devised the whole of his real and personal estate to his wife, "unfettered and unlimited," in full confidence, and with the firmest persuasion that in her future disposition and distribution thereof she would distinguish the heirs of his late father by devising and bequeathing the whole of his said estate together and entire to such of his said father's heirs as she might think best deserved her preference; it was held in D. P. that the wife was absolutely entitled for her own benefit, Lord Eldon considering that the testator intended to impose a moral but not a legal obligation on his wife; for which he relied much (as did also Lord Redesdale) on the words "unfettered and unlimited." Lord Eldon also adverted to the great difficulty of reconciling the testator's direction that the estate should go "entire" with his direction respecting its "distribution" (*j*).

A similar construction has been placed on a gift to the testator's

(*d*) *House v. House*, 23 W. R. 22; *Shepherd v. Nottidge*, 2 J. & H. 766.

(*e*) *Alexander v. Alexander*, 2 Jur. N. S. 898, not appealed on this point, 6 D. M. & G. 593.

(*f*) As in *Curtis v. Rippon*, 5 Madd. 434 ("remembering always the Church of God and the poor"); *Hoy v. Master*, 6 Sim. 658; *White v. Briggs*, 15 Sim. 33; *Ex parte Payne*, 2 Y. & C. 636; *Huskisson v. Bridge*, 15 Jur. 738 ("in any other way most agreeable to herself"); per Wood, V.-C., in *Bernard v. Minshull*, Johns. at p. 287; *Eaton v. Watts*, L. R., 4 Eq. 151 ("to dispose of as he thinks fit"); *Re Bond*, 4 Ch. D. 238 ("quite at liberty"); *Re Harbison*, [1902] 1 Ir. R. 103; *McCor-*

mick v. Grogan, L. R., 4 H. L. 82; *Sullivan v. Sullivan*, [1903] 1 Ir. R. 193 ("you may modify it if you think desirable").

(*g*) "Absolute" property means not only unlimited in estate, but unfettered by trust or condition: per James, V.-C., *Irvine v. Sullivan*, L. R., 8 Eq. 673; and per Wood, V.-C., *Godfrey v. Godfrey*, 2 N. R. 16.

(*h*) Secus, if the words are imperative, *Bonser v. Kinnear*, 2 Giff. 195; *Evans v. Evans*, 12 W. R. 508; *Curtis v. Graham*, ib. 993.

(*i*) 1 Sim. 542, 10 Pri. 306.

(*j*) See also *Lefroy v. Flood*, 4 Ir. Ch. R. 1; *Re Bond*, 4 Ch. D. 238.

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wife "for her own use and benefit," coupled with a suggestion that she should dispose of it amongst her children or family (*k*); and on a gift to the testator's wife to be disposed of "by her will in such way as she shall think proper," with a recommendation to her to dispose of one moiety among her own relations, and the other among such of his own as she should think proper (*l*); and on a gift to the testator's wife for her absolute use and benefit, "trusting that she will do justice to any children we may have" (*m*).

The subject of gifts of this nature is considered more in detail in a subsequent part of this chapter (*n*).

Ware v. Mallard,

It remains to notice the case of *Ware* (or *Wace*) *v. Mallard* (*o*), where the testator devised and bequeathed all his real and personal property to his wife, her heirs, executors, administrators or assigns, to and for her sole use and benefit, in full confidence that she would in every respect appropriate and apply the same unto and for the benefit of all his children. Sir J. Parker, V.-C., decided that the widow took a life estate with a power of appointment among the children. No reasons are reported. If the words "in full confidence," &c., created a trust, it is difficult to see how the widow could take any beneficial interest whatever: and if they did not, it is equally difficult to understand how she could be entitled to less than the whole.

The authority of the V.-C. has given some currency to this decision (*p*). But the better opinion is, that in such a case no trust is imposed on the widow. In the first place, the words "for her sole use and benefit" *prima facie* exclude the notion of a trust (*q*),

(*k*) *Williams v. Williams*, 1 Sim. N. S. 358. See also *Webb v. Woods*, 2 Sim. N. S. 267; *White v. Briggs*, 15 Sim. 33; *Re Bond*, 4 Ch. D. 238; *Parnall v. Parnall*, 9 Ch. D. 96; and the following cases bearing on the subject, *Winch v. Brutton*, 14 Sim. 379; *Bardswell v. Bardswell*, 9 Sim. 319; *Huskinson v. Bridge*, 15 Jur. 738; *Fox v. Fox*, 27 Beav. 301; *Green v. Marsden*, 1 Drew. 646; *M'Culloch v. M'Culloch*, 11 W. R. 504.

(*l*) *Johnston v. Rowlands*, 2 De G. & S. 356. See also *Pope v. Pope*, 10 Sim. 1; *M'Alinden v. M'Alinden*, Ir. R., 11 Eq. 219; *Morrin v. Morrin*, 19 L. R. Ir. 37. The cases of *Wood v. Cox* (1 Keen, 317, 2 Myl. & Cr. 684) and *Irvine v. Sullivan* (L. R., 8 Eq. 673) are sometimes referred to as bearing on the subject, but they seem to the editor to relate more properly to the matters treated of in the subsequent sections of

this chapter (post, pp. 895).

(*m*) *Ellis v. Ellis*, 23 W. R. 382.

(*n*) Post, p. 895.

(*o*) 21 L. J. Ch. 355, 16 Jur. 492.

(*p*) *Gully v. Oregoe*, 24 Beav. 185; *Shovelton v. Shovelton*, 32 Beav. 143; *Curnick v. Tucker*, L. R., 17 Eq. 320; *Le Marchant v. Le Marchant*, L. R., 18 Eq. 414. *Curnick v. Tucker* and *Le Marchant v. Le Marchant* were not followed by Jessel, M.R., in *Re Hutchinson and Tenant*, 8 Ch. D. 540, cited post. In *Godfrey v. Godfrey*, 11 W. R. 554, Wood, V.-C., refused to decide what interests the widow and children took. It seems doubtful whether in *Curnick v. Tucker* a dictum of Kindersley, V.-C., in *Palmer v. Simmonds*, 2 Drew. 221, was correctly interpreted as a surrender by him of the principle which he enforced in *Webb v. Woods*.

(*q*) See *Williams v. Williams*, and other cases cited *supra*.

and in the second place, the tendency at the present day is not to imply a trust from such words as "in full confidence." Thus, in *Re Hutchinson and Tenant* (r), where a testator gave all his real and personal estates to his "dear wife absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so," it was held by Sir G. Jessel, M.R., that the wife took absolutely. He considered the case undistinguishable from *Lambe v. Eames* (s), where a testator gave his estate to his widow "to be at her disposal in any way she may think best for the benefit of herself and family," upon which a strong opinion was expressed by the L.JJ. that no trust was created; but assuming that there was, it could not be extended to mean a trust for the widow for life, with remainder for the children in such shares as she might think fit to direct (t).

It should be observed that in some of the cases where Sir J. Parker's construction has prevailed, there has been a reference to the donee's death as the time when the recommended disposition was to take effect (u); and this may have been taken as marking the point of time when the interest of the other beneficiaries was to commence, as well as negating the widow's right to dispose of the corpus in her lifetime (v). But the distinction is discountenanced by *Meredith v. Heneage*, and *Johnston v. Rowlands*, and in expressing his dissent from the construction in question, Sir G. Jessel drew no distinction between the cases where such a reference existed and where it did not (w).

In *Re Byrne's Estate* (x) the testator gave property to his wife "to be held by her for her own and all my children's use and benefit. But I leave it entirely in her power to fix the portion that each of my children is to get out of my property." It was held that this did not impose a precatory trust on the wife, but that she was a trustee

(r) 8 Ch. D. 540.

(s) L. R., 6 Ch. 597. See also *Mackett v. Mackett*, L. R., 14 Eq. 49; *Re Adams and Kensington Vestry*, 27 Ch. D. 394; *Mussoorie Bank v. Raynor*, 7 App. Ca. 321. These cases are referred to again, post.

(t) See *Re Haly's Trusts*, 23 L. R. Ir. 130, where the legatee (a married woman) predeceased the testator, and it was held that the children were entitled: the question whether the mother took a life interest therefore did not arise. In that case the trust was imperative.

(u) *Gully v. Cregoe*, 24 Beav. 185; *Le Marchant v. Le Marchant*, L. R., 18 Eq. 414; *Cholmondeley v. Cholmondeley*,

14 Sim. 590 (but here the words were only "to be hers independent of her husband"—as to which see also *Stubbs v. Sargon*, 3 My. & Cr. 513).

(v) In *Hart v. Tribe*, 18 Beav. 215, 1 D. J. & S. 418, there was an express "recommendation" not to do so.

(w) It should be noticed that in *Fordham v. Speight* (23 W. R. 782) there was a gift of property to the testator's wife absolutely, in the full belief that she would so dispose of it by deed, will or otherwise that at her decease the whole might be equally divided between his children, and Jessel, M.R., held that this created a trust for the children.

(x) 29 L. R. Ir. 250.

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for herself and the children, with a large discretionary power of determining the children's portions. The case somewhat resembled *Crockett v. Crockett* (y).

Where donee has a discretion.

Another important restriction on the doctrine of precatory trusts was laid down by Sir R. P. Arden in *Malim v. Keighley* (z), in stating the general principle with regard to precatory trusts: "Wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust (a), unless he shews clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it." This qualification was approved by the House of Lords in *Knight v. Boughton* (b), and the decisions in several other cases have turned, wholly or partially, on it (c).

Limits of the doctrine of precatory trusts.

With regard to the general doctrine of precatory trusts, doubts began to arise, even in Mr. Jarman's day, whether it had not been carried too far; he remarks (d), with reference to the words which in *Broad v. Bevan* (e) were held to create a trust: "Recent cases suggest a doubt whether such words would now receive a similar construction, for the Courts seem to be sensible that they have gone far enough in investing with the efficacy of a trust loose expressions of this nature, which, it is probable, are rarely intended to have such an operation. Accordingly we find, of late, a more strict and uniform requisition of definiteness in regard to both the subject-matter and objects of the intended trust, than can be traced in some of the earlier adjudications." The cases referred to by Mr. Jarman are *Curtis v. Rippon* (f), *Abraham v. Alman* (g), *Sale v. Moore* (h), *Meredith v. Heneage* (i), *Benson v. Whittam* (j), *Hoy*

Instances of words being too indefinite to create a trust.

(y) 2 Ph. 553: post, p. 893.

(z) 2 Ves. jun. 333.

(a) "Everything in that passage, to my mind, turns upon the emphasis which is to be attributed to this expression, 'the way in which it shall go.' If it means 'the way in which it shall go'—imperatively—I do not quarrel with it:" per Lindley, L.J., in *Re Hamilton*, [1895] 2 Ch. at p. 372.

(b) 11 Cl. & F. 513.

(c) *Ex parte Payne*, 2 Y. & C. 636; *Curtis v. Rippon*, 5 Madd. 434; *House v. House*, 31 L. T. 427; *Greene v. Greene*, Ir. R., 3 Eq. 629; *Lefroy v. Flood*, 4 Ir. Ch. R. 1; *Re Harbison*. [1902] 1 Ir. R. 103.

(d) First ed. p. 338.

(e) 1 Russ. 511, n. In that case the testator bequeathed to his daughter

Ann a small annuity, and proceeded: "I also order and direct my son Joseph to take care of and provide for my said daughter Ann during her life"; he bequeathed all his property to Joseph, and appointed him sole executor: Plumer, M.R., held that the daughter was entitled to have a provision made for her out of the residue in addition to the annuity. Compare the case of *Re Moore*, ante, p. 872, in which Kay, J., referred to and distinguished *Broad v. Bevan*.

(f) 5 Madd. 434.

(g) 1 Russ. 509.

(h) 1 Sim. 534. See also *Reeves v. Baker*, 18 Beav. 372.

(i) 1 Sim. 542.

(j) 5 Sim. 22.

v. *Master* (k), *Lechmere v. Lavie* (l), *Horwood v. West* (m), and *Ex parte Payne* (n). CHAP. XXIV.

Some of these cases proceeded on the principle that even where the words used by the testator to express his wishes would, on the authority of the decisions above referred to (o), be sufficient to create a trust, they will not have this effect if the subject-matter of the trust is not defined with certainty. There are other cases to the same effect (p). Indeed, the rule is expressly recognized in all statements of the general doctrine of precatory trusts (q).

After discussing the cases above referred to, Mr. Jarman makes the following remarks (r): "Such, then, is the long train of decisions arising from the neglect of testators clearly to distinguish between expressions which are meant to impose a trust or obligation, and those which are intended merely to inculcate the discharge of a moral duty. At one period the Courts seem to have been so astute in detecting an intention to create a trust when wrapped in the disguise of vague and ambiguous expressions, as almost to take from a testator the power of intimating a wish without creating an obligation, unless, indeed, by the use of words distinctly negating the contrary construction. But though a sounder principle now prevails, the practitioner will perceive, in the state of the authorities, the strongest incentive to caution in the employment of words which may give rise to a question of this nature. If a trust is intended to be created, this should be done in clear and explicit terms; and if not, any request or exhortation which the testator may choose to introduce, should be accompanied by a declaration, that no trust or legal obligation is intended to be imposed."

Mr. Jarman's remarks upon the older cases.

Since Mr. Jarman wrote, the reluctance of the Courts to construe vague expressions of wish or advice as creating precatory trusts has increased. In *Lambe v. Eames* (s), James, L.J., said: "In

Modern decisions on the general doctrine.

(k) 6 Sim. 568.

(l) 2 My. & K. 197. Mr. Jarman points out (first ed. p. 341) that the language of the will in this case brought it within the principle of *Wynne v. Hawkins*, and the other cases referred to ante, p. 869.

(m) 1 Sim. & St. 387. This case is referred to above, p. 872.

(n) 2 Y. & C. 636. See also *Knight v. Knight*, 3 Beav. 148; s.c. nom. *Knight v. Boughton*, 11 Cl. & Fin. 513; *Lefroy v. Flood*, 4 Ir. Ch. Rep. 1 (in which great reliance was placed on the fact that the approbation of the devisee was required to the conduct of the persons claiming as cestuis que trustent; the force of which

requisition must, however, depend on circumstances, *Bonser v. Kinnear*, 2 Gif. 195; *Quayle v. Davidson*, 12 Moo. P. C. C. 268; *Maud v. Maud*, 27 Beav. 615; *Scott v. Key*, 35 Beav. 291 (as to one-third); but see *Malone v. O'Conner*, 2 Ll. & Go. 465.

(o) Ante, p. 869.

(p) *Eade v. Eade*, 5 Madd. 118; *Palmer v. Simmonds*, 2 Dr. 221. See also *Williams v. Williams*, 1 Sim. N. S. 358.

(q) Ante, p. 871.

(r) First ed. p. 344.

(s) L. R., 6 Ch. 597; supra, p. 875. Of course, the doctrine laid down in *Lambe v. Eames* does not apply if the

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hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts, where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed." The doctrine thus enunciated was followed by Jessel, M.R., in *Stead v. Mellor* (t) and *Re Hutchinson and Tennant* (u), and approved by the Judicial Committee in *Mussoorie Bank v. Raynor* (v); in that case the testator gave to his widow the whole of his property "feeling confident that she will act justly to our children in dividing the same when no longer required by her": and it was held that she took absolutely.

Re Adams.

In *Re Adams and the Kensington Vestry* (w), a testator gave all his real and personal estate and effects to his wife, "in full confidence" that she would do what was right as to the disposal thereof between his children either in her lifetime, or by will after her decease. It was held by the Court of Appeal (affirming the decision of Pearson, J.), that these words gave to the widow an absolute interest unfettered by any trust. Cotton, L.J., said: "I have no hesitation in saying myself, that I think some of the other authorities went a great deal too far in holding that some particular words appearing in a will were sufficient to create a trust. Undoubtedly confidence, if the rest of the context shews that a trust is intended, may make a trust, but what we have to look at is the whole of the will which we have to construe."

Re Diggles.

In *Re Diggles* (x), where a testatrix gave all her property to her daughter, adding "and it is my desire that she allows to A. G. an annuity of 25*l.* during her life," it was held by the Court of Appeal that the will created no trust or charge as to the annuity, but only a request to the daughter making it merely her moral duty to pay reasonable attention to the wishes of the testatrix. Bowen, L.J. (y), said: "Just as uncertainty of the property and object are reasons for not construing the will as creating a trust, so also the fact that a trust would cause embarrassment and difficulty is a reason for coming to the same conclusion." And Fry, L.J., (z) said: "The later cases have established the reasonable rule that the Court is to consider in each particular case what was the testator's intention."

language of the will is imperative; see *Re Haly's Trusts*, 23 L. R. Ir. 130, ante, p. 875.

(t) 5 Ch. D. 225. See *Clancarty v. Clancarty*, 31 L. R. Ir. 530.

(u) 8 Ch. D. 540, *supra*, p. 875.

(v) 7 App. Ca. 321. As to the use of word "justice" in gifts of this kind, see

Ellis v. Ellis, 23 W. R. 22.

(w) 24 Ch. D. 199, 27 Ch. D. 394. See also *Re Moore*, 55 L. J. Ch. 418, ante, p. 872. *Cochrane v. Dundonald*, 10 T. L. R. 262.

(x) 39 Ch. D. 253.

(y) *Ibid.* at p. 257.

(z) *Ibid.* at p. 258.

In *Re Hamilton* (a) a testatrix gave legacies to her two nieces for their separate use, and added: "I wish them to bequeath the same equally between the families of O. and P.," and it was held by the Court of Appeal (Lindley, Lopes and Kay, L.JJ.) that no precatory trust was created. The principle laid down in *Re Hamilton* was approved by the Court of Appeal (Esher, M.R., and Lopes and Chitty, L.JJ.) in *Hill v. Hill* (b).

The whole doctrine of precatory trusts was discussed in *Re Williams* (c). In that case a testator gave his residuary estate to his wife, "her heirs, executors, administrators and assigns absolutely, in the fullest confidence that she will carry out my wishes in the following particulars," namely, that she would pay the premiums on a policy of insurance on her life (which was her own property), and that she would by her will leave the moneys payable under the policy and also the moneys payable at the testator's death in respect of a policy on his life (which was the testator's property) to his daughter Lucy, and he appointed his wife and another person executors and trustees of his will: it was held by Lindley and A. L. Smith, L.JJ., affirming the decision of Romer, J., that the wife was not put to her election as to her policy, and that she took the testator's residuary estate absolutely, unfettered by any condition or trust. Rigby, L.J., dissented (d).

The present state of the authorities on the subject is not altogether satisfactory. "It would," as Lindley, L.J., remarked in the case last cited, "be an entire mistake to suppose that the old doctrine of precatory trusts is abolished. Trusts—i.e., equitable obligations to deal with property in a particular way—can be imposed by any language which is clear enough to shew an intention to impose them." The difficulty is to say how far the old decisions are binding authorities in cases where the language used is practically identical. It cannot be questioned that the leaning of the Courts at the present day is against the implication of a trust from precatory words; nor can it be questioned that this tendency is a sound one. A will is a business document, in which the use of diplomatic or courteous language is unnecessary, and it is, as Lopes, L.J., remarked (e), "inconceivable that a testator who really meant his

(a) [1895] 2 Ch. 370; *Re Conolly*, [1910] 1 Ch. 219.

(b) [1897] 1 Q. B. 483.

(c) [1897] 2 Ch. 12.

(d) *Re Williams* was followed in *Re Oldfield*, [1904] 1 Ch. 549, where a testatrix gave her property to her two

daughters for their absolute use and benefit, and added an expression of her "desire" that they should during the lifetime of their brother pay him a certain part of their income.

(e) *Hill v. Hill*, [1897] 1 Q. B. p. 488.

hope, recommendation, confidence or request to be imperative, should not express his intention in a mandatory form."

But such cases do occasionally happen. Thus in *Willis v. Kymer (ee)* a testatrix "requested" her sister to perform her wishes expressed in her will, and gave various directions as to the disposition of her property: it was held by Jessel, M.R., that this created a precatory trust.

In *Comiskey v. Bowring-Hanbury (f)*, the testator gave to his wife "the whole of my real and personal estate and property absolutely, in full confidence that she will make such use of it as I should have made myself, and that at her death she will devise it to such one or more of my nieces as she may think fit; and in default of any disposition by her thereof by her will or testament, I hereby direct that all my estate and property acquired by her under this my will shall at her death be divided among the surviving said nieces." It was held by Kekewich, J., and by the Court of Appeal (Vaughan Williams and Stirling, L.JJ., Cozens-Hardy, L.J., dissenting) (*g*), that the widow took absolutely for her own benefit. But this decision was reversed by the House of Lords, and it was held that there was an absolute gift of the testator's property to his wife, subject to an executory gift of the same at her death to such of his nieces as should survive her, equally, if more than one, so far as his wife should not dispose by will of the property in favour of the surviving niece or nieces, or any one or more of them. This construction (which was founded on the whole will, and not on the testator's use of any particular words) was strengthened by the bequest to one of the executors of "such sum not exceeding 150*l.* as my dear wife may decide upon": if the testator intended her to be absolute owner of the property this gift was senseless. The question of precatory trust did not, in the view taken by the House of Lords, arise at all.

Where no
trust created
donee takes
absolutely.

Whenever it is a question whether a trust has been created or not, the consequence of holding the expressions to be too vague for the creation of a trust is that the devisee or legatee retains the property for his own benefit; and in this respect such cases stand distinguished from those (*h*) in which there is considered to be sufficient indication of the testator's intention to create a trust, though the objects

(*ee*) 7 Ch. D. 181; ante, p. 868, note (*s*); *Re Burley*, [1910] 1 Ch. 215.

(*f*) [1905] A. C. 84. See Chap. XXXIII.

(*g*) *Re Hanbury*, [1904] 1 Ch. 415.

(*h*) *Stubbs v. Sargon*, *Fowler v. Garlike*, *Corporation of Gloucester v. Wood*, ante, p. 481; *Briggs v. Penny*, 3 De G. & S. 525; 3 M. & Gord. 546.

of it are uncertain : a state of things which, of course, lets in the claim of the residuary devisee or legatee, or of the heir or next of kin (as the case may be), to the beneficial ownership (i). In the latter class of cases there is no uncertainty as to the intention to create a trust, but merely as to the objects ; in the other class of cases it is uncertain whether any trust is intended to be created. But inasmuch as uncertainty in the object furnishes a strong argument that a testator did not intend to create a trust, it is obvious that the two classes of cases are intimately connected with each other. For the rule that a certain subject and a certain object are necessary to constitute a trust, where the words used are precatory only, does not mean that the subject or object must be so defined that it can in fact be ascertained by the Court. A precatory trust " for the benefit of —," or of " the person named in such a paper," where no such paper is found, or " for such objects as I have communicated to " the donee, where no such communication has been made (j), would completely exclude the donee from all beneficial interest, although it leaves the object wholly unascertained (k). But what is meant by the rule is this : in ascertaining whether the precatory words import merely a recommendation, or whether they import a definite imperative direction to the donee as to his mode of dealing with the property, the Court will be guided by the consideration whether the amount he is requested to give is certain or uncertain, and whether the objects to be selected are certain or uncertain, and if there is a total absence of explicit direction as to the quantum to be given, or as to the objects to be selected by the donee of the property, then the Court will infer from the circumstance of the testator having used precatory words, expressive only of hope, desire or request, instead of the formal words usual for the creation of a trust, that those words are used, not for the purpose of creating an imperative trust, but simply as suggestions on the part of the testator, for the guidance of the donee in the distribution of the property : the testator placing implicit reliance upon his discretion and leaving him the sole judge whether he will adopt those suggestions or not, and whether he will dispose of the property in the manner indicated by the testator, or in any other manner at his absolute discretion. The question is not whether the object

Meaning of the rule requiring certainty of object and subject for a precatory trust.

(i) Chap. XXI.

(j) *Bernard v. Minshull*, Johns. 276, see *Re Boyes*, 26 Ch. D. 531. But where the gift was subject to such disposition thereof or of any part thereof as the testator might by deed or writing there-

after direct, it was held there was no trust, the testator not having made up his mind whether he would make any such disposition or not, *Fenton v. Hawkins*, 9 W. R. 300, ante.

(k) See n. (h).

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is so defined that it can be distinctly ascertained by the Court, but whether the object is purposely left to be selected by the donee (*l*); as, for instance, where the testator expresses a desire that the donees shall "distribute the fund as they think will be most agreeable to his wishes" (*m*).

Gifts for a specified purpose.

(3) *Gifts for a Specified Purpose*.—We are now to consider whether, in cases where words are added expressing a purpose for which the gift is made, such purpose is to be considered obligatory.

Where the purpose is the benefit of donee alone, the gift is absolute.

Where the purpose of the gift is the benefit solely of the donee himself, he can claim the gift without applying it to the purpose, and that, it is conceived, whether the purpose be in terms obligatory or not. Thus, if a sum of money be bequeathed to purchase for any person a ring (*y*), or a life annuity (*z*), or a house (*a*), or to set him up in business (*aa*), or towards the printing of a book, the profits on which are to be for his benefit (*b*), the legatee may claim the money without applying it, or binding himself to apply it, to the specified purpose; and even in spite of an express declaration by the testator, that he shall not be permitted to receive the money (*c*).

Principle of the cases.

These cases rest on the principle that the Court will not compel that to be done which the legatee may undo the next moment, as by selling the thing to be purchased or giving up the business: the same principle (as we have already seen (*d*)) applies where property is directed to be converted, for the donee may claim it in its original state. But, of course, if there be more than one donee interested in the gift, the deviation from the testator's directions cannot be made without the consent of all: as if the house when purchased is to be conveyed to, or settled on, two or more persons (*e*).

Where a testator, in bequeathing a legacy, states the purpose for

(*l*) See the judgment of Wood, V.-C., *Bernard v. Minshull*, Johns. 287, 290, quoted ante, p. 483.

(*m*) *Stead v. Mellor*, 5 Ch. D. 225; *Reid v. Atkinson*, Ir. R., 5 Eq. 373, and *Creagh v. Murphy*, Ir. R., 7 Eq. 182, seem to have been decided on this principle.

(*y*) *Apreece v. Apreece*, 1 V. & B. 364.

(*z*) *Dawson v. Hearn*, 1 R. & M. 606; *Ford v. Batley*, 17 Beav. 303; *Re Browne's Will*, 27 Beav. 324. It makes no difference whether it be a bequest of a specified sum to purchase an annuity, or a direction to purchase an annuity of a specified amount, *Dawson v. Hearn*, supra.

(*a*) *Knox v. Hotham*, 15 Sim. 82;

Dowling v. Dowling, [1902] 1 Ir. R. 79.

(*aa*) This seems to follow from the decision in *Gough v. Bult*, 16 Sim. 45, though there the exact point did not arise: see post, p. 887.

(*b*) *Re Skinner's Trusts*, 1 J. & H. 102, in which it was a question of some difficulty whether the principal object of the bequest was the benefit of the person named, or the publication of the testator's opinions.

(*c*) *Stokes v. Cheek*, 28 Bea. 620.

(*d*) Chap. XXII., ante, p. 758.

(*e*) As to the case of *Re Cameron*, 26 Ch. D. 19, where a testator directed his executors to carry on his business for a certain time, but did not dispose of the profits during that time.

which he gives it, the mere fact that if the legacy were applied for that purpose it would benefit other persons besides the legatee, does not impose on him any trust in their favour (*f*).

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Where purpose would benefit others.

But if the testator bequeaths a legacy to trustees to be applied for the benefit of a number of persons, they can, if they are all ascertained and sui juris, elect to have the money paid to them in lieu of having it applied in the manner directed by the testator. Thus, a bequest of money to trustees to be laid out in planting trees on an estate of which the testator was tenant for life, is a gift for the benefit of the persons entitled to the estate, and belongs to them absolutely (*g*).

As a general rule, a bequest of a capital sum for the maintenance and education of a person is equivalent to a bequest of it for his benefit, and entitles him to the whole (*h*), but if a legacy is directed to be applied by the testator's executors or trustees in a certain way for the benefit of A., with a gift over of any surplus remaining after the purpose is fulfilled, this only entitles A. to so much of the legacy as is necessary for the purpose (*i*).

Gift over.

The principle above stated does not apply in cases where the motive is so stated as to create a condition. Thus, in *Re Unite* (*j*), a testatrix gave a sum of 20,000*l*. "towards the new building and equipment to the satisfaction and under the direction of my executors, of the B. Hospital." Between the date of the will and the death of the testatrix, the hospital was almost totally rebuilt, but not painted, furnished or equipped. It was held by Kekewich, J., that the object specified by the testatrix could not be treated as merely the motive of the gift (*k*), so as to entitle the hospital to the legacy in any event. The question whether, if any balance of the legacy remained, after the expenditure of such part of it as could be properly applied in rebuilding or equipment, it might be treated as charitable and applied *cy-près*, was reserved.

Distinction where gift conditional.

Where the principle applies and the gift is immediate, the legatee's interest vests on the death of the testator, and if he dies before the money is paid or laid out, his personal representatives are entitled to it (*l*).

Death of legatee.

(*f*) *Adams v. Loddell*, 25 L. R. Ir. 311; *Mexborough v. Savile*, 88 L. T. 131, stated post.

(*g*) *Re Bowes*, [1896] 1 Ch. 507, and cases there cited.

(*h*) See post, p. 885.

(*i*) *Re Lee's Trusts*, Ir. R., 10 Eq. 157; *Falls v. Alford (Re Black)*, [1907] 1 Ir. R. 486.

(*j*) [1906] W. N. 26.

(*k*) As in the class of cases referred to by Wood, V.-C., in *Re Sanderson's Trust*, 3 K. & J. 497 · the passage is quoted post, p. 888.

(*l*) *Yates v. Compton*, 2 P. W. 308; *Barnes v. Rowley*, 3 Ves. 305; *Palmer v. Craufurd*, 3 Swanst. 482. Compare *Gough v. Bull*, 16 Sim. 45, stated post, p. 887.

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Future and
contingent
gifts.

Provision
against
alienation.

Direction to
accumulate
income, when
void.

The rule is applied where the gift is to take effect at a future time. For example, if a testator directs a sum of money or share of residue to be laid out at a future time (e.g., on the death of a tenant for life) in the purchase of an annuity, and the annuitant dies before the time arrives, his representatives will be entitled to the money (*m*). If an annuity is directed to be purchased for a person on the happening of a contingent event, and he dies before the event happens, his representatives have no claim; but if he dies after the event has happened and before the annuity is purchased, his representatives are entitled to the money (*n*).

If an annuity is directed to be purchased in the name of the annuitant, a gift over in the event of his alienating it is inoperative, and he takes absolutely (*o*). But if the annuity is directed to be held by trustees for the annuitant, with a gift over in case he should alienate it or become bankrupt, his right to receive the fund is taken away (*p*). Where such a trust is not to take effect immediately, but is postponed until the death of a tenant for life, and the annuitant dies before the tenant for life without alienating or becoming bankrupt, the question arises whether the personal representatives of the annuitant are entitled to the fund, or whether the bequest of the annuity fails altogether. The authorities are conflicting (*q*).

On the same principle, if a testator gives property to A. absolutely, but directs his trustees to retain possession and accumulate the income for a certain number of years and then transfer the property and accumulations to A., the trust for accumulation is nugatory, and A. is entitled to have the property transferred to him at once. Of course if the gift is contingent or defeasible, or if any other person may, by possibility, be interested in the trust, the principle does not apply (*r*). Nor does it apply where the trust for accumulation is illegal, so that the income is undisposed of (*rr*).

(*m*) *Bayley v. Bishop*, 9 Ves. 6; *Day v. Day*, 22 L. J. Ch. 878; *Palmer v. Craufurd*, 3 Swanst. 482.

(*n*) *Re Mabbett*, [1891] 1 Ch. 707. In *Re Ross*, [1900] 1 Ch. 162, an arrangement was made between the beneficiaries under a will that a sum should be set aside to purchase an annuity, and the annuitant died before the purchase was made: it was held that her representatives were entitled to the money. The annuitant was a married woman restrained from anticipation, but this was held not to affect the question.

(*o*) *Hunt-Foulston v. Furber*, 3 Ch. D. 285.

(*p*) *Hatton v. May*, 3 Ch. D. 148; per Kindersley, V.-C., in *Day v. Day*, 22 L.

J. Ch. 881.

(*q*) *Day v. Day*, 22 L. J. Ch. 878; *Power v. Hayne*, L. R., 8 Eq. 262; *Re Draper's Trusts*, 57 L. J. Ch. 942. They are discussed in Chap. XXXI.

(*r*) *Saunders v. Vautier*, 4 Bea. 115, Cr. & Ph. 240; *Gosling v. Gosling*, Johns. 265; *Coventry v. Coventry*, 2 Dr. & Sm. 470; *Gott v. Nairne*, 3 Ch. D. 278; *Wharton v. Masterman*, [1895] A. C. 186. In the last case the gift was charitable; see *Re Swain*, [1905] 1 Ch. 669.

(*rr*) *Talbot v. Jevvers*, L. R., 20 Eq. 255; *Weatherall v. Thornburgh*, 8 Ch. D. 261; *Re Parry*, 60 L. T. 489; *Re Travis*, [1900] 2 Ch. 541.

Again, if a testator gives property for the benefit of A. absolutely (that is, without settling it on him for life, or providing for a gift over, or the like) (*s*), and gives his trustees a discretion, or specific directions, as to the manner in which the property shall be held and applied for A.'s benefit, A. takes it absolutely (*t*). And the same rule applies even where the testator shews that his object was to secure the property for the benefit of A.'s children (*u*). So if the testator expressly directs that the property shall not be delivered over to him until he attains twenty-five, or the like, he is nevertheless entitled to immediate delivery, if he has attained twenty-one (*uu*). So if the whole of a certain fund or income is given for the maintenance, or the maintenance and education, of a person, he is absolutely entitled to the fund or income, as the case may be, and if he dies before it has been paid or expended, his personal representatives are entitled to it, or if he becomes bankrupt, his interest passes to the trustee for his creditors (*v*). But if the money is given for the maintenance of several persons in such manner as the trustees think proper, no one beneficiary is entitled to any specific share (*w*).

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Trust, when ineffective.

Trusts for maintenance.

So where property was given to trustees upon trust to apply it in the maintenance or advancement of the testator's son A., "it being my wish that my said son (if living) should have the whole benefit of such moneys if he should conduct himself steadily and to the satisfaction of" the trustees, with a gift over of any unapplied part, it was held that this was equivalent to a gift of the fund in trust for the son, subject to a power in the trustees to deprive him of it if he should not conduct himself steadily and to their satisfaction (*x*).

Discretionary trust with gift over.

There are also cases in which a sum of money is directed to be applied for the benefit of a person in a certain way (as to bind him apprentice), but the time within which it is to be expended is left to the discretion of the testator's executors or trustees: here the beneficiary cannot, so long as the trustees exercise their discretion

Where time is left to discretion of trustees.

(*s*) *Re Eagles*, [1890] Week. N. 74.

(*t*) *Richards v. Richards*, 9 Price, 219; *Re Jacob's Will*, 29 Bea. 402, and other cases cited in Chap. XVII.; *Re Johnston*, [1894] 3 Ch. 204; *Re Miller*, [1897] 1 Ir. R. 290.

(*u*) *Dowling v. Dowling*, [1902] 1 Ir. R. 79.

(*uu*) *Rocke v. Rocke*, 9 Bea. 66; *Re Couturier*, [1907] 1 Ch. 470.

(*v*) *Hanson v. Graham*, 6 Ves. 239; *Webb v. Kelly*, 9 Sim. 469; *Beevor v. Partridge*, 11 Sim. 229; *Green v. Spicer*,

1 Russ. & My. 395; *Youngehusband v. Gisborne*, 1 Coll. 400; *Presant v. Goodwin*, 1 Sw. & Tr. 544; *Lewes v. Lewes*, 16 Sim. 266; *Noel v. Jones*, ib. 309; *Soames v. Martin*, 10 Sim. 287; *Wilkins v. Jodrell*, 13 Ch. D. 564; *Williams v. Papworth*, [1900] A. C. 563. See also *Re Howard*, [1901] 1 Ch. 412.

(*w*) *Re Coleman*, 39 Ch. D. 443; *Re Booth*, [1894] 2 Ch. 282.

(*x*) *Re Coe's Trust*, 4 K. & J. 199. See the reference to this case in Chap. XXXIX.

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Where performance of trust becomes unnecessary.

properly, demand payment of the money, but if he dies before it is applied, his personal representatives are entitled to the money (y).

On a somewhat similar principle, if a legacy is given to be applied for the benefit of a person in a particular way, and the prescribed mode of application becomes impossible or unnecessary, the legatee is entitled to the legacy absolutely (z). As in *Lockhart v. Hardy* (a), where a legacy was given to a person to enable him to pay off a mortgage debt on the estate devised to him, and he was held entitled to it although the mortgage was foreclosed in the testator's lifetime. There are numerous other authorities to this effect (b).

In *Re Howard* (c) a testator directed his trustees to set aside 200*l.* and thereout to pay to his wife 3*l.* monthly "so long as she remains unmarried, or until the said sum of 200*l.* becomes exhausted, the said payment of 3*l.* monthly to cease on my said wife marrying again." She died without having married again, and it was held that her executrix was entitled to the unexpended balance.

Where part only need be applied.

In the preceding cases the trust applied to the whole fund, but where the trust is to expend a sum "not exceeding" a certain amount, or such a sum as the trustees think fit, for a specific purpose, a different principle applies, and the true rule seems to be that the beneficiary is not entitled to the whole fund, or the maximum amount, unless it is required to satisfy the specified purpose (d). There are, indeed, some early cases in which the contrary rule was applied, but it is doubtful whether they are now binding authorities.

Thus, in *Cope v. Wilmot* (e), the testator directed that his trustees "should and might" raise any sums they should think proper, not exceeding in the whole 3,000*l.*, for the advancement of the plaintiff

(y) *Barlow v. Grant*, 1 Vern. 255; *Woolridge v. Stone*, 4 L. J. O. S. 56; *Barton v. Cooke*, 5 Ves. 461. The beneficiary's creditors have not, during his lifetime, any higher right than he has: *Chambers v. Smith*, 3 A. C. 795. See the cases cited with reference to provisions against involuntary alienation, post, Chap. XXXIX.

(z) *Leche v. Lord Kilmorey*, T. & R. 207; *A.-G. v. Haberdashers' Company*, 1 M. & K. 420. See *Palmer v. Flower*, L. R., 13 Eq. 250. In *Nevill v. Nevill*, 2 Vern. 431, a sum of money directed to be applied for the benefit of a child was ordered to be paid to him, apparently because the mode of application had become impossible: see *Cowper v. Mantell*, 22 Bea. 231.

(a) 9 Bea. 379. See also *Parsons v. Coke*, 27 L. J. Ch. 828.

(b) *Earl of Lonsdale v. Berchtoldt*, 3 K. & J. 185; *Re Colson's Trusts*, Kay, 133; *Re Bowes*, [1896] 1 Ch. 507. As to this last case, see post.

(c) [1901] 1 Ch. 412.

(d) A direction to apply the income of a fund, "or so much as may be necessary," for the maintenance of a person, does not give the trustees a discretion how much shall be applied; if the whole income is required it must be applied: *Rudland v. Crozier*, 2 De G. & J. 143.

(e) [1771] 1 Coll. 396, n. See the observations of Wood, V.-C., on this case in *Re Sanderson's Trust*, infra.

in any business, art or profession, or in any civil or military employment; they laid out over 1,000*l.* in purchasing a commission in the army, &c., but declined to expend any more: it was held that the plaintiff was entitled to be paid the balance of the 3,000*l.* *Gough v. Bult* (f) is commonly cited as an authority to the same effect. In that case the testator "ordered and empowered" his trustees at their free will and pleasure to sell part of the trust property, and to pay and apply such part of the proceeds not exceeding 2,000*l.* to each of his sons for setting them up in business, or for such other purposes as his wife should think proper and most beneficial for them, and to apply the residue in manner therein mentioned. One of the sons survived the testator and died nine years afterwards, without any part of the 2,000*l.* having been raised; his personal representative filed a bill to have the 2,000*l.* raised, and a demurrer to it was overruled. Shadwell, V.-C., held that the whole 2,000*l.* ought to be raised: Cottenham, L.C., agreed that the testator's direction to sell was imperative, and that the mode of applying the money alone was discretionary, but he did not decide that the plaintiff was entitled to the whole 2,000*l.* *Palmer v. Flower* (g) seems to have been decided on the same principle, and it is supported by the dicta of Wood, V.-C., in *Joel v. Mills* (h).

Gude v. Worthington (i) is commonly cited as carrying the rule even farther. There the testatrix gave a fund to trustees upon trust to apply the principal or interest for the benefit of A. B. in such way as they might in their discretion think fit during her life, with power to dispose the principal and interest or any part thereof, or to withhold the whole and let the interest accumulate, without being accountable to A. B. or anyone else, and there was a gift over of any undisposed-of part of the fund. The trustees paid the interest and part of the principal to A. B., and died without any other exercise of their powers: Knight Bruce, V.-C., held that A. B. was absolutely entitled to the whole fund, but directed a reference to the Master to approve of a settlement, from which it would appear that the Court undertook to exercise the discretion given to the trustees. If A. B. had died before the trustees, it seems clear that her representatives would have had no claim to the fund.

*Gude v.
Worthington.*

The true principle is laid down in *Lewis v. Lewis* (j), where power was given to trustees to raise a sum not exceeding 600*l.*, and to

True
Principle.

(f) 16 Sim. 45.

(g) L. R., 13 Eq. 250; *Maud v. Maud*, 27 Bea. 615.

(h) 3 K. & J. 458.

(i) 3 De G. & S. 389.

(j) 1 Cox, 162, followed in *Robinson v. Cleator*, 15 Ves. 526. See also *Bull v. Vardy*, 1 Ves. jun. 270; *Brown v. Higgs*, ante, pp. 651 seq.

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apply it for the preferment or advancement in life or other the occasions of A. B. before he attained twenty-six, as the trustees should think proper. Lord Thurlow said: "This is not the case of a gift by the testator, but a power to others to give, and that seems confined to answer some particular purpose. The proper question to be made in this case is whether the present situation and circumstances of the petitioner are such as the testator intended this legacy for. I shall therefore refer it to the Master to inquire whether the present situation of the petitioner requires any, and what part of this money to be advanced before his age of twenty-six, and to report the grounds of his determination." So in *Cowper v. Mantell* (*k*), the testator authorised his trustees to apply any sum not exceeding 600*l.* in the purchase of a church preferment for the benefit of A. : Romilly, M.R., said that the trustees had a discretion as to the propriety of exercising the power at all, and that the legatee could not during his lifetime have claimed payment of it, and that as he died before the money was expended, his representatives had no claim to it. *Re Stanger* (*l*) seems to have been decided on the same principle.

Sanderson's Trust.

The principle has also been laid down by Wood, V.-C. (*m*): "In reference to gifts of this description, there are two classes of cases between which the general distinction is sufficiently clear, although the precise line of demarcation is occasionally somewhat difficult to ascertain. If a gross sum be given, or if the whole income of the property be given, and a special purpose be assigned for that gift, this Court always regards the gift as absolute, and the purpose merely as the motive of the gift, and therefore holds that the gift takes effect as to the whole sum or the whole income, as the case may be. Thus, where there is the gift of a sum to apprentice a child or to buy a commission for a son, the Court gives effect to the entire gift; and whether the sum can or cannot be applied for the purpose of buying the commission or apprenticing the child, the Court holds that the child is entitled to the whole of it. So again with regard to maintenance, as to which the distinction between the two classes of cases is very clearly put by Sir William Grant in *Hanson v. Graham* (*n*), where he says that if an entire fund is given for the maintenance of children or the like, they take the whole fund absolutely, and the maintenance is treated in effect as simply the motive in making the gift; while on the other hand, if a portion

(*k*) 22 Bea. 231.

(*l*) 64 L. T. 693. See *Re Ward's Trusts*, L. R., 7 Ch. 727.

(*m*) *Re Sanderson's Trust*, 3 K. & J.

at p. 503. The principle was followed in *Re Andrew*, [1905] W. N. 86, where the trust was created inter vivos.

(*n*) 6 Ves. 239.

only of the fund is given for maintenance, then they are entitled to draw out so much only as may be necessary for the purpose specified.”

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It is on this principle that a discretionary trust to apply the whole or part of the income of a fund for the maintenance of a person is effective, notwithstanding assignment or bankruptcy (o).

Maintenance of spend-thrift.

Even where maintenance is not referred to, and the direction is to pay to the beneficiary the whole or only a portion of the income, subject to any conditions or restrictions, as the trustees in their sole and absolute discretion think fit, this gives the beneficiary or his assigns no right to any part of the income, unless the trustees fail to exercise their discretion properly (p).

Unlimited discretionary trust.

If trustees in the exercise of their discretion expend money in making a purchase for the object of their power, it seems that the thing purchased becomes his absolute property (q). In *Messeena v. Carr* (r), Romilly, M.R., held that a discretionary power to purchase an annuity authorised the trustees to make payments out of capital to the beneficiary : sed quære.

Exercise of discretion.

If the object of a discretionary trust dies before the fund is expended, his personal representatives have no claim to it (s).

Death of object.

On the other hand, it seems that the trustees may, if they think fit, renounce their discretion, and pay over the whole fund to the cestui que trust (ss).

If a trustee in whom a discretion is vested dies without exercising it, or refuses to exercise it, the question may arise whether it can be exercised by other trustees, or by the Court. If the discretion is a mere power and it is not executed, the Court cannot execute it (t). But if property is given to trustees upon trust to apply it according to some principle indicated by the testator, the manner being left to the discretion of the trustees, then the Court will, as a general rule, exercise the discretion if the trustees fail to do so. As if property is given upon trust to apply so much as may be required for the maintenance of one or more persons (u) or upon trust to divide it among the testator's relations according to their necessities (v). These cases, however, must be distinguished from

Failure of trustee to exercise discretion.

(o) *Re Coleman*, 39 Ch. D. 443; *Re Bullock*, 60 L. J. Ch. 341. In *Two-penny v. Peyton*, 10 Sim. 487, Shadwell, V.-C., practically overruled his own decision in *Snowdon v. Dales*, 6 Sim. 524.

(p) *Train v. Clapperton*, [1908] A. C. 342.

(q) *Lawrie v. Bankes*, 4 K. & J. 142; *Re Coleman*, *supra*.

(r) L. R., 9 Eq. 260.

(s) *Cowper v. Mantell*, 22 Bea. 231; *Messeena v. Carr*, L. R., 9 Eq. 260; *Re Stanger*, 64 L. T. 693.

(ss) *Re Coe's Trust*, 4 K. & J. 199, stated post, Chap. XXXIX.

(t) See *Bull v. Vardy*, 1 Ves. jun. 270; *Cowper v. Mantell*, 22 Bea. 231.

(u) *Re Sanderson's Trust*, 3 K. & J. 497.

(v) *Gower v. Mainwaring*, 2 Ves. sen. 87; *Lewin on Trusts*.

Doyley v. Attorney-General (w) and *Brown v. Higgs* (x) and similar cases, where a power of selection or distribution among a number of objects gives rise to an implied gift in their favour, and if the power is not exercised the Court divides the property among them equally (y).

In *Re Yates* (z) the testator directed his trustees to pay an annuity to his wife during widowhood, and to pay to her a further annuity until his daughter should attain twenty-one, to be applied by his wife for the maintenance and education of the daughter; subject to the payment of this and other annuities, the trustees were directed to accumulate the income until his daughter attained twenty-one. The widow died while the daughter was an infant: it was held that the further annuity continued to be payable during her minority.

Farr v. Hennis (a) was the converse case. There the testator gave an annuity to his niece of 8s. a week "towards the support and maintenance of her two children until they shall attain the age of twenty-one years." By a codicil the testator gave certain leasehold property to the niece "to enable her to provide for her children," and referred to his will as "my said will in her favour." One of the children of the niece died, and the other attained twenty-one. It was held that the words in the gift of the annuity referring to the support and maintenance of the children were merely descriptive of the testator's motive in making the gift, and that they did not cut down the life estate of the niece.

Where the purpose not for benefit of donee alone: three constructions.

Where the motive or purpose of the gift is the benefit of other persons as well as the primary donee, three constructions obtain, according to the language used. The purpose may be so peremptorily expressed as to constitute a perfect trust; or may be such as to leave entirely in the discretion of the primary donee the quantum of benefit to be communicated to the other persons, provided that such discretion is honestly exercised; or lastly, the expression of motive or purpose may be merely nugatory, and not operate to abridge the previous absolute gift to the primary donee. In the following cases, illustrating these distinctions, the decisions will be found on examination of the reports to turn in

(w) 2 Eq. Ca. Ab. 195. *Down v. Worrall* (1 Myl. & K. 561) would probably not now be followed, the use of the word "or" not being sufficient to exclude the general rule.

(x) Ante, p. 651.

(y) See *Longmore v. Broom*, 7 Ves. 124; *Salisbury v. Denton*, 3 K. & J. 536; *Re Douglas*, 35 Ch. D. at p. 485.

(z) [1901] 2 Ch. 438. Compare *Ryan v. Keogh*, Ir. R., 4 Eq. 357.

(a) 44 L. T. 202.

many instances on minute distinctions, which it would require too much space to particularise, and some cases will be found almost irreconcilable with others; the preponderance, however, seems to lean in favour of giving the primary donee a discretion which he must honestly exercise, or in default, subject himself to the control of the Court, with a tendency, however, rather to narrow than to extend the effect heretofore ascribed to words expressing the purpose or motive of the gift.

(a) As to the cases in which a complete trust is created. A gift to A., to dispose of among his children (b), or for bringing up his children, or to be applied for their maintenance and education (c), gives A. no interest, but creates a complete trust for the children (d). And in *Taylor v. Bacon* (e), where the testator bequeathed the dividends of stock to R., the wife of his son G., for the benefit of his son G., of herself and of their children, and after the decease of G., the stock to remain in trust for the benefit of R. and her children during her lifetime, if she should remain a widow; it was held that the wife was a trustee of the interest for herself, her husband and children.

(a) Cases of complete trust.

In *Jubber v. Jubber* (f), the bequest was to the testator's wife "for the benefit of herself and unmarried children, that they may be comfortably provided for as long as my wife may remain in this life," with a bequest over upon her death. The widow and unmarried daughters were held to be entitled in equal shares to the income during the widow's life, whether as joint tenants or tenants in common was not decided. In *Wetherell v. Wilson* (g), the testatrix, under a general power, bequeathed a sum of stock in trust for her children at twenty-one or marriage, and directed the trustees, in the meantime, to pay the interest of the fund to her husband, in order the better to enable him to maintain the children of the marriage, until their shares should become assignable to them. Lord Langdale decided that the husband took nothing beneficially, but was bound to apply the income for the benefit of

(b) *Blakeney v. Blakeney*, 6 Sim. 52; *Barnes v. Grant*, 26 L. J. Ch. 92. See *Re Haly's Trusts*, 23 L. R. Ir. 130, where the primary legatee predeceased the testator.

(c) *Pilcher v. Randall*, 9 W. R. 251; *Re Delahunty*, [1907] 1 Ir. R. 507, distinguishing *Mackett v. Mackett*, L. R., 14 Eq. 49, post, p. 894.

(d) See *Talbot v. O'Sullivan*, 6 L. R. Ir. 302, where the mother died ante

litem motam, and it was therefore unnecessary to decide whether she took any interest.

(e) 8 Sim. 100; see also *Chambers v. Atkins*, 1 S. & St. 382; *Fowler v. Hunter*, 3 Y. & J. 506; *Re Camac's Trust*, 12 Jur. 470; *Barnes v. Grant*, 26 L. J. Ch. 92; *Bibby v. Thompson*, 32 Beav. 646.

(f) 9 Sim. 503.

(g) 1 Kee. 80.

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the children. In *Wilson v. Maddison* (*h*), the testator bequeathed "to A. W., with her little girl and two little boys, for their joint maintenance,—their mother to have the care of bringing them up to the best of her power, till they are able to do for themselves,—30*l.* a year, to be paid to the said mother, as above, half-yearly, as may best suit"; and it was held that the four persons were constituted joint tenants, and that while three were minors, the fourth, being an adult, should receive the annuity for their maintenance (*i*).

A trust for the maintenance of children is *primâ facie* for the benefit of adults as well as infants, and, if necessary, the Court will direct an inquiry what provision should be made (*j*).

Interest
coupled with
trust.

Where the donee has a beneficial interest coupled with a trust, the extent of his interest is sometimes difficult to define. In *Evans v. Evans* (*k*) the testator gave all his property to his wife absolutely, and to be by her willed to any or either of his children in any manner suitable to her wishes: the wife died *ante litem motam*, so that it was unnecessary to decide the exact nature of her interest, but the result seems to have been that she took a life interest, with a power of appointment by will among the children.

(*b*) Cases in
which there
is a discretion
liable to be
controlled.

(*b*) As to the cases in which the Court has considered the primary donee to have a discretion liable to be controlled, if not honestly exercised (*l*). In *Hamley v. Gilbert* (*m*), the residue was given to E. G. H., to be laid out and expended by her at her discretion, for or towards the education of her son F. G. H., and that she should not at any time thereafter be liable and subject to account to her said son or to any other person whatever for the disposal or application of such residue or any part thereof. It was held that E. G. H. was absolutely entitled to the residue, subject to a trust to apply a part to the education of her son during his minority (*n*), and it was referred to the Master to inquire what would be a sufficient sum to be appropriated for that purpose. In *Gilbert v. Bennett* (*o*), the testator bequeathed all his property to his wife and two other persons in trust, to pay the income to his wife for the

(*h*) 2 Y. & C. C. C. 372.

(*i*) See also *Re Harris*, 7 Exch. 344; *Re Yates*, [1901] 2 Ch. 438, ante, p. 890.

(*j*) *Re Booth*, [1894] 2 Ch. 282.

(*k*) 33 L. J. Ch. 662.

(*l*) As to the circumstances and manner in which the Court will control the discretion of the donee, see *Castle v. Castle*, 1 De G. & J. 352; *Re Roper's Trusts*, 11 Ch. D. 272; *Re G.*, [1899] 1 Ch. 719; *Re O'Flanagan and Ryan*, [1905] 1 Ir. R. 280.

(*m*) Jac. 354.

(*n*) As to this, see below, p. 925. Compare *Re Robertson's Trust*, 6 W. R. 405, where the bequest was to A. for the maintenance and support of himself and his family: Kindersley, V.-C., said that no trust was created, and ordered the money to be paid to A., but added that if the children were not maintained they could apply to the Court: this implies that a trust was created.

(*o*) 10 Sim. 371.

education and support of his children by her; but none of his property was to be disposed of, but the income arising therefrom to be applied as above, to their maintenance and support, and advancement in life and support of his children; and after her death, he gave the property to be divided among his children. The V.-C. said the natural construction of the will was, that the testator intended the whole of the income to be paid to his wife for her life, and to impose on her the burden of maintaining and educating the children out of it. In *Hadow v. Hadow* (p), *Leach v. Leach* (q), *Browne v. Paull* (r), and *Longmore v. Elcum* (s), words nearly similar received the same construction (t). It appears, as the result of these authorities, that where the interest of the children's legacies is given to a parent to be applied for or towards their maintenance and education, there, in the absence of anything indicating a contrary intention, the parent takes the interest subject to no account, provided only that he discharges the duty imposed upon him of maintaining and educating the children (u); and that a contrary intention is not indicated by a direction, that in case of the parent's death, other trustees should make the application of the fund, in which case, however, such trustees would take nothing beneficially (v).

Result of the authorities.

The question how long a trust for maintenance lasts is discussed in a later part of this chapter (vv).

In *Crockett v. Crockett* (w), where the testator directed that all his property should be at the disposal of his wife for herself and children, the only point decided was that the wife and children were not joint tenants; but Lord Cottenham was of opinion that the wife had a personal interest in the fund, and that as between herself and her children she was either a trustee with a large discretion as to the application of it, or had a power in favour of the children, subject to a life estate in herself. The former construction would have been the more consistent with the previous authorities. The latter would not only have introduced a limitation of the wife's interest not expressed in the will, but would have left that

Duration of trust for maintenance. *Crockett v. Crockett*.

(p) 9 Sim. 438.

(q) 13 Sim. 304.

(r) 1 Sim. N. S. 92; see also *Bowden v. Laing*, 14 Sim. 113.

(s) 2 Y. & C. C. C. 363.

(t) See also *Re Booth*, [1894] 2 Ch. 282; *Farr v. Hennis*, 44 L. T. 202; *Berkeley v. Swinburne*, 6 Sim. 613.

(u) Per Lord Cranworth, 1 Sim. N. S. 103. See *Farr v. Hennis*, 44 L. T.

202; *Re Moore*, 55 L. J. Ch. 418.

(v) 1 Sim. N. S. at p. 105.

(vv) Post, p. 924.

(w) 2 Phil. 553, reversing the decision, 5 Hare, 326 (which seems to have proceeded on some misapprehension of the decree, 1 Hare, 451). As to *Crockett v. Crockett*, see *Lambe v. Eames*, infra. See also *Scott v. Key*, 35 Beav. 291; *Armstrong v. Armstrong*, L. R., 7 Eq. 518.

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diminished interest still subject to the charge of maintaining the children. A "recommendation" not to diminish the principal but to vest it in government or freehold securities, has been held to require this construction (x).

Raikes v. Ward.

In *Raikes v. Ward* (y), the gift was to the testator's wife, "to the intent she may dispose of the same for the benefit of herself and our children in such manner as she may deem most advantageous." The Court, in deciding against the claim of the children to an absolute interest, said, it could not deprive the widow of the honest exercise of the discretion which the testator had vested in her, or refuse its assistance to inquire into or sanction any reasonable arrangements which she might desire to make. Expressions somewhat similar to those found in the last two cases have received the same construction in the cases of *Conolly v. Farrel* (z), *Woods v. Woods* (a), and *Costabadie v. Costabadie* (b).

Other cases.

Donee allowed to receive legacy without his interest being declared.

In several cases (c), the Court has held the donee entitled to receive the legacy or dispose of the property devised or bequeathed and receive the proceeds, without saying whether he was absolutely entitled or bound honestly to exercise a discretionary trust. In such cases it was merely decided that there was no absolute trust.

Distinction where given in first instance absolutely.

But here, as in the case of precatory trusts, if the property is given in the first instance for the absolute benefit, or to be at the disposal, of the donee, especially if such donee be the parent, no trust will be created by subsequent words shewing that the maintenance of the children was a motive of the gift. And, although it is not directly denied that the Court may control the execution of a trust where the shares of the beneficiaries are left to the discretion of the donee (for the Court is in the constant habit of ascertaining the amount required for maintenance of children), yet increased weight is given to that indefiniteness as shewing that no trust whatever was intended. Thus, in *Lambe v. Eames* (d), a testator gave his estate to his widow "to be at her disposal in any way she may think best for the benefit of herself and family"; the widow

(x) *Hart v. Tribe*, 18 Beav. 215; but see per Turner, L. J., 1 D. J. & S. 418.

(y) 1 Hare, 445.

(z) 8 Beav. 347.

(a) 1 My. & Cr. 401 ("towards her support and her family").

(b) 6 Hare, 410; and see *Cowman v. Harrison*, 10 Hare, 234; *Smith v. Smith*, 2 Jur. N. S. 967; *Godfrey v. Godfrey*, 2 N. R. 16; *Dixon v. Dixon*, W. N. 1876, p. 225; *Ryan v. Keogh*, Ir. R., 4 Eq. 357; *Bond v. Dickinson*, 33 L. T. 221; *Re Robertson's Trust*, 6 W. R. 405.

(c) *Cooper v. Thornton*, 3 Br. C. C. 96; *Robinson v. Tickell*, 8 Ves. 142; *Woods v. Woods*, 1 My. & Cr. 401; *Wood v. Richardson*, 4 Beav. 174; *Pratt v. Church*, ib. 177; *Briggs v. Sharp*, L. R., 20 Eq. 317. As to *Re Robertson's Trust*, 6 W. R. 405, see supra, p. 892 n. (n).

(d) L. R., 6 Ch. 597. See also *Mackett v. Mackett*, L. R., 14 Eq. 49; *Re Adams and Kensington Vestry*, 24 Ch. D. 199. But see *Scott v. Key*, 35 Beav. 291.

made a will disposing of part of her husband's estate, and giving an interest therein to a natural son of one of his children; and the questions were whether there was a trust, and if there was, whether it had been duly executed. *Crockett v. Crockett*, and other cases cited above, were pressed on the Court; but with reference to them Sir W. James, L.J., expressed a strong disapproval of the "official kindness" of the Court in interposing trusts where none were intended, and said, "If the case stood alone, I should say that no sufficient trust was declared by the will; but if there be any such obligation, I think it has been fairly discharged by the way in which she (the widow) has made her will" (e).

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(c) Lastly, as to cases where the primary donee is held to be absolutely entitled.

(c) Where primary donee held absolutely entitled.

In *Brown v. Casamajor* (f), a legacy was given to a father, the better to enable him to provide for his younger children. The father consented to secure the principal for the benefit of his younger children, but the Court, on his petition, held him entitled to the past arrears of interest. The report suggests no reason for this decision, but that which appears to be the reasonable one, viz. that the legacy was originally absolute to the father, and remained so except so far as his consent to settle it had deprived him of his interest.

Brown v. Casamajor.

Again, in *Hammond v. Neame* (g), there was a gift to a trustee of a sum of stock, upon trust to pay the income to the testator's niece, "for and towards the maintenance, education and bringing up of all and every her children, until he, she, or they shall attain twenty-one"; and then the stock was given equally among them. The niece having no children at the testator's death, it was held that she was entitled to the interest of the stock.

Hammond v. Neame.

In *Wood v. Cox* (h) the testatrix gave property to A. for his own use and benefit, "trusting and wholly confiding in his honour that he will act in strict conformity to any wishes": it was held that A. took absolutely, subject to the payment of certain legacies which were admitted to be validly bequeathed.

Wood v. Cox.

(e) As to *Willis v. Kymer*, 7 Ch. D. 181, see ante, p. 868, note (s).

(f) 4 Ves. 498.

(g) 1 Sw. 35. See also *Benson v.*

Whittam, 5 Sim. 22.

(h) 1 Kee. 317; 2 My. & Cr. 684.

See *Irvine v. Sullivan*, L. R., 8 Eq. 673, a similar case. See ante, p. 866.

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*Thorp v.
Owen.*

In *Thorp v. Owen* (i), the testator desired that everything should remain in its present position during the lifetime of his wife, and after her decease gave his real and personal property to other persons, and then added, "I give the above devise to my wife, that she may support herself and her children according to her discretion and for that purpose." Sir J. Wigram, V.-C., decided that the widow took absolutely for her life. He said, "The cases should be considered under two heads: first, those in which the Court has read the will as giving an absolute interest to the legatees, and as expressing also the testator's motive for the gift; and, secondly, those cases in which the Court has read the will as declaring a trust upon the fund, or part of the fund, in the hands of the legatee. A legacy to A. the better to enable him to pay his debts, expresses the motive for the testator's bounty, but certainly creates no trust which the creditors of A. could enforce in this Court; and again, a legacy to A. the better to enable him to maintain, or educate and provide for, his family must, in the abstract, be subject to a like construction: it is a legacy to the individual, with the motive only pointed out. This is very clearly, and, in my opinion, very correctly, laid down by the V.-C. in *Benson v. Whittam*; and the cases of *Andrews v. Partington* (k), *Brown v. Casamajor*, and *Hammond v. Neame*, illustrate the same principle. At the same time, a legacy to a parent upon trust to be by him applied, or in trust, for the maintenance and education of his children, will certainly give the children a right, in a Court of Equity, to enforce their natural claims against the parent in respect of the fund on which the trust is declared" (kk). And the V.-C. added (l): "If you give property to persons to accomplish an object, increasing their funds so that they might be the better able to do it—that is, in point of fact, a gift to them, and there is no trust which others can enforce." This is an important distinction, clear in principle, but often difficult of application.

Bequest
to A. to
maintain B.

In *Biddles v. Biddles* (m), under a gift to A., to bring up and maintain B., A. was held to be absolutely entitled, principally on the ground that the testatrix directed the income of one-fourth of

(i) 2 Hare, 607. See *M'Alinden v. M'Alinden*, 11 E. R., 11 Eq. 219; *Morrin v. Morrin*, 19 L. R. Ir. 37.

(k) 2 Cox, 223. Compare *Barrs v. Fewkes*, 2 H. & M. 60.

(kk) See *Re Robertson's Trust*, ante, p. 892, n. (n).

(l) 2 Hare, 614.

(m) 16 Sim. 1; see also *Berkeley v.*

Swinburne, 6 Sim. 613 (where the income was payable to the guardians of the children after the death of their parent); *Oakes v. Strachey*, 13 Sim. 414; *Leigh v. Leigh*, 12 Jur. 907; *Jones v. Greatwood*, 16 Beav. 527; *Hart v. Tribe*, 18 Beav. 215 (as to the 100l.); *Wheeler v. Smith*, 1 Gif. 300; *Howorth v. Dewell*, 29 Beav. 18.

her residuary estate to be applied for the maintenance and education of B. during his infancy, and the capital to be paid to him on attaining twenty-one. And in *Byne v. Blackburn* (n), where the testator bequeathed a sum of money to trustees, in trust after the death of his daughter M., to pay the dividends to her husband during his life, "nevertheless to be by him applied for or towards the maintenance, education or benefit of the children of M.," it was held that no trust was created in favour of the children, and that A. was entitled absolutely for his life; on the ground that if the testator had intended A. to be merely a trustee, he would not have made the bequest in the first instance to other trustees; and that where there is a gift to a parent, coupled with a direction that he shall perform certain parental duties (which are legal obligations as regards a father, but are merely moral obligations in the case of a mother), it is a gift to and a beneficial interest in the person to whom it is made. Yet nothing is more common in trusts for the maintenance of children, than to direct the trustees to pay the money over to the children's guardian, to be by him applied for their benefit; and with regard to the second reason, it is difficult to reconcile it with Sir J. Wigram's remarks cited above.

In *Dowling v. Dowling* (o) a testator gave a fund to be equally divided among his four sons, and then provided that his executors should invest the share of his son J. in the purchase of a residence "where my said son and family may enjoy apartments free of rent, and that he may have . . . some income towards support of himself and family." It was held that the gift to J. was absolute, and that the trust was repugnant and void.

In *Re Harbison* (p), property was given to "the Rev. T. L., parish priest, for a Roman Catholic school, or for whatever other purpose he pleases": it was held that he took beneficially. Vagueness of purpose.

In *Earl of Mexborough v. Savile* (q) a testator bequeathed to his eldest son, to whom certain settled estates would pass on the testator's death, "a sum of money sufficient to pay and discharge all the estate duty which may be payable by" him: it was held that this was a gift to the son for his own absolute benefit, and that it did not impose upon him a trust to pay the duty for the benefit of the persons interested in the settled estates in succession to him. Legacy to pay estate duty.

In *Adams v. Lopdell* (r) a testator devised lands to A. charged

(n) 26 Beav. 41. See also the judgment in *Lambe v. Eames*, L. R., 6 Ch. 597.

(o) [1902] 1 Ir. R. 79.

(p) *Re Harbison* (*Morris v. Larkin*),

[1902] 1 Ir. R. 103.

(q) 88 L. T. 131, overruling *C. A. Re Mexborough*, 86 L. T. 331.

(r) 25 L. R. Ir. 311.

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Intention
to create a
trust.

Directions
as to
tenancies,
employment
of particular
persons, &c.

Direction
to permit
tenants to
continue in
occupation,

to employ
a particular
steward, &c.

*Hibbert v.
Hibbert.*

with an annuity to B., and bequeathed a sum of money to A. to assist him in paying off a mortgage on the demised lands. It was held that B. could not compel A. to apply the money in discharge of the mortgage.

But, of course, a testator may use language shewing that he intends to create a trust: as in *Cary v. Cary* (s), where the testator gave leaseholds to A. in order to exonerate his estates from certain debts and incumbrances, and charged the leaseholds with the payment thereof.

(4) *Directions as to Employment in Office, &c.*—Sometimes a testator's recommendation in favour of a third person is not of a nature to create a simple absolute trust for his benefit, but has for its object the placing or continuance of such person in some office or capacity connected with the property that is the subject of disposition, involving the performance of a certain duty. As where a testator directs that the tenants of the devised property shall be allowed to continue in its occupation, either with or without a condition or restriction as to rent, cultivation, &c.

In *Tibbits v. Tibbits* (n), where a testator made a devise to his son, recommending him to continue his cousins A. and B. "in the occupation of their respective farms in the county of W. as heretofore, and so long as they continue to manage the same in a good and husbandlike manner, and to duly pay their rents," it was held to be a trust for the cousins, who had been tenants at will. Whether such words would be given this effect at the present day may, perhaps, be doubted.

It has been much discussed whether a direction or injunction to employ a particular agent or steward, imposes on the devisee an obligation in the nature of a trust in favour of the person so named, subject, of course, to the implied condition faithfully to discharge the duties of the office. In *Hibbert v. Hibbert* (o), the testator, whose only real estates were in Jamaica, directed that his friend H. should be appointed receiver of his real and personal estates, adding that he made this appointment for the sake of benefiting H. in a pecuniary point of view. Sir W. Grant, M.R., gave effect to the testator's direction by appointing H. to be receiver, agent and consignee for the Jamaica estates, upon his personal recognizance,

(s) 2 Sch. & L. 173, explained in *Barrs v. Fewkes*, 2 H. & M. 60, cited ante, p. 708.

(n) 19 Ves. 656. Compare *Quayle v. Davidson*, 12 Moo. P. C. C. 268.

(o) 3 Mer. 681. See also *Saunders v. Rotherham*, 3 Gif. 556 (direction to continue testator's trade and employ A. as manager).

without (as would have been required if he had not been appointed by the testator) giving the usual security. But the Court obviously had a discretion in the matter.

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In *Williams v. Corbet* (p), where a testator devised his estates to trustees upon trust to let the same, and apply the rents in paying off certain incumbrances, and appointed A. to be auditor of the accounts during the execution of the trusts, and directed the trustees to pay him the usual annual remuneration; Sir L. Shadwell, V.-C., held that the trustees were not justified in removing A. from the office, there being no imputation on his conduct, for that he had as much right to be the auditor as any one of the devisees had to the estates.

Williams v. Corbet.

True principle.

The application of this rule, however, would in many cases cause serious embarrassment to trustees in the management of the trust, and it is submitted that the true principle was laid down in *Lawless v. Shaw* (q), where a testator, after devising his estates, charged with certain annuities, to his friend William Shaw for life, with remainders over in strict settlement, and after bequeathing to his friend and agent B. E. Lawless 100*l.* as a token of the testator's esteem for him, declared it to be his particular desire that Shaw should continue Lawless in the receipt and management of the devised estates, and likewise should employ and retain him in the agency and management of lands to be purchased in pursuance of the will, at the usual fees allowed to agents, he having acted for the testator since he became possessed of the estate fully to his satisfaction. Soon after the testator's decease, Shaw dismissed Lawless from his office as land-agent, but without impeaching his character or capacity. Lawless filed a bill against Shaw, claiming to be reinstated, which was dismissed by Lord Plunket. This decision, after being reversed by Sir E. Sugden, was restored by the House of Lords (r), on the ground that a gift of an estate to one person is inconsistent with a direction that another should have the management of it.

The same principle was followed in *Finden v. Stephens* (s): where the testator expressed the wish and desire that the plaintiff be appointed as agent, receiver, or manager, whenever the trustees should have occasion for the services of a person in that capacity. Lord Cottenham said: "The testator gives his property to trustees who, until the death of the survivor of the wife and her

(p) 8 Sim. 349.

(q) Ll. & Go. 154.

(r) *Shaw v. Lawless*, 5 Cl. & Fin. 129.(s) 2 Ph. 142; *Belaney v. Kelly*, 24 L. T. 738.

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nieces, were to act in the management of the estate. . . . Is it consistent with this purpose, that he should give to the plaintiff an irrevocable office of agent, receiver or manager ? ”

So, a direction in a will that a particular person “ shall be the solicitor to my estate and to my said trustees in the management and carrying out the provisions of this my will,” has been held not to impose any trust or duty on the trustees to continue such person as their solicitor (*t*).

Solicitor
trustee.

A testator sometimes appoints a solicitor, surveyor, stock-broker, or other professional person to be one of the trustees of his will, and authorises him to charge for his professional services (*u*). Such a provision confers a beneficial interest under the will within sect. 15 of the Wills Act, which is forfeited if the person to whom it is given attests the execution of the will (*v*). It cannot be claimed as against creditors (*w*), and appears to be liable to legacy duty (*x*).

Trust must
have object.

III.—Trusts without a Definite Object.—The general rule is that “ every trust must have a definite object. There must be somebody in whose favour the Court can decree performance ” (*y*). Charitable gifts are no exception to the rule, because they can be enforced at the suit of the Attorney-General, representing the Crown; but in a charitable trust, as in any other trust, there must be a cestui que trust, namely, the public or a section of the public (*z*). And an intention to create a trust of a charitable nature must be expressed (*a*).

Discretionary
trusts.

What appears to be an exception to the rule is where property is given to a person as a trustee, with power to apply it in a certain way at his discretion, the result being that he may apply it in that way if he likes : that no one can compel him to apply it in that way : and that if he does not apply it in that way, it (or the unapplied part) belongs to the original donor or his representatives. This is called a discretionary trust. Whether it can properly be called

(*t*) *Foster v. Elsley*, 19 Ch. D. 518.

(*u*) See *Re Ames*, 25 Ch. D. 72 ; *Re Chapple*, 27 Ch. D. 584.

(*v*) *Re Barber*, 31 Ch. D. 665 ; *Re Pooley*, 40 Ch. D. 1.

(*w*) *Re White*, [1898] 2 Ch. 217.

(*x*) *Re Thorley*, [1891] 2 Ch. 613. It is difficult to understand, on principle, why this should be so. See Hanson's *Death Duties*, 4th edition, 419.

(*y*) Per Sir W. Grant, M.R., in *Morice v. Bishop of Durham*, 9 Ves. 399. Compare *Doe d. Toone v. Copestake*, 6 East, 328, where the trusts were so in-

definite that the trustees might apply the property to any use they thought fit : and *Re Cameron*, 26 Ch. D. 19, where a testator directed his executors to carry on his business for a certain time without disposing of the profits, and it was held that except so far as it might be necessary to do so for the purpose of paying debts and legacies, the direction was inoperative : and see ante, p. 481.

(*z*) *Re Church Patronage Trust*, [1904] 2 Ch. 643.

(*a*) Ante, Chap. IX.

a trust or not does not seem very material: perhaps it would be more accurate to call it a power in the nature of a trust. A common example is the ordinary power of applying income for the maintenance of infants (*w*); a discretionary trust for the benefit of an adult is another example (*x*). In *Gott v. Nairne* (*xx*), trustees were allowed to carry out a trust, although there was no person who could enforce it.

On the same principle, a direction by a testator that a monument shall be erected to his memory is lawful. Such a direction is effectual to this extent, that the executors or trustees are justified in expending the money, but no one can compel them to do so: "it stands on the same footing as an expensive funeral" (*y*).

Erection of monument.

The rule laid down in *Morice v. Bishop of Durham* has been much discussed in connection with the decision of North, J., in *Re Dean* (*z*). There the testator bequeathed his horses and dogs to his trustees with an annual sum for their maintenance, payable for a term of fifty years from his death, if any of the animals should so long live: it was held that the trust was valid, although it was not a charity, and that any surplus unexpended by the trustees belonged to the testator's representatives. The decision was based partly on the analogy of a trust for the erection of a monument, and partly on the authority of *Mitford v. Reynolds* (*a*), where the point does not seem to have been argued. Its correctness has been doubted, on the ground that the trust was incapable of enforcement (*b*), but it is submitted that if the trust had been limited to the period allowed by the Rule against Perpetuities, it would have been good, on

Trust for benefit of animals.

(*w*) See Conveyancing Act, 1881, ss. 42, 43.

(*x*) *Gisborne v. Gisborne*, 2 App. Ca. 300; *Re Coleman*, 39 Ch. D. 443.

(*xx*) 3 Ch. D. 278.

(*y*) *Mellick v. Asylum*, Jac. 180, 184; *Adnam v. Cole*, 6 Bea. 353; *Trimmer v. Danby*, 25 L. J. Ch. 424 (where *Mitford v. Reynolds*, 1 Ph. 185, is referred to); *Hoare v. Osborne*, L. R., 1 Eq. 585; *Mussett v. Bingle*, [1876] W. N. 170. As to expensive funerals, see Chap. LIV. It has been held that a trust for the maintenance of a tomb is legal, if restricted to the period allowed by the Rule against Perpetuities. These decisions have been criticized by Mr. Gray (Perp. §§ 906-7), but I venture to contend that they are correct. No one can enforce the performance of such a trust, and therefore if the trustees do not expend the income for the purposes of it, there is a resulting trust for the persons interested in the testator's

estate; it follows that their interest is contingent, being dependent on the acts of the trustees, and if the trust were of indefinite duration, it would allow contingent interests to take effect beyond the period allowed by law: it is therefore illegal, unless restricted to the period allowed by the Rule against Perpetuities. [C. S.]

(*z*) 41 Ch. D. 552.

(*a*) 16 Sim. 105. See also *Hicks v. Ross*, L. R., 14 Eq. 141.

(*b*) See an article by Professor Gray in the *Harvard Law Review*, xv. 509; Gray on Perp. §§ 905 seq.; and an article by the present editor in the *Juridical Review* for July 1906. On the question of perpetuity, see above, p. 279. The proper way of providing for animals is to give an annuity to the custodian payable so long as any of the animals are living: *Re Howard*, Times, October 30, 1908.

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the ground that a discretionary trust can be created for the benefit of animals as well as for the benefit of a spendthrift or lunatic. The difficulty as to perpetuity did not arise in *Pettingall v. Pettingall* (c), where the trust was held to be valid.

How far
objects must
be defined.

If a testator shews an intention to create a trust, it is not always necessary that he should definitely indicate the objects of it. Thus where a testator bequeathed 5,000*l.* to trustees upon trust to expend it in planting trees on land of which he was tenant for life, it was held that this was a good trust for the benefit of the owners of the land for the time being (d).

Discretion-
ary gift.

If the gift be expressly "in trust," or if the donees are described as trustees, though the property is to be disposed of in such manner and for such purposes as they think fit, "it being my will that the distribution thereof shall be left entirely to their discretion," they are trustees, and the beneficial interest results to the heir or the next of kin (e). It was at one time supposed that if the property was not expressly given in trust, the donees took beneficially. Thus in *Gibbs v. Rumsey* (f), the testatrix gave the residue of her property to her "said trustees and executors" (naming them) to be disposed of unto such person and persons and in such manner and form as they in their discretion should think proper and expedient, and it was held by Grant, M.R., that this was not a trust, but the same thing as a general power of appointment, and that the executors took the residue beneficially. But this distinction has been disapproved (g), and in *Fenton v. Nevin* (h), where the testator bequeathed various legacies, including a legacy to each of his executors, and after directing his property to be sold, proceeded as follows: "I will my executors shall apply the overplus, if any, as they think fit": it was held that they did not take beneficially. Again, in *Re Sinclair* (i) the testator gave and bequeathed, "with the exception of my said house in Sunderland, the disposal of which I leave to the discretion of my trustees hereinafter mentioned," his real and personal estate to his wife and A. B. upon certain trusts; A. B. predeceased the testator: it was held that the wife took neither a

(c) 11 L. J. Ch. 176.

(d) *Re Bowes*, [1896] 1 Ch. 507. *Cary v. Cary*, 2 Sch. & L. 173, may perhaps be referred to this principle; and see *Re Mexborough*, 86 L. T. 331, 88 L. T. 131, ante, p. 897. As to the result when it becomes impossible to carry out such a trust, see below.

(e) *Fowler v. Garlike*, 1 R. & My. 232; *Buckle v. Bristow*, 10 Jur. N. S. 1095; *Re Dean*, 41 Ch. D. 552, where an

annual sum was given to trustees to be expended for certain purposes, with a direction that any part remaining unapplied should be dealt with by them at their sole discretion.

(f) 2 V. & B. 294.

(g) See *Buckle v. Bristow*, supra; *Yeap Cheah Neo v. Ong Cheng Neo*, L. R., 6 P. C. 381.

(h) 31 L. R. Ir. 478.

(i) [1903] W. N. 113.

beneficial interest in the house nor a beneficial power of appointment, and that the house devolved to the testator's heir.

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But where a testator gives property to his executor or trustee, without words implying any discretion or power of selection, it may appear from the general frame of the will, and the circumstances of the testator's family, that the gift was intended to be beneficial (*j*); as where he provides for his immediate relatives, and gives the residue of his estate to A. B., whom he has previously appointed executor and trustee (*k*). The question whether a person is to take as an executor or trustee, or is to have a beneficial interest, is a question of intention, and (as regards executors) is not affected by the Executors Act, 1830 (*l*).

Where no discretion is given.

The question whether the objects of a trust are sufficiently indicated often arises in gifts which are partly for charitable purposes (*m*).

Charity.

It will, of course, be remembered that the question frequently arises whether property is given to a person for the purpose of conferring on him the beneficial interest, subject to a particular purpose, or whether it is given to him for a particular purpose, with no intention of conferring on him any beneficial interest; in the latter case, if there is no disposition of the beneficial interest, a resulting trust arises. This subject is discussed in Chapter XXI.

Resulting trust.

IV.—Executory Trusts.—The question whether words used by a testator in declaring a trust are complete in themselves (*n*), or whether they are intended to serve merely as an outline or minutes of the trust, the details of which are to be filled in by the trustees or some other person, arises chiefly in those cases where the testator directs property to be settled on a certain person and his or her issue (*o*).

Direction to settle.

The nature of the estates and interests which ought to be limited in pursuance of a direction to settle land, or money to be laid out in the purchase of land, is discussed in another chapter, in connection with the rule in *Shelley's Case* (*p*).

Strict settlement of land.

(*j*) *Fenton v. Hawkins*, 9 W. R. 300.

(*k*) *Williams v. Arkle*, L. R., 7 H. L. 606: post, Chap. XXI.

(*l*) Ibid.

(*m*) See above, pp. 228 et seq.

(*n*) A gift of property to trustees upon trust to convey, transfer or pay it to certain persons in certain events, is not, properly speaking, an executory trust, but the construction of such a gift is sometimes different from that of a direct gift. See Chap. XXXVII., and *Abbiss v. Burney*, 17 Ch. D. 211.

(*o*) Lord St. Leonards's definition of "executory trusts," in *Egerton v. Brownlow*, 4 H. L. C. at p. 210, is quoted in Chap. XLVIII. A direction to executors to settle land which is not devised to them gives them a common law power: *Knocker v. Bunbury*, 6 Bing. N.C. 306.

(*p*) Chap. XLVIII. As to the way in which a name and arms (shifting) clause should be framed, see *Trevor v. Trevor*, 13 Sim. 108. In *D'Eyncourt v. Gregory*, 34 Bea. 36, a testator directed a

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Doctrine of
cy-près.
Form of
settlement
of land.

The doctrine of cy-près is sometimes applied to executory trusts for the settlement of land on a person's issue (q).

It may here be mentioned that where land is devised or agreed to be settled upon a person and his issue in tail, the established form of limitation, in the absence of express provision to the contrary, is to the first and other sons successively, according to seniority, in tail, remainder to the daughters as tenants in common in tail, with cross remainders between them (r). But if there are words importing division among the issue, it seems that they all take as tenants in common in tail, with cross remainders between them (s). It seems that although a direction to settle land on a person and his children means that it must be settled as realty, the Court may authorize the insertion of powers of leasing, sale, and exchange, with provisions for advancement, &c. (t). According to the older cases, even where there was a direction to insert usual powers, neither a power to jointure (u), nor a power of portioning (v), could be inserted. But a more liberal principle of construction seems now to prevail (w).

Jointure.

In *Wright v. Wright* (x) a testator gave real and personal estate to his son, to be settled in strict settlement on his marriage: the son having married and died without any settlement having been made, it was held that the widow was entitled to an annuity by way of jointure.

Direction to
"entail"
realty or
personalty.

If real or personal property is directed to be "entailed" on A. and his heirs, it seems that A. only takes a life interest, with remainder to his heirs in tail or absolutely, according to the nature of the property (y).

Second wife.

If the trust is to settle land on marriage as a jointure to the wife, the widow of a second marriage may be entitled (z).

settlement to be made and to contain two shifting clauses in different forms; the M.R. held that the testator had not been his own conveyancer.

(q) Ante, p. 289. The argument in favour of such a settlement failed in *Seal v. Seal*, Prec. Ch. 421.

(r) See *Grier v. Grier*, L. R., 5 H. L. 688, post, Chap. XLVIII.

(s) *Dodson v. Hay*, 3 Br. C. C. 404; *Hadwen v. Hadwen*, 23 Bea. 551. See *Phillips v. James*, 3 De. G. J. & S. 72; *Mason v. Mason*, 5 Ir. R. Eq. 288; *Vaizey on Settlements*, 167 seq.

(t) *Turner v. Sargent*, 17 Bea. 515; *Wise v. Piper*, 13 Ch. D. 848. Older cases are *Peake v. Penlington*, 2 V. & B. 311; *Hill v. Hill*, 6 Sim. 136; *Lindow v. Fleetwood*, 6 Sim. 152; *Wheate v. Hall*, 17 Ves. 80; *Horne v. Barton*, Jac. 437;

Pearse v. Baron, Jac. 158; *Brewster v. Angell*, 1 J. & W. 625; *Duke of Bedford v. Abercorn*, 1 M. & Cr. 312.

(u) *Duke of Bedford v. Marquess of Abercorn*, 1 My. & C. 312.

(v) *Higginson v. Barneby*, 2 S. & St. 516.

(w) *Viscount Holmesdale v. West*, L. R., 3 Eq. 474; 12 Eq. 280; *Sackville-West v. Holmesdale*, L. R., 4 H. L. 543; *Vaizey*, 180.

(x) [1904] 1 Ir. R. 360.

(y) See *Graves v. Hicks*, 11 Sim. 536; *Sealy v. Stawell*, Ir. R., 2 Eq. 326. In *Boydell v. Golightly*, 14 Sim. 327, the ultimate limitation of the real and personal estate was made to the person who was the testator's heir.

(z) *Mason v. Mason*, 5 Ir. R. Eq. 288. See *Allanson v. Clitherow*, 1 Ves. sen. 24.

Another question which sometimes arises is whether a bequest of chattels or leaseholds (*v*) to follow the limitations of a strict settlement of realty, or to go with a title, creates an executed or executory trust. This question also is discussed in another chapter (*w*).

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Bequest of
chattels
in strict
settlement.

The case of *Shelley v. Shelley* (*x*), in which a testatrix bequeathed jewels to be held as heirlooms, without reference to any real estate, is referred to in the same chapter.

A somewhat narrow construction has been placed on testamentary trusts or powers to settle personalty (*y*). In *Laing v. Laing* (*z*) the testator gave a legacy of stock to a female infant, to be paid or transferred to or settled upon her by his trustees and executors by such deed or instrument in writing as they should think most prudent and proper, upon her attaining the age of twenty-one; she married in the testator's lifetime, and attained twenty-one after his death: Shadwell, V.-C., directed the stock to be transferred to her. In *Kennerley v. Kennerley* (*a*) the testator gave all his property to his wife to bring up his children, "and when they come of age to settle on them what shall be deemed by her prudent": it was held that this merely gave her a power of appointment among the children, and not a power to settle property on them for life, with remainder to their children. In *Loch v. Bagley* (*b*) greater attention was paid to the obvious intention of the testator; he directed his daughters' shares in his residuary personal estate "to be settled on themselves strictly," and it was held that each daughter should have a life interest for her separate use without power of anticipation, with a power of appointment by will over the corpus if she predeceased her husband: in default of appointment the property to go to her next of kin or, if she survived her husband, to her absolutely. In *Magrath v. Morehead* (*c*), the narrow construction was applied. In that case the testator gave a share of his property to each of his daughters, "to be settled on themselves on their marriage": it was held by Bacon, V.-C., that on the daughters attaining twenty-one, being unmarried, they were entitled to their shares absolutely.

Direction
to settle
personalty.

(*v*) See *Miles v. Harford*, 12 Ch. D. 691.

(*w*) Chap. XX., ante, pp. 695 seq.

(*x*) L. R., 6 Eq. 540, stated ante, p. 696.

(*y*) In *White v. Briggs* (15 Sim. 17) and *Combe v. Hughes* (L. R., 14 Eq. 415) a direction that property should be "secured" for the benefit of certain persons was held to be equivalent to a direction to settle it. As to the pecu-

liar case of *Burrell v. Crutchley* (15 Ves. 544), see Vaizey on Settlements, 190.

(*z*) 10 Sim. 315.

(*a*) 10 Ha. 160.

(*b*) L. R., 4 Eq. 122. Compare *Munt v. Glynes*, 41 L. J. Ch. 639, where the legatee was judicially separated from her husband, and the legacy was ordered to be paid to her.

(*c*) L. R., 12 Eq. 491.

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Where restrained from anticipation.

Effect of gift over,

or contingent legacy.

Interests of children.

But if a legacy is given to a woman, with a direction that it shall be settled upon her for her life, it will be settled for her separate use with a restraint on anticipation (*d*).

If the testator gives a legacy to his daughter, with a direction to settle it on her marriage, and a gift over in the event of her not leaving issue, this is an effective direction, and will be carried into effect by giving her a life interest for her separate use, with remainder to her children as she shall appoint, and in default to her children who attain twenty-one or being daughters, marry (*e*). And if a legacy is given to a feme sole contingently on her marriage, a direction to settle it is effective (*f*). A fortiori, a direction to settle property on a person and his or her issue, children or family is effective (*g*). The children take as tenants in common (*gg*).

Where the testator directs a legacy to be settled on the legatee and his (or her) wife (or husband) and children, a power of appointment among the children will be given to the husband and wife, or the survivor, with the usual trust in default of appointment for children who attain twenty-one or marry, and the usual hotchpot, maintenance and advancement clauses (*h*). But if the testator has shewn an intention that the children are to take equally, the power of appointment will be omitted (*i*). The ultimate trust varies according to circumstances (*ii*). In *Turner v. Sargent* (*j*) a trust to settle on children, with a substitutional gift to their issue,

(*d*) *Re Parrott*, 33 Ch. D. 274; *Re Dunnill's Trust*, Ir. R., 6 Eq. 322. See *Turner v. Sargent*, 17 Bea. 515; *Symonds v. Wilkes*, 11 Jur. N. S. 659; *Eustace v. Robinson*, 7 L. R. Ir. 83; *Stanley v. Jackman*, 23 Bea. 450; *Dowd v. Dowd*, [1898] Ir. 244. It has been held that where a precatory trust has been created by will in favour of "children," the trustee may vary the trust, by limiting the shares of daughters to their separate use: *Willis v. Kymer*, 7 Ch. D. 181. But see ante, p. 868 n. (*s*).

(*e*) *Young v. Macintosh*, 13 Sim. 445; *Oliver v. Oliver*, 10 Ch. D. 765; *Harris v. Loftus* (No. 2), [1903] 1 Ir. R. 203. Compare *Stanley v. Jackman*, 23 Bea. 450, where the direction to settle was contained in a deed. If there are several children of the first taker, and one of them dies under age and unmarried before the settlement is executed, it seems that the survivors take the whole: *Herring-Cooper v. Herring-Cooper*, [1905] 1 Ir. R. 465. Compare *Harris v. Loftus*, supra. In *Findon v. Findon*, 1 De G. & J. 380, there was a direction to settle on testator's daughter and her issue,

with a gift over "in default of such issue"; no settlement was executed, and the daughter's only child died an infant in her lifetime: it was held that the daughter's personal representative was entitled to the fund.

(*f*) *Duckett v. Thompson*, 11 L. R. Ir. 424.

(*g*) *Stonor v. Curwen*, 5 Sim. 264; *White v. Briggs*, 15 Sim. 17; *Combe v. Hughes*, L. R., 14 Eq. 415; *Re Spicer*, 84 L. T. 195; *Wright v. Wright*, [1904] 1 Ir. R. 360, and the cases cited post. The decision of Shadwell, V.-C., in *Samuel v. Samuel* (14 L. J. Ch. 222) is unintelligible.

(*gg*) *Taggart v. Taggart*, 1 Sch. & L. 84. (*h*) *Re Gowan*, 17 Ch. D. 778: following *Cogan v. Duffield*, 2 Ch. D. 44.

(*i*) *Re Parrott*, 33 Ch. D. 274. As to the practice in Ireland with regard to the hotchpot clause, see *Re Norcott's Estate*, 14 Ir. Ch. 315; *Lees v. Lees*, Ir. R., 5 Eq. 549; *Miller v. Gulson*, 13 L. R. Ir. 408.

(*ii*) *Stanley v. Jackman*, 23 Bea. 450. (*j*) 17 Bea. 515.

was carried out so as to exclude issue who did not survive the tenant for life. This would probably not be followed at the present day (*k*).

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A covenant to settle after-acquired property is not a "usual" provision (*kk*).

It seems that a direction to settle property on a person and his or her issue or "family" does not authorise a direct provision for his or her wife or husband (*l*). But in *Charlton v. Rendall* (*m*) the Court approved of the insertion in the settlement of a power enabling the legatee to appoint a life interest to her husband (*n*).

Wife or husband of legatee.

Where a testator directs personalty to be settled on a person for life, with remainder to his (or her) children in such a way as to include children by any marriage, and provides for a life interest being given to the wife (or husband), this authorises a life interest being given to a second wife (or husband) (*o*).

Future wife or husband.

There are also cases in which real and personal property is directed to be settled by the same will. No general principle as to the frame of the settlement in such cases seems to be deducible from the decisions (*p*).

Real and personal property in same settlement.

If a settlement on marriage is directed, and the marriage takes place, but no settlement is executed, it seems that a proper settlement will be directed at any time, even after the death of the original devisee or legatee (*q*).

Failure to settle.

Where a legacy is given to a woman with a direction that it shall be settled on her for life, with remainder to her children, it may be ordered to be paid over to her if she lives to an advanced age without marrying (*r*). And if a legacy is directed to be settled on A. and his (or her) children, and no settlement is made, and A. dies without any children, the legacy belongs to A.'s representatives (*s*).

Where legatee takes absolutely.

V.—Undisclosed Trusts.—Notwithstanding the statutory requirement that every will must be in writing, there are cases in

(*k*) See the result of the long conflict of authority on this point stated in Chap. XXXVI.

(*kk*) *Re Maddy's Estate*, [1901] 2 Ch. 820.

(*l*) *White v. Briggs*, 15 Sim. 17; *Young v. Macintosh*, 13 Sim. 445.

(*m*) 11 Ha. 296.

(*n*) Compare *Wilkinson v. Joughin*, 41 L. J. Ch. 234.

(*o*) *Nash v. Allen*, 42 Ch. D. 54. In *Re Parrott*, supra, the terms of the will excluded a future husband. As to the case of divorce, see *Marlborough v. Marlborough*, [1901] 1 Ch. 165.

(*p*) See *White v. Briggs*, 15 Sim. 17, 2 Ph. 583; *Boydell v. Golightly*, supra, p. 904; *Turner v. Sargent*, 17 Bea. 515; *Vaizey on Settlements*, 189.

(*q*) *Mason v. Mason*, Ir. R., 5 Eq. 288; *Wright v. Wright*, [1904] 1 Ir. R. 360.

(*r*) *Lyddon v. Ellison*, 19 Bea. 565; *Re Jordan's Trusts*, [1903] 1 Ir. R. 119.

(*s*) *Bell v. Jackson*, 1 Sim. N. S. 547; *Norman v. Kynaston*, 3 D. F. & J. 29; *Eaton v. Barker*, 2 Coll. 124; *Olphert v. Olphert*, [1903] 1 Ir. R. 326. See also *Bradford v. Young*, 29 Ch. D. 617, and compare the cases cited in Chap. XXXVII.

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which property disposed of by will can be made subject to trusts, the terms of which are not declared by the will or by any document incorporated in it.

The cases fall under two classes, one comprising those cases in which the existence of a trust appears on the face of the will, and the other comprising those cases where the trust is altogether secret.

Existence of trust disclosed by the will.

It has been decided that if property is given to A., and the will shews that the testator intends him to hold it upon trust (*t*), but does not either expressly or by reference to any existing document declare what the terms of the trust are, oral evidence is admissible to prove them, provided the trust was communicated to A. prior to, or simultaneously with, the execution of the will (*u*).

So, in *Re Huxtable* (*v*), where a testatrix bequeathed 4,000*l.* to C. "for the charitable purposes agreed upon between us," evidence was admitted to shew what those purposes were.

But the wishes of the testator may, of course, be expressed in such a way that they would not, even if set forth in the will, create a trust (*w*).

Rule not applicable to powers.

With regard to the rule above stated, there is a difference between trusts and powers. Thus in *Re Hetley* (*x*), a testator gave his property to his wife for life, and desired and empowered her by her will or in her lifetime to dispose of his estate in accordance with his wishes verbally expressed by him to her: it was held by Joyce, J., that parol evidence could not be admitted to shew what the testator's verbally expressed wishes were, and that the power of disposition given to the widow was void for uncertainty.

Trust not communicated at date of will.

There is some conflict of judicial opinion on the question whether the general rule above stated applies where the trust is not communicated to A. until after the execution of the will. The cases of *Moss v. Cooper* (*y*) and *Norris v. Frazer* (*z*) are sometimes cited as

(*t*) See *Re Spencer's Will*, referred to *infra*, p. 910; *Balfe v. Halpenny*, [1904] 1 Ir. R. 486; *O'Brien v. Condon*, [1905] 1 Ir. R. 51.

(*u*) *Re Fleetwood*, 15 Ch. D. 594; the following cases are cited and commented on in the judgment: *Crook v. Brooking*, 2 Vern. 50; *Pring v. Pring*, 2 Vern. 99; *Smith v. Attersoll*, 1 Russ. 266; *Podmore v. Gunning*, 7 Sim. 644; *Johnson v. Ball*, 5 De G. & S. 85; *Irvine v. Sullivan*, L. R., 8 Eq. 673; *Riordan v. Banon*, 10 Ir. Eq. R. 469. See also *In bonis Marchant*, [1893] P. 254, and the cases cited in note (*t*), *supra*. It may

be noted that *Crook v. Brooking* (or *Crooke v. Brookeing*) is not an authority on the point now under discussion: in that case the trust was declared by a letter written by one of the legatees to the other.

(*v*) [1902] 1 Ch. 214, 2 Ch. 793.

(*w*) *Sullivan v. Sullivan*, [1903] 1 Ir. R. 193; *Reid v. Atkinson*, Ir. R., 5 Eq. 373; *Creagh v. Murphy*, Ir. R., 7 Eq. 182; *Re Baillie*, 2 T. L. R. 60.

(*x*) [1902] 2 Ch. 866.

(*y*) 1 J. & H. 352.

(*z*) L. R., 15 Eq. 318.

establishing the affirmative of the proposition, but in each of those cases the existence of the trust did not appear on the face of the will. In *Riordan v. Banon* (a), the Vice-Chancellor thought that there was no difference in principle between the two classes of cases, but Parker, V.-C., in *Johnson v. Ball* (b), and Joyce, J., in *Re Hetley* (c), seem to have been of a different opinion. And in *Balfe v. Halpenny* (d) it was held that an attempt to create a "secret trust" after the execution of the will was nugatory, and that the trustees held the property upon trust for the next of kin.

Trusts declared by unincorporated document.

Possibly the decision in *In bonis Marchant* (e) can be supported on the principle now under discussion. In that case the testatrix had two documents of a testamentary character prepared, one appointing X. as executor, and containing various dispositions of her property, and the other a bequest of her property to A. "for the purposes I require him to do absolutely." The latter was duly executed as a will: the former was not executed. The Court granted probate of the second paper (apparently to X.), and ordered that the executor should administer the estate according to the trusts of the first paper. But there is nothing in the report to shew that the trusts were communicated to A., and if they were not, the decision seems erroneous. And in any case it is difficult to see how X. can have been entitled to probate: the first document was not incorporated in the second (ee).

Reference to future written declaration of trust.

In *Johnson v. Ball* (f), a testator gave a policy of assurance to two trustees "to hold the same upon uses appointed by letter signed by them and myself." No such letter existed at the date of the will, but the testator afterwards signed and delivered to the trustees a memorandum declaring the trusts of the policy: it was held that this attempt to create a power to dispose of property by an instrument not duly executed as a will was ineffectual, and that the trustees held the policy in trust for the residuary legatees.

Trust not communicated during testator's lifetime.

It is equally clear that if the trust is not communicated to the legatee during the lifetime of the testator, it cannot be established by a paper not executed as a will (g).

Where trustee cannot take beneficially.

Where the fact that a gift to A. is made to him merely as trustee appears on the face of the will, he cannot in any case take beneficially, and if the trust is not established, or is illegal, or fails, he holds upon

(a) 10 Ir. Eq. R. 469: so in *Sullivan v. Sullivan*, supra.

(b) 5 De G. & S. 85.

(c) Supra.

(d) [1904] 1 Ir. R. 486.

(e) [1893] P. 254.

(ee) Ante, p. 135, n. (v).

(f) 5 De G. & S. 85.

(g) *Scott v. Brownrigg*, 9 L. R. Ir. 246. Compare *Re Boyes*, 26 Ch. D. 531, where the trust was secret.

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trust for the residuary legatee (or devisee), or the next of kin (or heir at law) as the case may be (*h*). This is so even if it appears from the evidence that, subject to the trusts which fail, the testator intended the trustee to take the property for his own benefit (*hh*).

And if the gift is by the terms of the will made to A., merely as trustee, without any limitation, parol evidence is not admissible to shew that the trusts apply only to a part of the property. Thus, in *Re Huxtable* (*i*) a testatrix bequeathed 4,000*l.* to C. "for the charitable purposes agreed upon between us": it was held that evidence was admissible to shew what the charitable purposes were, but not to shew that the trust only applied to the income of the 4,000*l.* during C.'s lifetime.

Where trustee takes beneficially subject to trust.

But if the gift is to A. "absolutely," or "for his own use and benefit," followed by a reference to the testator's wishes with regard to the disposition of the property, A. takes beneficially, subject only to his carrying out the testator's wishes if and so far as they create a trust. Thus in *Irvine v. Sullivan* (*j*) the testator gave his property to D. absolutely, "trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted"; the "wishes" were that D. should make payments to certain persons: it was held that she took the property beneficially, subject to making the payments in question.

Secret trust.

Where property is given by will to A. in terms which imply that he is to take it for his own benefit, but the testator informs A. of his intention that A. is to hold the property upon trust, the terms of which he communicates to him, evidence of the trust is admissible (*k*), and it will, if legal, be enforced (*l*). The theory is that A. has induced the testator to leave the property to him, on his express or tacit promise to perform the trust, and that the Court ought not to allow him to commit a fraud by refusing to carry out the testator's wishes (*m*). The communication of the

Communication of trust.

(*h*) See *Briggs v. Penny*, 3 De G. & S. at p. 546; *Johnson v. Ball*, *supra*; *Re Boyes*, *supra*. As to secret trusts of land for charities, see *ante*, p. 263.

(*hh*) *Re Baillie*, 2 T. L. R. 660.

(*i*) [1902] 2 Ch. 793. It is submitted that the decision in *Morrison v. M'Ferran*, [1901] 1 Ir. 360, conflicts with this principle.

(*j*) L. R., 8 Eq. 673. In *Wood v. Cox*, 2 Myl. & Cr. 684, the payments to be made by the residuary legatee were specified in a paper which under the old law was testamentary.

(*k*) As to the nature of the evidence required, see p. 912, n. (*x*).

(*l*) *Russell v. Jackson*, 10 Ha. 204; *Norris v. Frazer*, L. R., 15 Eq. 318; *O'Brien v. Condon*, [1905] 1 Ir. R. 51. In *Re Spencer's Will*, 57 L. T. 519, the testator bequeathed a legacy to A. and B., "relying, but not by way of trust, upon their applying it" in a manner "privately communicated to them" by him: evidence of a secret trust was admitted.

(*m*) *Wallgrave v. Tebbs*, 2 K. & J. 313; *McCormick v. Grogan*, L. R., 4 H. L. 82,

terms of the trust may take place before or after the execution of the will (*n*). CHAP. XXIV.

The wishes of the testator may be expressed in such a way as to shew that he did not intend to create a trust, as where he gives the devisee or legatee an absolute discretion in the disposition of the property (*o*). Where no trust created by expression of wish.

Where the gift is made to A. and B. as joint tenants, and the trust is communicated to A. before the execution of the will, B. is also bound by the trust, on the principle that no person can claim an interest under a fraud committed by another (*p*). But if the trust is not communicated to A. until after the execution of the will, B. is not bound (*q*). Communication to one of two joint tenants.

If the gift is made to A. and B. as tenants in common, and the trust is communicated to A., whether before or after the execution of the will, but is not communicated to B., then B.'s share is not bound by the trust (*r*). Tenants in common.

If no communication on the subject of the trust is made to the legatee or devisee during the testator's lifetime, he takes the property for his own benefit; no declaration made by the testator (unless executed as a will) can affect him with a trust (*s*). Trust not communicated during lifetime.

If, however, the testator during his lifetime informs A. of his intention to leave property to A. upon a trust, the terms of which are not communicated to A. during the testator's lifetime, A. takes as trustee, but the intended trust is ineffectual, and cannot be ascertained by a written declaration of the testator not executed as a will. Thus, in *Re Boyes* (*t*), the property was given to A. absolutely, but before the execution of the will he had agreed to hold it upon such trusts as should be afterwards communicated to him by the testator; no such communication was made, and the only declaration of the trusts was contained in two letters addressed to A., signed by the testator but unattested, found among his papers after his death: it was held that this declaration was ineffectual, and that A. was trustee for the next of kin. Trust communicated, but not details.

and another decision of the House of Lords in *French v. French*, [1902] 1 Ir. R. 172.

(*n*) See per Kay, J., in *Re Boyes*, 26 Ch. D. at p. 535; *Re Maddock*, [1902] 2 Ch. 220.

(*o*) *McCormick v. Grogan*, L. R., 4 H. L. 82; *Re Pitt-Rivers*, [1902] 1 Ch. 403; *Sullivan v. Sullivan*, [1903] 1 Ir. R. 193. Compare other cases cited ante, p. 871.

(*p*) *Russell v. Jackson*, supra; *Jones v. Badley*, L. R., 3 Eq. 635, 3 Ch. 362. The point does not seem to have been

considered in *Turner v. Att.-Gen.*, Ir. R., 10 Eq. 386.

(*q*) *Moss v. Cooper*, supra; *Burney v. Macdonald*, 15 Sim. 6; *Re Stead*, [1900] 1 Ch. 237.

(*r*) *Tee v. Ferris*, 2 K. & J. 357; *Rowbotham v. Dunnett*, 8 Ch. D. 430; *Geddis v. Semple*, [1903] 1 Ir. R. 73.

(*s*) See *Jones v. Badley*, L. R., 3 Eq. 635, L. R., 3 Ch. 362; *Re Stead*, [1900] 1 Ch. 237.

(*t*) 26 Ch. D. 531.

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Illegal trust.

If a secret trust is illegal, the devisees or legatees hold the property upon trust for the persons upon whom it would have devolved if the gift had not been contained in the will (*u*).

Personal nature of secret trust.

A secret trust is a personal obligation binding the individual devisee or legatee. If he renounces and disclaims, or dies in the lifetime of the testator, the persons intended to be benefited by the secret trust can claim nothing against the heir at law, next of kin, or residuary devisees or legatees (*v*).

Administration.

For the purpose of administering the estate of the testator, a secret trust has the same effect as if it were contained in the will (*w*).

Evidence.

Clear evidence is required to establish a secret trust (*x*).

Certainty of subject not required.

The rule which applies in cases where a precatory trust is alleged to exist—namely, that in order to create such a trust, there must be a certainty of subject—does not apply to secret trusts, for if property is devised or bequeathed to a person upon a secret trust, the onus of shewing to what part of the property the trust does not extend lies on him (*z*).

Release of debt.

The principle above stated applies to the release of a debt. If a testator makes a person his residuary legatee, and informs him that he has released, or wishes to release, a debtor from the debt due by him to the testator, and the residuary legatee does not express dissent, this is tantamount to an undertaking by him to give effect to the testator's desire, and he will therefore not be allowed to enforce payment of the debt (*a*).

VI.—Trusts and Powers frequently inserted in Wills.—In addition to the clauses which determine the beneficial interests devised or bequeathed by a testator, it is usual for wills to contain various trusts or powers directing or empowering the trustees to convert or manage the property in certain ways. Further, the trustees are often given power to vary or affect the beneficial interests within certain limits. The most common of the former class of trusts are those for conversion, investment, and of powers for sale, mortgaging or leasing. Of the latter, powers for maintenance and

(*u*) *Russell v. Jackson*, 10 Ha. 204. See Chap. IX. as to trusts void under the Mortmain Act, &c.

(*v*) Per Cozens-Hardy, L.J., in *Re Maddock*, [1902] 2 Ch. at p. 231.

(*w*) *Re Maddock*, [1902] 2 Ch. 220.

(*x*) *McCormick v. Grogan*, L. R., 4 H. L. 82; *Jones v. Badley*, L. R., 3 Ch. 362; *Re Downing's Estate*, 60 L. T. 140;

Re Pitt-Rivers, [1902] 1 Ch. 403.

(*z*) *Russell v. Jackson*, 10 Ha. 204. Compare *Re Huxtable*, [1902] 2 Ch. 793.

(*a*) *Re Applebee*, [1891] 3 Ch. 422, in which *Wekett v. Raby*, 2 Br. P. C. 386; *Byrn v. Godfrey*, 4 Ves. 5; *Flower v. Marten*, 2 My. & Cr. 459; and *Cross v. Sprigg*, 6 Ha. 552, are referred to.

advancement are the most usual, but other discretions are frequently given to trustees. In this chapter some of the questions of construction which arise in connection with such trusts or powers are considered; the powers given by the Settled Land Acts to tenants for life, and the powers contained in the Conveyancing Act, 1881, and the powers vested in executors as incident to their office, are all available for the purpose of dealing with the testator's property, but do not give rise to questions of construction in the will, and are not within the scope of this work.

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Trusts and Powers for Sale of Land.—Where a power of sale is given to trustees over settled property, the power (expressed to be during the continuance of the trust) does not come to an end when an undivided share of the property has vested absolutely (*b*), but it comes to an end if the purposes for which it was created have ceased to exist (*c*). A power of sale will, in general, come to an end when by reason of the expiration or cesser of the limitations the absolute interests come into possession, but such a power may be exercised within a reasonable time after that period for the purpose of dividing the property (*d*), unless the beneficiaries have elected to take the property as it stands (*e*), or it may be exerciseable for the purpose of raising money to pay debts and legacies (*f*). So long as the Rule against Perpetuities is not infringed, the duration of a power of sale is one of intention (*g*).

Duration of power.

An imperative trust for sale also does not come to an end when all the interests have vested in possession, unless the beneficiaries have elected to take the property as real estate (*h*).

Duration of trust for sale.

Where the trustees have a power to postpone the sale, the vesting in possession of one of the shares does not put an end to the power of postponement (*hh*).

Power to postpone.

A direction to sell within five years, and apply the proceeds in paying debts and legacies, and then to invest, &c., does not prevent the trustees from selling after the expiration of the five years (*i*).

Time limited.

(*b*) *Trower v. Knightley*, 6 Mad. 134; *Re Brown*, L. R., 10 Eq. 349 (settlement); *Tait v. Swinstead*, 26 Bea. 525; *Wood v. White*, 4 My. & Cr. 460.

624.

(*c*) *Wheat v. Hall*, 17 Ves. 80; *Wolley v. Jenkins*, 23 Bea. 53; *Re Kaye and Hoyle's Contract*, 53 Sol. J. 520.

(*f*) *Re Dyson and Fowke*, [1896] 2 Ch. 720.

(*g*) *Re Jump*, [1903] 1 Ch. 129.

(*d*) *Peters v. Lewes and East Grinstead Railway Co.*, 18 Ch. D. 429; *Re Lord Sudeley and Baines*, [1894] 1 Ch. 334.

(*h*) *Re Tweedie and Miles*, 27 Ch. D. 315; *Re Douglas and Powell*, [1902] 2 Ch. 296. See *Re Cooke's Contract*, 4 Ch. D. 454.

(*hh*) *Re Hornsnail*, [1909] 1 Ch. 631.

(*i*) *Pearce v. Gardner*, 10 Ha. 287; *Cuff v. Hall*, 1 Jur. N. S. 972.

(*e*) *Re Cotton's Trustees*, 19 Ch. D.

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Remoteness.

Doctrine
of notice.

The question whether an unlimited trust or power of sale is void within the Rule against Perpetuities is discussed elsewhere (*j*).

Where a trust or power of sale is given for payment of debts, although it comes to an end as soon as the debts are paid, yet if the purchaser has no notice that they have been paid, and if (in cases under the old law (*k*)), the sale is made within a reasonable time after the testator's death, the purchaser gets a good title (*l*).

Administra-
tor.

A power of sale given by a testator to his executors or administrators can be exercised by an administrator *durante minore ætate* (*m*).

Consent.

Where a power or trust for sale is exerciseable with the consent of a particular tenant for life, or of the tenant for life for the time being, the question may arise whether the consent can be effectually given, if the tenant for life is an infant or has aliened or incumbered his interest or become bankrupt (*n*), or where one of several tenants for life (named in the will) has died (*o*). The question may also arise whether the consent of a person entitled to the income under an overriding term of years is required in addition to that of the tenant for life (*p*).

Settled Land
Acts.

The statutory powers of sale given by the Settled Land Acts do not fall within the scope of this treatise, but it may be mentioned that in the case of settled land, where a will gives a power of sale to trustees, sect. 56 of the Settled Land Act, 1882, prohibits the exercise of such a power without the consent of the tenant for life.

Person to sell
not named.

A power in a will to sell or mortgage without naming a donee will, if a contrary intention do not appear, vest in the executor if the fund is to be distributable by him, either for the payment of debts or legacies (*q*). And where there is a general direction to sell, but it is not stated by whom the sale is to be made, if the produce of the sale is to be applied by the executors in the execution of their office a power to sell will be implied to the executors (*r*). But where the management of the fund produced by the sale is not given to the

(*j*) Chap. X., ante, pp. 307 seq.

(*k*) As to whether the law has been altered in this respect, see post, p. 916, n. (z).

(*l*) *Forbes v. Peacock*, 1 Ph. 717; *Carlyon v. Truscott*, L. R., 20 Eq. 348; *Stroughill v. Anstey*, 1 D. M. & G. 635. Compare *Re Venn and Furze* and other cases, cited infra, p. 916 n. (z).

(*m*) *Monsell v. Armstrong*, L. R., 14 Eq. 423; and see *Re Cope*, 16 Ch. D. 49.

(*n*) *Re Neave's Trusts*, 49 L. J. Ch. 642; *Re Cardross*, 7 Ch. D. 728; *Warburton v. Farn*, 16 Sim. 625; *Re Beding-*

feld and Herring, [1893] 2 Ch. 332, where the earlier cases are cited.

(*o*) *Sykes v. Sheard*, 2 D. J. & S. 6.

(*p*) *Robertson v. Walker*, 44 L. J. Ch. 220.

(*q*) *Curtis v. Fulbrook*, 8 Hare, 278. See *Haydon v. Wood*, 8 Hare, 279; *Hooper v. Strutton*, 12 W. R. 367.

(*r*) *Tylden v. Hyde*, 2 S. & Stu. 238; *Forbes v. Peacock*, 11 Sim. 152, 11 M. & W. 630; *Bentham v. Wiltshire*, 4 Madd. 44; and see *Blatch v. Wilder*, 1 Atk. 420, and *Lockton v. Lockton*, 1 Ch. Ca. 179.

executors, a direction to sell does not give the executors power to sell real estate, even though it is devised to minors (s). CHAP. XXIV.

It may be mentioned that the existence of a power of sale in trustees is no bar to a decree for partition (t), but a trust for sale is (u).

A power of sale may be created indirectly or by implication. Thus, a direction by a testator that his executors shall sell his lands, gives them a common law power of sale, and on a sale the purchaser (under the old law) takes as if they had been devised to him (v). Implied power of sale.

An implied power of sale could also, under the old law, be conferred by a charge of debts or legacies on the real estate, but the law was not clearly settled, especially with reference to the question who was the proper person to sell and make a title (w). In *Eidsforth v. Armstead* (x), it was said by Wood, V.-C., that the testator, having charged his real estate with a sum of money, must be taken to have given an implied power of sale to some person, to raise the sum required, and that the donee of the power must be ascertained, in each case, from the whole will. Charge of debts and legacies.

The difficulty of knowing who was the proper person to sell real estate charged with debts or legacies was partly removed by Lord St. Leonards's Act (22 & 23 Vict. c. 35) (y), and in cases within Statutory provisions.

(s) *Patton v. Randall*, 1 J. & W. 189; *Bentham v. Wiltshire*, supra.

(t) *Boyd v. Allen*, 24 Ch. D. 622.

(u) *Biggs v. Peacock*, 20 Ch. D. 200, 22 Ch. D. 284.

(v) Farwell on Powers, 2, citing *Lancaster v. Thornton*, 2 Burr. 1027; *Doe v. Shotton*, 8 A. & E. 905; *Stafford v. Buckley*, 2 Ves. sen. 170; *Warnford v. Thompson*, 3 Ves. 513; *Smith v. Lord Camelford*, 2 Ves. jun. 698. As to copyholds, see *R. v. Wilson*, 3 B. & S. 201; *R. v. Corbett*, 1 E. & B. 836; *Glass v. Richardson*, 2 D. M. & G. 658.

(w) *Ball v. Harris*, 8 Sim. 485, 4 My. & Cr. 264. In this case, and in *Shaw v. Borser*, 1 Kee. 559, the doctrine that a general direction to pay debts charged them on the real estate was treated as too clear for discussion, the only contest being whether such a charge conferred an implied authority to sell on the person taking the legal estate subject to certain trusts, which was decided in the affirmative. See also *Gosling v. Carter*, 1 Coll. 644; *Mather v. Norton*, 21 L. J. Ch. 15; *Sabin v. Heape*, 27 Bea. 553; *Hodkinson v. Quinn*, 1 J. & H. 303; *Doe d. Jones v. Hughes*, 6 Ex. 223. In this last case it was decided

at law that a simple charge of debts did not give the executor not taking the legal estate a power of sale. *Robinson v. Lowater*, 17 Beav. 592, 5 D. M. & G. 272 (where, however, the legal estate was obtained by the purchaser aliunde), and *Wrigley v. Sykes*, 21 Beav. 337, are contra; and see *Bolton v. Stannard*, 4 Jur. N. S. 576; *Colyer v. Finch*, 5 H. L. Ca. 905; *Corser v. Cartwright*, L. R., 7 H. L. 731; Sug. V. & P. 662 n., 14th edition; *Hayes and Jarman*, Conc. Wills, 564, 8th edition, and 2 Jur. N. S., Part 2, 68. As to a sale for legacies only, see *Horn v. Horn*, 2 S. & St. 448; *Re Rebbeck*, 71 L. T. 74, and post, p. 916, n. (b). The cases of *Watkins v. Cheek*, 2 S. & St. 199; *Johnson v. Kennett*, 6 Sim. 384; *Page v. Adam*, 4 Bea. 269; and *Forbes v. Peacock*, 11 Sim. 152, 1 Ph. 717, are examined in *Stroughill v. Anstey*, 1 D. M. & G. 635.

(x) 2 K. & J. 333.

(y) As to the application of this act, see *Re Clay and Tetley*, 16 Ch. D. 3; *Re Adams and Perry*, [1899] 1 Ch. 554; *Re Wilson*, 54 L. T. 600; *Re Barrow-in-Furness Corporation and Rawlinson*, [1903] 1 Ch. 339.

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Part I. of the Land Transfer Act, 1897, no such question can arise, as executors now have the same power of selling real estate as they have always had in the case of chattels real (z).

Protection of purchaser.

Even in cases governed by the old law, the general rule is that where executors or trustees sell for payment of debts, or of debts and legacies, the purchaser is not bound to see to the application of the purchase money, and the rule seems to be the same where real estate is devised to a person beneficially charged with debts generally, or with debts and legacies (a). But if it is devised subject only to legacies, or subject to a particular debt or other sum of money, then the purchaser must see to the application of the purchase money (b).

Implied from power to vary investments.

A power of sale may also be implied from a power to vary investments, where the will authorizes an investment in the purchase of land (c).

Implied from trust for division.

The cases in which a power of sale is inferred from a direction to divide the testator's real and personal estate into shares have been already referred to (d).

Not implied from power to mortgage.

It seems clear that a power to mortgage does not authorize a sale by the donee of the power (e), although it authorizes a mortgage giving the mortgagee a power of sale.

Partnership land.

An executor always had power to sell, or concur in selling, real estate belonging to a firm in which the testator was a partner (f).

Joint sale.

The circumstances under which trustees, having a trust for or power of sale over one property, may join with the owner of another property in selling both properties together, are considered in *Re*

(z) See ante, pp. 64 seq., and Chaps. LIII., LIV. With regard to the question under what circumstances a purchaser is bound to inquire whether any debts remain unpaid, it has not yet been decided whether the rule in *Re Venn and Furze*, [1894] 2 Ch. 101, now applies to real estate, displacing that in *Re Tanqueray-Willauve and Landau*, 20 Ch. D. 465, in the case of testators dying since 1897. As to leaseholds, see *Re Whistler*, 35 Ch. D. 561; *Re Venn and Furze*, supra. The rule in *Re Venn and Furze* does not always apply: *Re Verrell*, [1903] 1 Ch. 65; *Re Higgins and Stephenson*, [1906] 1 Ir. 656.

(a) Sugden, V. & P. 656, 660; *Stroughill v. Anstey*, 1 D. M. & G. 635; *Colyer v. Finch*, 5 H. L. C. 905; *Re Henson*, [1908] 2 Ch. 356. But apparently this rule would not apply where the testator has died since 1897.

(b) *Re Rebbeck*, 71 L. T. 74. As to a sale by executors for payment of legacies only, see *Forbes v. Peacock*, 1 Ph. 717, explained in *Carlyon v. Truscott*, L. R., 20 Eq. 348; *Re Henson*, supra.

(c) *Re Gent and Eason*, [1905] 1 Ch. 386. Compare *Tait v. Lathbury*, L. R., 1 Eq. 174.

(d) Ante, p. 913.

(e) *Cook v. Dawson*, 29 Bea. 123, 3 D. F. & J. 127. In this case the question did not really arise, for the power to mortgage was given for a particular purpose, and the sale was made for another, namely, to pay debts. The argument was that the power to mortgage gave the executrix a power of disposition over the fee, and so enabled her to sell in order to pay the debts: see Chap. LIII.

(f) *West of England, &c., Bank v. Murch*, 23 Ch. D. 138.

Cooper and Allen's Contract (g). If the sale of the property can be effected at a higher price by joining with somebody else, the trustees are only carrying out their trusts and performing their duty by so obtaining that higher price (h).

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Where several properties are held under one lease, the trustees may sell them separately upon the terms that one of the purchasers shall take an assignment of the lease and grant under-leases to the other purchasers, and that if any part of the property is not sold, the trustees shall retain the lease and grant under-leases of the sold portions (i).

Sale by underlease

It is hardly necessary to say that trustees who hold land upon trust for sale cannot dispose of it for the shares or securities of a company, unless expressly authorized to do so. But in *West of England, &c., Bank v. Murch* (j) a transaction of this kind was upheld as a compromise, the so-called sale being made for the purpose of satisfying the debts of the firm in which the testator was a partner.

Sale for shares of a company.

Trustees having a power of sale over a reversion may exercise it before the reversion falls into possession, although (if the reversion is settled) by doing so they increase the interest of the tenant for life at the expense of the remainder-man (k). Thus, in one case, a testator who was entitled to an estate in remainder subject to the life estate of J. S., devised it to trustees to pay annuities, with remainder to his widow for life, with remainders over, and empowered his trustees to sell it with the consent of the tenant for life entitled in possession under his will. J. S. surrendered her life estate, and it was held that the trustees, with the consent of the widow, could sell and make a good title (l).

Reversion.

A power given to trustees to sell an estate with the consent of the tenant for life (m), does not authorize the trustees to sell the estate exclusive of the timber growing upon it, under an arrangement by which the tenant for life sells the timber for his own benefit (n). In *Buckley v. Howell* (o) it was held that a

Severance of timber and minerals.

(g) 4 Ch. D. 802, where *Rede v. Oakes*, 4 D. J. & S. 505, is considered, and *Morris v. Debenham*, 2 Ch. D. 540, is approved. See also *Cavendish v. Cavendish*, L. R., 10 Ch. 319.

(h) 4 Ch. D. at p. 815.

(i) *Re Judd and Poland*, [1906] 1 Ch. 684, overruling *Re Walker and Oakshott*, [1901] 2 Ch. 383.

(j) 23 Ch. D. 138. As to the conversion of a business into a company, see *Re Morrison*, [1901] 1 Ch. 701, and the

other cases cited post, p. 920.

(k) *Blackwood v. Borrowes*, 4 Dru. & War. 441.

(l) *Truell v. Tysson*, 21 Bea. 437.

(m) The power should be framed to deal with the case where the tenant for life is an infant: see *Re Neave's Trusts*, 28 W. R. 976.

(n) *Cockerell v. Cholmeley*, 10 B. & Cr. 564, 1 Cl. & F. 60; *Cholmeley v. Paxton*, 3 Bing. 207.

(o) 29 Bea. 546.

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power of sale and exchange did not authorize trustees to sell the lands with a reservation of minerals. In consequence of this decision, the statute 25 & 26 Vict. c. 108 was passed (*p*). This act is now repealed and replaced by sect. 44 of the Trustee Act, 1893, as amended by sect. 3 of the Trustee Act, 1894.

Express or
implied.

Trusts for Conversion.—It seems convenient to consider under this heading those cases in which a testator directs his residuary real and personal estate to be converted into money. A trust for conversion may be express or implied, for a testator may shew an intention that his estate shall be converted without an express direction or trust to that effect. Thus, in *Mower v. Orr* (*q*), the testator directed his real and personal estate to be divided into twenty shares, sixteen of which he gave to his sons, and the remaining four shares he bequeathed as follows: two shares to his daughter Mary, and two shares, to be invested in the Government funds, for the use of her children: it was held that this created a trust for conversion. *Affleck v. James* (*r*) is to the same effect.

In *Re Holloway* (*s*) the testator declared that it should be lawful for his trustees "to continue the whole or any part of my estate at all times and from time to time in the firm of Holloway Brothers or their successors or assigns, or to invest, re-invest and lend any part of my estate to them upon such terms as the said trustees shall at such discretion as aforesaid think proper, without any personal liability for the safety of such investment." North, J., held that the power to invest did not imply a power of selling the real estate.

Power to
postpone
conversion.

An express trust for conversion is often followed by a discretionary power given to the trustees to postpone conversion. The Court will not generally interfere with such a discretion as long as it is honestly exercised: nor are the trustees liable for loss (*t*). But if there is a difference of opinion among the trustees whether certain investments should be retained or not, the trust for conversion prevails (*tt*).

A direction to trustees to convert at their absolute discretion

(*p*) As to a reservation of minerals on a sale or lease under the Settled Land Acts, see *Re Gladstone*, [1900] 2 Ch. 101; *Re Duke of Rutland's Settled Estates*, [1900] 2 Ch. 206.

(*q*) 7 Ha. 473; *Cornick v. Pearce*, 7 Ha. 477; *Flux v. Best*, 23 W. R. 228; *Carlisle v. Cooke*, [1905] 1 Ir. R. 269; *Re Cooke's Contract*, 4 Ch. D. 454.

(*r*) 17 Sim. 121. These cases are

discussed in Chap. XIX.

(*s*) 60 L. T. 46.

(*t*) See Lewin on Trusts. *Re Norrington*, 13 Ch. D. 654; *Re Blake*, 29 Ch. D. 913; *Re Courtier*, 34 Ch. D. 136; *Re Crowther*, [1895] 2 Ch. 56; *Re Smith*, [1896] 1 Ch. 171; *Re Horsnail*, [1909] 1 Ch. 631; *Re Schneider*, 22 T. L. R. 223.

(*tt*) *Re Hilton*, [1909] 2 Ch. 548.

seems to be equivalent to a trust for conversion with power to postpone (u). CHAP. XXIV.

Trusts for Investment.—The general rules governing investments by trustees, whether under express or statutory powers, are beyond the scope of this treatise, but questions sometimes arise as to the effect of particular expressions used by testators. Where, for instance, a testator directs his trustees to invest the trust moneys in such modes of investment as they think fit, this does not, it seems, give them an absolute discretion, although it is difficult to say how far their discretion is restricted (v). Again, a direction to invest a fund in a particular way does not in itself prohibit investment in securities authorized by law (vv). Discretionary trust for investment.

A power to invest money “in his name or under his legal control” does not authorize a trustee to invest on contributory mortgage (vvv).

In its proper sense, “security” generally implies a charge on property, with or without a personal debt or obligation, and therefore does not include shares in companies (w), but in popular language “security” is often used in the sense of “investment.” In *Re Rayner* (x) the testator declared that his estate might be invested in such securities as his trustees in their absolute discretion should think fit, and he authorized his trustees to continue or leave any moneys invested at his death in or upon the same securities: it was held by the Court of Appeal (reversing Farwell, J.,) that the context shewed that “securities” meant “investments.” “Securities.”

A power to invest in “real securities” does not authorize an investment on contributory mortgage (y), or on long leaseholds (z), except in cases within the Trustee Acts, 1888 and 1893. Real securities.

A power to invest “upon” ground rents does not mean “upon the security of” ground rents; such a power authorizes the purchase of ground rents (a).

It seems that a power to invest in the stocks, funds or securities Companies.

(u) *Re Atkins*, 81 L. T. 421, post.

(v) *Stretton v. Ashmall*, 3 Dr. 9; *Stewart v. Sanderson*, L. R., 10 Eq. 26; *Re Kavanagh* (*Murphy v. Doyle*), 27 L. R. Ir. 495, 29 L. R. Ir. 333; *Lewis v. Nobbs*, 8 Ch. D. 591; *Re Brown*, 29 Ch. D. 889; *Re Smith*, [1896] 1 Ch. 71. See *Dickinson v. Player*, C. P. Cooper, 178, where the executors were authorized to “employ” the residue in any manner they thought proper.

(vv) *Re Burke*, [1908] 2 Ch. 248.

(vvv) *Re Dive*, [1909] 1 Ch. 328.

(w) See *Harris v. Harris*, 29 Bea. 107. As to the meaning of “real security,” see *Cavendish v. Cavendish*, 30 Ch. D. 227 (tolls).

(x) [1904] 1 Ch. 176. Compare *Re Johnson*, 89 L. T. 520; *Re Gent and Eason*, [1905] 1 Ch. 386.

(y) *Webb v. Jonas*, 39 Ch. D. 660.

(z) *Re Boyd's Settled Estates*, 14 Ch. D. 626.

(a) *Re Mordan*, [1905] 1 Ch. 515.

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of "any" company is not confined to companies formed under the law of England (*b*). "Companies in the United Kingdom" includes companies registered under the Companies Acts, although their business is carried on in foreign countries (*bb*).

Sanction of
the Court to
change of
investment.

In some cases the Court has jurisdiction to sanction an alteration in the investment of a trust estate in a manner not authorized by the will or settlement, when such a course is clearly for the benefit of persons under disability or unborn; but to give the Court jurisdiction in a case of this kind it seems that the element of compromise or unforeseen emergency must be present (*c*).

Loan to firm.

A power to lend money to a particular firm is, as a general rule, put an end to by a change in the firm (*d*).

Trust to carry on Business.—It not infrequently happens that part of a testator's estate consists of a business carried on by him, and that he directs or empowers his trustees to carry it on, either for the purpose of winding it up or realizing it to advantage, or in order that it may be kept on as a going concern until some beneficiary is old enough to take it over.

Rights as
against
beneficiaries.

The general principle is clear, that trustees who carry on a business in this way are personally liable for all liabilities contracted in connection with the business after the death of the testator. If the testator has authorized his trustees to employ a part of the trust estate in the business (*e*), and they carry on the business properly, they are entitled, as against the beneficiaries under the will, to resort for their indemnity to that part of the trust estate. In such a case the trustees' creditors are entitled, by subrogation, to stand in the place of the trustees, and thus to obtain payment of their debts out of that part of the trust estate (*f*).

(*b*) *Re Stanley*, [1906] 1 Ch. 131. As to what is a "public" company, see *Re Sharp*, 45 Ch. D. 286; *Re Castlehow*, [1903] 1 Ch. 352; and as to what is a company incorporated by act of parliament, see *Elve v. Boyton*, [1891] 1 Ch. 501; *Re Smith*, [1896] 2 Ch. 590. A new species of company—the "private company"—has been called into being by the Companies Act, 1907 (repealed and re-enacted by the Companies Consolidation Act, 1908).

(*bb*) *Re Hilton*, [1909] 2 Ch. 548.

(*c*) *Re Crawshaw*, 60 L. T. 357; *Re Morrison*, [1901] 1 Ch. 701; *Re New*, [1901] 2 Ch. 534; *Re Smith*, [1902] 2 Ch. 667; *Re Tollemache*, [1903] 1 Ch. 457, 953; *Re Welle*, [1903] 1 Ch. 848; *Re Anson's Settlement*, [1907] 2 Ch. 424.

(*d*) *Re Tucker*, [1894] 1 Ch. 724; *Smith v. Patrick*, [1901] A. C. 282.

(*e*) A mere direction to carry on the business does not authorize the trustees to employ in it a greater part of the testator's estate than was employed in it by him: *Ex parte Richardson*, 3 Madd. 138; *McNeillie v. Acton*, 4 D. M. & G. 744. See *Moore v. McGlynn*, [1904] 1 Ir. R. 334; *Re Dimmock*, 52 L. T. 494.

(*f*) *Re Johnson*, 15 Ch. D. 548; *Re Morgan*, 18 Ch. D. 93; *Strickland v. Symons*, 26 Ch. D. 245; *Re Frith*, [1902] 1 Ch. 342. Older cases are, *Ex parte Garland*, 10 Ves. 110; *Cutbush v. Cutbush*, 1 Bea. 184; *Ex parte Edmonds*, 4 D. F. & J. 488. See also *Re Kidd*, 70 L. T. 648.

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This principle, however, does not affect the testator's creditors. They have a prior claim on all the assets of the testator, and any trustee or executor who uses the assets in carrying on the testator's business (except to such an extent as is necessary to enable him to wind it up or sell it as a going concern) does so at his own risk, so far as the testator's creditors are concerned (*g*).

As against testator's creditors.

If the business is carried on by the trustees with the assent of the testator's creditors, then the trustees are entitled to be indemnified out of the testator's estate (including any assets acquired by the trustees in carrying on the business) in priority to the testator's creditors; and the business creditors have, by subrogation, a corresponding right to resort to the testator's estate for payment of their debts (*h*).

Effect of assent by testator's creditors.

The same rule applies if the business is carried on under an order of the Court (*i*).

Order of Court.

But the rule does not apply unless the trustee (or executor) has continued the business in good faith, either under an authority contained in the will or conferred by the Court, or for the purpose of winding up the estate (*j*).

Where trustee carries on business for his personal benefit.

Trustees ought not to carry on their testator's business, unless they are expressly or implicitly authorized to do so (*jj*). A power to carry on a business may be inferred from the fact that it is included in a gift of the testator's residuary estate to trustees upon trust for conversion, with a power to postpone conversion, and the usual provision as to interim income (*k*).

Implied power.

As to the so-called "sale" of a business for shares in a company, see *Re Morrison* (*l*) and other cases already cited (*m*).

Conversion into company.

Powers of Mortgaging.—It has been held that a power to lease authorizes a demise by way of mortgage (*n*). A power "to make arrangements" given to a trustee-executor to whom the real estate is devised, authorizes a mortgage of the real estate (*o*), but a power to use real estate as capital in the testator's business does not enable the trustees to mortgage it so as to override an

Implied power.

(*g*) *Dowse v. Gorton*, [1891] A. C. 190; *Re Millard*, 72 L. T. 823.

(*h*) *Dowse v. Gorton*, [1891] A. C. 190; *Hodges v. Hodges*, [1899] 1 Ir. R. 480.

(*i*) *Re Brooke*, [1894] 2 Ch. 600; *Hodges v. Hodges*, [1899] 1 Ir. R. 480.

(*j*) *Re Millard*, 72 L. T. 823; *McAloon v. McAloon*, [1900] 1 Ir. 367.

(*jj*) *Kirkman v. Booth*, 11 Bea. 273; *Travis v. Milne*, 9 Ha. 141; *Stainer v. Hodgkinson*, 73 L. J. Ch. 179. As to

trustees making a personal profit by

supplying goods, see *Re Sykes*, [1909] 2 Ch. 241, post, Chap. XXXIV.

(*k*) *Re Chancellor*, 26 Ch. D. 42; *Re Crowther*, [1895] 2 Ch. 56; *Re Smith*, [1896] 1 Ch. 171.

(*l*) [1901] 1 Ch. 701.

(*m*) Ante, p. 917. See also, as to the "sale" of land for shares, post.

(*n*) *Mostyn v. Lancaster*, 23 Ch. D. 583.

(*o*) *Re Jones*, 61 L. T. 661.

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annuity charged by the will (*p*). A direction to carry on business authorizes a mortgage of the business land (*q*) but not of other land (*r*).

Lord St. Leonards laid it down, as a general rule, that "a power of sale out and out, for a purpose or with an object beyond the raising of a particular charge, does not authorise a mortgage; but that where it is for raising a particular charge and the estate itself is settled or devised subject to that charge, there it may be proper under the circumstances to raise the money by mortgage, and the Court will support it as a conditional sale, as something within the power, and as a proper mode of raising the money" (*s*).

Implied
from
power of
manage-
ment.

If land is devised to trustees upon trust for sale, with the usual power of postponing a sale and powers of interim management and of making outlay for improvements, repairs, &c., it seems that the trustees may raise money for these purposes by mortgage (*t*).

A power to mortgage authorises a mortgage with a power of sale (*u*).

Settled
Land
Acts.

Powers of Leasing.—Where property is settled by will, the tenant for life, or the person having the powers of a tenant for life, has now various powers of leasing under the Settled Land Acts (*v*), and if the powers given to the trustees overlap these, the consent of the tenant for life is necessary to the exercise of such powers by the trustees. It may be mentioned that a power to trustees to lease and manage real estate does not by itself raise an implication of the testator's intention to exclude his wife from dower so as to compel her to elect (*w*). Trustees cannot grant one lease of two properties held upon different trusts (*x*). In one case

(*p*) *Re Webb*, 63 L. T. 545. For a power to mortgage so as to override a legacy, see *Redman v. Rymer*, 65 L. T. 270.

(*q*) *Devitt v. Kearney*, 13 L. R. Ir. 65.

(*r*) *McNeillie v. Acton*, 4 D. M. & G. 744.

(*s*) Per Lord St. Leonards in *Stroughill v. Anstey*, 1 D. M. & G. at p. 645, where *Mills v. Banks*, 3 P. W. 1; *Haldenby v. Spofforth*, 1 Bea. 390; and *Ball v. Harris*, 4 My. & Cr. 264, are referred to. See also *Page v. Cooper*, 16 B. 396 (trust for sale held not to authorize a mortgage); *Walker v. Southall*, 56 L. T. 882.

(*t*) *Re Bellinger*, [1898] 2 Ch. 534.

(*u*) *Re Chawmer's Will*, L. R., 8 Eq. 569; following *Bridges v. Longman*, 24

Bea. 27, and not following *Clarke v. Royal Panopticon*, 4 Dr. 26.

(*v*) This renders such cases as *Re Shaw's Trusts*, L. R., 12 Eq. 124, and *Naylor v. Arnitt*, 1 R. & M. 501 (no power of leasing); *Davis v. Harford*, 22 Ch. D. 128 (power to tenant for life, who agreed to lease and died), no longer of any practical interest. *Naylor v. Arnitt* was followed in *Fitzpatrick v. Waring*, 11 L. R. Ir. 35.

(*w*) *Warbuton v. Warbuton*, 2 Sm. & G. 163, where *Hall v. Hill*, 1 Dr. & War. 94, is explained.

(*x*) *Tolson v. Sheard*, 5 Ch. D. 19. The power to lease was given by an order made under the Settled Estates Act, 1856.

where the power of leasing was wide enough to include a building lease, the Court allowed the trustees to put the property up to auction on the terms of granting a building lease to the highest bidder, and subsequently to sell the land subject to the building lease (y).

A direction to an executor to let real estate and apply the profits to a particular purpose, does not raise by implication an estate in him extending beyond the period required for accomplishing the purpose (z).

Whether trustees take an estate.

Powers of Charging.—Questions do not often arise on powers of this kind, as the forms used in wills generally follow those used in carefully drawn settlements (a).

Trusts for Maintenance and Education.—Effect will be given to a trust for maintenance where it is imperfectly expressed, provided the intention is clear (b). Thus in *Re Yates* (c) the testator gave to his widow a “further annuity” of 300*l.* for the maintenance and education of his infant daughter; the widow died during the minority of the daughter, but it was held that the annuity continued to be payable for her maintenance and education. So if a legacy is given to an infant contingently on his attaining twenty-one, a power to apply it for the benefit of the legatee may have the effect of making the legacy carry interest for maintenance (cc).

Implied and precatory trusts for maintenance.

The question whether a trust for maintenance has been effectually created, generally arises in those cases where property or income is given to a person, coupled with an expression of desire or hope on the part of the testator that he will thereout maintain certain persons, or with a statement that the gift is made to him for the purpose of enabling him to maintain them (d). These cases have been already discussed (e).

(y) *Re James*, 73 L. T. 1.

(z) *Lambert v. Browne*, Ir. R., 5 C. L. 218.

(a) See *Re Beckett*, 93 L. T. 746, on the construction of the words “at any one time.” As to the failure by lapse of a power of charging, notwithstanding sect. 33 of the Wills Act, see *Griggs v. Gibson*, 35 L. J. Ch. 458, ante, Chap. XXIII. As to the revocation of an instrument exercising a power of charging, see *Re Gore-Booth's Estate*, [1908] 1 Ir. R. 387.

(b) *Leslie v. Leslie*, Ll. & G. t. Sug. 1; *Lambert v. Parker*, Coop. t. Eldon, 143;

Acherley v. Wheeler (or *Vernon*), 1 P. W. 783. But see *Crickett v. Dolby*, 3 Ves. 10; *Festing v. Allen*, 5 Hare, 573.

(c) [1901] 2 Ch. 438.

(cc) *Pett v. Fellows*, 1 Sw. 561 n.; *Re Churchill*, [1909] 2 Ch. 431.

(d) In modern wills express powers of maintenance are generally omitted in reliance on the provisions contained in s. 43 of the Conveyancing Act, 1881. As to interest being allowed for maintenance in the case of legacies to the testator's infant children, see Chap. XXX.

(e) Ante, p. 892.

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Liability to
account.

The cases which establish the general rule that where income is directed to be paid to a person for the maintenance and education of his children, he takes it subject to no account, provided he discharges the duty of maintaining and educating the children, have been already considered (*f*).

Gift of
capital.

It has been already mentioned that when a sum, or the capital of a fund, is given for the maintenance of A., this is considered as a simple legacy for his benefit, and he is entitled (if an adult) to have it paid to him (*g*); and a gift of residue to the testator's wife "for the support and maintenance of herself and children and for their education," has been held to be an absolute gift to the wife (*h*).

Maintenance
out of
capital
or income.

A testator sometimes provides for the maintenance or education of an infant out of capital (*i*), and in that case a gift over of what is not expended, in the event of the infant dying under age, will have effect (*k*); but as a general rule, maintenance is given out of the income of a fund, or by means of an annuity.

Interest on
legacy.

Where a testator bequeaths a legacy to an infant, and expressly or impliedly directs the interest to be applied in its maintenance the interest runs from the death of the testator (*l*). But this rule does not apply in the case of a legacy to an adult (*m*).

Gift to
parent.

Where money is given to a parent for the maintenance of his children, the general rule is that he is not bound to account for its application (*n*). The cases in which property is given to a parent for the benefit or maintenance of himself or herself, and his or her children, have been already discussed (*o*).

"Maintenance" and
"education."

A trust for the "maintenance and support" of children include, their education (*p*), but sometimes "maintenance" and "education" are distinguished (*q*).

Maintenance
and educa-
tion not
necessarily
confined to
minority.

In *Knapp v. Noyes* (*r*), a case where gifts were made to infants, with a provision for their maintenance and education, Lord Camden is reported as having said that "maintenance and education are

(*f*) *Supra*, p. 892.

(*g*) *Noel v. Jones*, 16 Sim. 309, ante, p. 885.

(*h*) *Bond v. Dickinson*, 33 L. T. 221.

(*i*) See *Cusack v. Jellico*, 22 W. R. 344 (settlement by deed). In *Falls v. Alford* (*Re Black*), [1907] 1 Ir. R. 486, a legacy to A. for her education was held to authorize the expenditure of the capital.

(*k*) Ante, p. 885.

(*l*) *Newman v. Bateson*, 3 Sw. 689; *Pett v. Fellows*, 1 Sw. 561, n.; *Re Richards*, L. R., 8 Eq. 119; *Chidzey v. Whitby*, 41 L. J. Ch. 699, and see

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(*m*) *Raven v. Waite*, 1 Sw. 553.

(*n*) *Berkeley v. Swinburne*, 6 Sim. 613; *Hadow v. Hadow*, 9 Sim. 438; *Browne v. Paull*, 1 Sim. N. S. 92. See *Hammond v. Neame*, ante, p. 895. As to controlling the discretion of a person charged with the duty of maintenance, see ante, p. 892 n. (*h*).

(*o*) Ante, p. 892.

(*p*) *Re Breeds' Will*, 1 Ch. D. 226.

(*q*) *Wilkins v. Jodrell*, 13 Ch. D. 564; *Re Booth*, [1894] 2 Ch. 282.

(*r*) *Amb*. 662.

confined to minority." And in *Gardner v. Barber* (o), Wood, V.-C., avowedly basing his decision on the dictum of Lord Camden, held that a trust for maintenance and education must of itself imply that it was only to last during minority, though not in terms so confined. But in *Soames v. Martin* (p), where a testator directed a sum of money to be applied for the maintenance and education of an infant nephew, but made no disposition of the principal, Shadwell, V.-C., held that the nephew was entitled to the income of the fund during his life. And in *Wilkins v. Jodrell* (q), Hall, V.-C., approved of and followed this decision, pointing out that the decision in *Gardner v. Barber* was based on the mistaken assumption that the dictum of Lord Camden (which was evidently referable to the circumstances of that particular case), was intended to be of general application. There are numerous cases in which property has been given to the widow of a testator for the maintenance of herself and the children. In such a case it is clear that the widow is entitled to maintenance during the whole of her life (r).

Maintenance of widow and children.

If income is given for the maintenance of several persons as joint tenants, they take it for their lives and for the lives and life of the survivors and survivor, unless the joint tenancy is severed (s).

Joint tenants.

Where income is given to trustees upon trust to apply it for "the board, lodging, maintenance, support and benefit" of A. in such way as they think proper in their absolute discretion, and so that A. shall not have power to alienate or anticipate the income, they cannot apply it otherwise than for A.'s benefit, and if he becomes bankrupt it belongs to his creditors (t). But this result can be avoided by giving the trustees power to apply such part of the income as they think fit, or by giving them a power of selection among several objects (u).

Effect of bankruptcy.

The rule that maintenance is not confined to minority applies where income is given for the maintenance, or maintenance and education, of A. during the life of B.; in the absence of words

Trust for maintenance of A. during life of B.

(o) 18 Jur. 508. The decision was probably right so far as the intention of the testator went, for he directed his trustees to pay or apply a yearly sum for the maintenance and education of a child who, if she attained majority, would take a share in the capital. The same remark applies to *Foley v. Parry*, 2 My. & K. 138. The decision in *Ryan v. Keogh* (Ir. R., 4 Eq. 357), where an annuity for the maintenance of A.'s children was held to cease on the death of A., the children being then all of age, seems to have turned on the special

words of the will.

(p) 10 Sim. 287.

(q) 13 Ch. D. 564.

(r) *Carr v. Living*, 28 Bea. 644, 33 Bea. 474; *Berry v. Briant*, 2 Dr. & S. 1, and the cases cited ante, p. 891.

(s) *Wilkins v. Jodrell*, supra, quoted and approved in *Williams v. Papworth*, [1900] A. C. 563.

(t) *Green v. Spicer*, 1 Russ. & My. 395.

(u) See *Twopeny v. Peyton*, 10 Sim. 487; *Re Coleman*, 39 Ch. D. 443, and the other cases cited in Chap. XXIII.

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expressing a contrary intention, A. continues to be entitled to the income after attaining majority. In *Badham v. Mee (v)*, the trust was for the maintenance, education, and bringing up of the three children of A. during A.'s life; one of the children attained twenty-one during his father's life, and he was held to be entitled to his share of the income during the rest of his father's life.

The question most frequently arises in the case of a bequest of income to the testator's wife for life, subject to a trust for the maintenance, or maintenance and education, of the testator's children; it is clear that in such a case a child does not lose his or her right to an allowance for maintenance merely by attaining majority, or in the case of a daughter, marrying: and the Court will, if necessary, ascertain what, if any, allowance ought to be made (w).

Postpone-
ment of
distribution.

The effect of a trust for the maintenance of adult as well as infant members of a class, may be to postpone the distribution of vested shares (x).

Income for
maintenance
primâ facie
confined
to life of
beneficiary.

Where the income of a fund, or an annuity, is given for a person's maintenance, it would naturally be supposed that the testator intended it for the personal benefit of that person, and that the gift would cease on his death. Thus in *Wilkins v. Jodrell (y)*, a testator gave to A. an annuity of 100*l.* and directed that in the event of her death it should be continued to her children for their maintenance and education; Hall, V.-C., said: "It appears to me obvious that the annuity was meant to be for the personal enjoyment and benefit of the annuitants, and therefore that it was not meant to be continued beyond their lives."

Decisions to
the contrary.

However, there are some decisions to the effect that where an annuity is given for the maintenance of A. during the life of B., it does not cease on the death of A. Thus, in *Lewes v. Lewes (z)*, a testator gave an annuity of 300*l.* for the maintenance, clothing and education of his son's children during the life of their father; all the children attained twenty-one, and one of them died during the father's lifetime; Shadwell, V.-C., said that the gift was equivalent to a gift "for the benefit of the children," and that the personal representatives of the deceased child were entitled to one-third

(v) 1 Russ. & My. 631.

(w) *Longmore v. Elcum*, 2 Y. & C. C. 363; *Scott v. Key*, 35 Bea. 291; *Re Booth*, [1894] 2 Ch. 282. The older cases as to the effect of a daughter marrying are, *Camden v. Benson*, 4 L. J. Ch. 256, cited 8 Bea. at p. 350; *Bowden v. Laing*, 14 Sim. 113; *Carr v. Living*, 28

Bea. 644, 33 Bea. 474. The question what words will create a trust for maintenance is discussed ante, p. 891.

(x) *Berry v. Briant*, 2 Dr. & S. 1.

(y) 13 Ch. D. 564. See also Chap. XXXI.

(z) 16 Sim. 266.

of the 300*l.* a-year during the life of the father (a). How this could benefit the deceased child is not explained. In *Bayne v. Crowther* (b), and *Attwood v. Alford* (bb), Romilly, M.R., followed the same principle. These decisions seem to be based on a misapprehension of the rule that where the capital of a fund is given for the maintenance of A., this is equivalent to a simple legacy to A., on the principle already discussed (c). This principle, however, is not required in the case of a gift of income (d). In *Re Ord* (e), where the testator gave property to A. for life with remainder to B., and bequeathed an annuity of 40*l.* to B. during A.'s life, James, L.J., said: "We may make a guess that the son [B.] was intended to have the 40*l.* only for his personal maintenance, and it may be difficult to imagine why it should be continued after his death. But it is in express terms an annuity to be paid until the death or second marriage of the testator's widow, and there is nothing which justifies us in cutting it down to the life of the son." Baggallay, L.J., said: "With regard to the annuity, I felt at one time some doubt; I was disposed to think that it was intended only for the personal enjoyment of the son." It is, therefore, submitted that a bequest of income or an annuity expressly given for maintenance ought, in the absence of words shewing a contrary intention, to be construed as confined to the life of the beneficiary.

In some cases, where there is a trust for accumulation, and no provision is made for the maintenance of the person entitled subject to the trust for accumulation, the Court will presume that the testator must intend that the person he wished ultimately to benefit should not starve, and should in the meantime receive such maintenance and education as would enable him to take the position intended for him, and consequently will allow maintenance contrary to the terms of the will (f).

Maintenance
contrary to
terms of will.

(a) The V.-C. had expressed a similar opinion in *Webb v. Kelly*, 9 Sim. 469. The decision in *Lewes v. Lewes* is cited in the judgment of the J. C. in *Williams v. Papworth*, [1900] A. C. at p. 567, but in that case the question was whether the income was payable to the infant and adult children as joint tenants.

(b) 20 Bea. 400.

(bb) L. R., 2 Eq. 479.

(c) Ante, p. 885.

(d) See *Wilkins v. Jodrell*, supra.

(e) 12 Ch. D. 22.

(f) *Revel v. Wilkinson*, 1 Ves. sen. 93; *Benett v. Wyndham*, 23 Bea. 521, 4 D.

F. & J. 259; *Aveline v. Melhuish*, 10 Jur. N. S. 788; *Griggs v. Gibson*, 21 W. R. 818; *Re Collins*, 32 Ch. D. 229; *Re Walker*, [1901] 1 Ch. 879; *Havelock v. Havelock*, 17 Ch. D. 807; *Re Colgan*, 19 Ch. D. 305, where a provision for recoupment was made. See *Re Arbuckle*, 14 L. T. N. S. 538; *Re Alford*, 32 Ch. D. 383; *Re Tanner*, 53 L. J. Ch. 1108. In *Re Smeed*, 54 L. T. 929, Chitty, J., seems to have questioned the decision in *Havelock v. Havelock*, and it was disapproved by the First Court of Appeal in *Kemmis v. Kemmis*, 15 L. R. Ir. 90. Compare *Festing v. Allen*, 5 Hare, 573.

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Several
funds for
maintenance.

Ability of
father.

Accumula-
tions.

Statutory
provisions for
maintenance.

Where there are several funds provided by different persons for the maintenance of an infant, or a lunatic, or other person under disability, the interest of the beneficiary must alone determine which of the funds is primarily applicable (*g*).

The question sometimes arises whether the income of trust funds can be applied for maintenance where the father is of ability to maintain his children. If there is only a power of maintenance, the father, in such a case, is not necessarily entitled to receive the income and apply it for maintenance, but he is so entitled if there is a trust (*h*).

Where a will gives maintenance out of the interest on a legacy, accumulations of past income may be applied for this purpose (*i*).

The Conveyancing Act, 1881 (*j*), sects. 42 and 43, confers on trustees powers of applying income of the property of infants during minority, or, in the case of women, till marriage; sect. 42 applies only to income derived from land to which the infant is beneficially entitled in possession; sect. 43 applies to all property held in trust for an infant; both sections contain provisions for the accumulation of unapplied income, and it will be observed that the destination of accumulations of income under the respective sections is not identical. The powers do not apply in any of the following cases:

(1) Where the vesting is or may be postponed until after the age of twenty-one years (*k*).

(2) Where the property produces no income. Thus, a legacy to an infant which is payable at twenty-one (whether vested or contingent) does not as a general rule carry interest (*l*), and consequently there is no income out of which to give maintenance; that is to say, the statutory power of maintenance does not affect the construction of the will (*m*). Where there is a gift to several contingently on attaining twenty-one, the member of the class who first attains twenty-one does not then become entitled to the income of

(*g*) *Foljambe v. Willoughby*, 2 S. & St. 165; *Bruin v. Knott*, 1 Ph. 572; *Methold v. Turner*, 4 De G. & S. 249; *Re Ashley*, 1 R. & Myl. 371. As to the rule where several sources of income are available under a will which contains no express trust for maintenance, see Chap. XXX.

(*h*) *Newton v. Curzon*, 16 L. T. 221 (where the words "shall and may" were held to constitute a trust); *Malcolmson v. Malcolmson*, 17 L. R. Ir. 69. See also *Ransome v. Burgess*, L. R., 3 Eq. 773 (settlement); *Stocken v. Stocken*, 4 Sim. 152, 4 M. & Cr. 95 (settlement).

(*i*) *Edwards v. Grove*, 2 D. F. & J. 210.

(*j*) Repealing the corresponding provisions of Lord Cranworth's Act (23 & 24 Vict. c. 145), as to which see *Re Cotton*, 1 Ch. D. 232; *Re Buckley's Trusts*, 22 Ch. D. 583.

(*k*) *Re Judkin's Trusts*, 25 Ch. D. 743.

(*l*) As to the exception to the rule where the testator is the parent of or in loco parentis to the infant, see Chap. XXX.

(*m*) *Re Dickson*, 29 Ch. D. 331. The rule was the same under Lord Cranworth's Act: *Re George*, 5 Ch. D. 837.

the whole fund, but those under twenty-one can be maintained out of the income of their contingent shares, although the class is capable of increase (*n*).

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The unapplied income and the accumulations thereof form an accretion to capital. Consequently, if the gift is vested, the surplus income belongs to the infant, whether he takes absolutely, or subject to a gift over on his dying under twenty-one (*o*), or has only a life interest (*p*). But if the gift is contingent on the infant attaining twenty-one, and he dies under that age, or attains twenty-one but has only a life interest, in either case the surplus income forms part of the capital; in the latter case, therefore, the legatee on attaining twenty-one is only entitled to the income of the accumulations (*q*).

Statutory accumulations.

The statutory provisions do not alter the rule that a contingent legacy, given to an infant to whom the testator is in loco parentis, carries interest by way of maintenance, but "the Court determines the quantum of the allowance, either the whole of the usual interest allowed by the Court, or less, according to circumstances" (*r*). Where there is a residuary bequest to an infant, the statutory powers of maintenance apply as soon as the residue is ascertained (*s*).

Effect of statutory provisions.

Trusts for Accumulation.—This subject has been already considered in Chapter XI., in connection with the Thellusson Act. The cases in which income is accumulated without any express trust for that purpose have also been referred to (*t*). The statutory powers given by the Conveyancing Act have been mentioned in the preceding section.

Where a testator divides his residue into shares, and directs the income of each share to be accumulated, the question may arise whether the accumulations arising from each share go with it, or form part of the general residue (*tt*).

In *Mole v. Mole* (*u*) maintenance was allowed to an infant out of

(*n*) *Re Holford*, [1894] 3 Ch. 30 (overruling *Re Jeffery*, [1891] 1 Ch. 671); *Re Jeffery*, [1895] 2 Ch. 577.

(*o*) *Re Buckley's Trusts*, 22 Ch. D. 583 (a decision under Lord Cranworth's Act).

(*p*) *Re Humphreys*, [1893] 3 Ch. 1.

(*q*) *Re Bowlby*, [1904] 2 Ch. 685 (settled legacy), disapproving *Re Scott*, [1902] 1 Ch. 918 (settled share of residue), in which Buckley, J., followed the same line of reasoning as North, J., in *Re Wells*, 43 Ch. D. 281. The decision in *Re Bowlby* justifies the remark of Mr. Challis (Hood and Challis, 5th edition, 118), that this line of reasoning

"attributes to [s. 43 of the Conveyancing] Act an intolerable degree of looseness in the use of language."

(*r*) Roper on Legacies, 4th edition, p. 1257, cited with approval by Romer, L.J., in *Re Bowlby*, [1904] 2 Ch. at p. 706; and see Chap. XXX. In the same case, Cozens-Hardy, L.J., suggested that the statute does not apply to a legacy until it has been appropriated.

(*s*) *Re Smith*, 42 Ch. D. 302.

(*t*) *Supra*, p. 929.

(*tt*) *Fulford v. Hardy*, [1909] A. C. 570.

(*u*) 1 Dickens, 310.

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the residue of the personal estate bequeathed to him by his father, where the will directed the interest to accumulate till the infant attained twenty-one, and if he died before, the whole was given over.

Liberal-
ly con-
strued.

Trusts for Advancement.—Trusts of this nature usually receive a wide construction. Thus in *Re Kershaw's Trusts* (v) a power to apply part of a fund for the advancement of a married woman “or otherwise for her benefit,” was held to justify an advance to her husband to be used as capital in his business, the husband giving his bond as security. In *Talbot v. Marshfield* (w), a power of advancement for setting up the children of the testator in business was held to enable an advance to be made to a married daughter for the purpose of a farming business, her husband covenanting that the business should be for her separate use, but not an advance for the purpose of paying the husband’s debts. In *Re Brittlebank* (x) the will contained a power for the trustees to apply the capital of a fund for the “benefit and advancement in the world” of the person entitled to the income of the fund for life: it was held that the word “and” must be read “or,” and that the trustees might apply the fund not merely for advancement in the strict sense of the term, but for any purpose for the benefit of the legatee. In *Lowther v. Bentinck* (y), a power to apply part of a fund “in or towards the preferment or advancement of L., or otherwise for his benefit,” was held to authorize the payment of L.’s debts.

But *primâ facie* an advancement “is a payment to persons who are presumably entitled to, or have a vested or contingent interest in, an estate or legacy before the time fixed by the will for their obtaining the absolute interest in a portion or the whole of that to which they would be entitled” (z), and a clause which merely says: “I give a power of advancement to my trustees,” does not authorize advances out of corpus to persons who only take a life interest (a).

Effect of
advancement.

The proper exercise of a power of advancement takes the money expended out of settlement altogether, and the person advanced is not afterwards bound to account for it or bring it into hotchpot (b).

Duration of
power.

A power of advancement of a portion of a person’s expectant or presumptive share is not confined to minority, or (in the case of a

(v) L. R., 6 Eq. 322.

(w) L. R., 3 Ch. 622.

(x) 30 W. R. 99.

(y) L. R., 19 Eq. 166.

(z) Per Cotton, L.J., 55 L. T. at p.

556.

(a) *Re Aldridge*, 55 L. T. 554.

(b) *Re Fox*, [1904] 1 Ch. 480: following *Re Gosset's Settlement*, 19 Bea. 529; *Lawrie v. Bankes*, 4 K. & J. 142.

woman) to spinsterhood (*bb*); nor does it come to an end merely because the probability of such person attaining a vested interest is in fact very small. Thus, where a testator directed that in the event of his sister A. marrying and having children, his property should be divided among the children of his sisters A. and B. upon the youngest child attaining twenty-one, and empowered his trustees to raise a portion of the expectant, presumptive, or vested share of any child of B. for his or her advancement; A. was a widow of fifty-four years of age, and had no child: it was held that the power continued in operation during the lifetime of A. (*c*).

Discretionary Trusts and Powers.—The term “discretionary trust” is often used in the sense of a trust for the benefit of an improvident person. Under such a trust the trustees have a discretionary power, either to apply such part of the fund (capital or income) as they think fit for the maintenance or benefit of the cestui que trust, or to apply the whole of the income for the maintenance or benefit of several named persons, including the spendthrift, in such manner as the trustees think fit. In either case the effect is that he has no right capable of voluntary or involuntary assignment (*cc*). A testator who has the ordinary power of appointing settled property among his children, cannot exercise the power by appointing a share to trustees, subject to a discretionary trust for the benefit of one of his children, as this would be a delegation of the power (*d*).

Spendthrift trust.

A discretionary power given to trustees of dealing with the trust property, is *primâ facie* given to them as an incident of their office, and passes to their successors in office (*dd*).

When annexed to office.

A direction given to trustees to sell at their discretion is not equivalent to a direction that the trustees may sell or not at their absolute discretion (*e*).

As a general rule, the Court will not interfere with the exercise of a discretion so long as the trustees act honestly (*ee*).

(*bb*) *Pride v. Fooks*, 2 Bea. 430.

(*c*) *Re Hocking*, [1898] 2 Ch. 567.

(*cc*) See *Re Coleman*, 39 Ch. D. 443, and other cases cited ante, p. 925.

(*d*) *Farwell on Powers*, 441. *Chester v. Chadwick*, 13 Sim. 102.

(*dd*) *Re Smith*, [1904] 1 Ch. 139, where Farwell, J., expressed the opinion that the general principle laid down by Grant, M.R., in *Cole v. Wade*, 16 Ves. 27, is inconsistent with the principle acted on by the C. A. in *Crawford v.*

Forshaw, [1891] 2 Ch. 261, where it was held that a discretionary power given to “my executors herein named” could not be exercised by one of them who renounced probate.

(*e*) *Re Atkins*, 81 L. T. 421. *Miller v. Miller*, L. R., 13 Eq. 263, so far as contra, seems to be wrong.

(*ee*) *Gisborne v. Gisborne*, 2 A. C. 300; *Tabor v. Brooks*, 10 Ch. D. 273; *Bethell v. Abraham*, L. R., 17 Eq. 24; *Re Brown*, 29 Ch. D. 889; *Re Smith-*

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A trustee paying money into Court incapacitates himself from exercising any of the discretions he may have had (*f*), but in some cases the Court will exercise the discretion (*g*). An administration action does not put an end to the exercise of a discretion by trustees (*h*), but it is proper for them to obtain the sanction of the Court to all important steps taken by them, and after an administration judgment the Court will supervise the exercise of their discretions and powers (*i*).

It has been mentioned earlier in this chapter that where a legacy is given to a person and is expressed to be given for a particular purpose, e.g., to bind him apprentice (*j*), though the purpose may fail, the legatee in some cases is entitled to the legacy. But where a discretion is given to trustees to advance or pay money for a particular purpose, and the discretion is not exercised, there is no gift to the person for whose benefit the money was to be applied. Thus, where a testator authorized his trustees to apply any sum not exceeding 600*l.* in the purchase of church preferment for A., and A. died before any sum had been so applied, it was held that the gift wholly failed (*k*).

Where a testator gives wide discretions to trustees, their exercise is not controlled by the wishes of the testator being known to the trustees (*l*), or by the fact of the person to be benefited being a lunatic (*m*).

Exercise of
discretion by
the Court.

Where trustees refuse to exercise a discretion, and thus affect the rights of beneficiaries, the Court will direct the necessary acts to be done (*n*).

Bosanquet's Trusts, 53 Sol. J. 430, and the cases on a discretionary power to postpone conversion, ante, p. 918. As to discretionary trusts for maintenance, &c., see ante, p. 892.

(*f*) *Re Nettlefold's Trusts*, 59 L. T. 315; *Re Wright's Trusts*, 3 K. & J. 419; *Re Murphy's Trust*, [1900] 1 Ir. R. 145. *Re Landon's Trusts*, 40 L. J. Ch. 370, is opposed to the general current of authority.

(*g*) *Re Ashburnham's Trusts*, 54 L. T. 84.

(*h*) *Brophy v. Bellamy*, L. R., 8 Ch. 798 (application of income for maintenance).

(*i*) *Cafe v. Bent*, 3 Ha. 245; *Turner v. Turner*, 30 Bea. 414; *Re Gadd*, 23 Ch. D. 134; *Re Norris*, 27 Ch. D. 333 (appointment of new trustees); *Bethell v. Abraham*, L. R., 17 Eq. 24 (investments); *Re Mangell*, 54 L. J. Ch. 883 (sale).

(*j*) *Barlow v. Grant*, 1 Vern. 255.

(*k*) *Cowper v. Mantell* (No. 2), 22 Bea. 231. Other illustrations of this doctrine are: *Lewis v. Lewis*, 1 Cox, 162; *Robinson v. Cleator*, 15 Ves. 526; *Bull v. Vardy*, 1 Ves. jr. 270; *Down v. Worrall*, 1 Myl. & K. 561.

(*l*) *Re Squire's Trust*, 17 T. L. R. 724.

(*m*) *Gisborne v. Gisborne*, 2 A. C. 300.

(*n*) See *Prendergast v. Prendergast*, 3 H. L. C. 195; *Lord v. Godfrey*, 4 Madd. 455, and other cases cited in Chap. XXXIV. *Nickisson v. Cockill*, 3 D. J. & S. 622; *Tempest v. Lord Camoys*, 21 Ch. D. 576, n. But if the discretion relates to a question of detail, the Court will not interfere with the trustees, even if there is a difference of opinion among them: *Marquis Camden v. Murray*, 16 Ch. D. 161; *Tempest v. Lord Camoys*, 21 Ch. D. 571; *Re Bryant*, [1894] 1 Ch. 324; *Re Lever*, 76 L. T. 71.

A testator may relieve his trustees from the operation of the general rule that a trustee may not make a profit out of the trust, but special words are required to have this effect (*nn*).

VII.—Devolution of Trusts and Powers.—Disclaimer—Survivorship, &c.—If a testator gives a power of sale (but no estate) to “my executors hereunder named,” a surviving executor can sell (*o*). Executors.

As a general rule, where a power is given to “my executors,” even if it involves the exercise of a discretion (such as the selection of institutions to share in a charitable gift), it is given to them in the character of executors, and can be exercised by the executors for the time being, but not by a renouncing executor. But if it is given to “my executors A. and B.” or to “my executors herein named,” then it is a question of the construction of the particular will whether it is given to them personally, or in the character of executors (*p*).

Where a discretionary power (such as the selection of charities) is given to “A. B., my executor,” and A. B. renounces, the result of holding that the power is annexed to the office is that the power is gone (*q*). In an Irish case (*r*) it was held that a power of sale given to “my executor, J. L.,” was exerciseable by J. L., notwithstanding his renunciation. Sole executor.

In the case of trustees, the old doctrine was (or was supposed to be) that wherever a power was of a kind which indicated personal confidence, it was *primâ facie* understood to be confined to the individual to whom it was given, and would not, except by express words, pass to others to whom the same character might happen to belong (*s*). But this doctrine may be regarded as obsolete, and if a testator appoints persons to be trustees of his will, and gives to “my said trustees” various powers and discretions, they can be exercised by the trustees or trustee for the time being of the will (*t*). Trustees.

(*nn*) *Re Sykes*, [1909] 2 Ch. 241.

(*o*) *Houell v. Barnes*, Cro. Car. 382; and see *Lee v. Vincent*, Cro. Eliz. 26 (power to a class to sell); *Yates v. Compton*, 2 P. W. 308 (renouncing executor).

(*p*) *Crawford v. Forshaw*, [1891] 2 Ch. 261; *Re Fisher and Haslett*, 13 L. R. Ir. 326; *Keates v. Burton*, 14 Ves. 434; *Earl Granville v. McNeile*, 7 Ha. 156. As to the stat. 21 Hen. VIII. c. 4, see

Peppercorn v. Wayman, 5 De G. & S. 230.

(*q*) *Att.-Gen. v. Fletcher*, 5 L. J. Ch. 75.

(*r*) *Madden v. Madden*, 23 L. R. Ir. 167.

(*s*) *Cole v. Wade*, 16 Ves. 27.

(*t*) *Re Smith*, [1904] 1 Ch. 139, and cases there cited; *Re Perrott and King's Contract*, 90 L. T. 156.

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If a testator devises to trustees upon trust for sale, and one of them disclaims, the other trustees or trustee can sell and give a receipt for the purchase money (*u*), and if one dies the survivors can sell (*v*).

Bare powers.

But this rule did not apply to bare powers, and it is therefore provided by the Trustee Act, 1893, s. 22 (re-enacting sect. 38 of the Conveyancing Act, 1881), that where, by an instrument coming into operation after 1881, a power or trust is given to or vested in two or more trustees jointly, it may be exercised or performed by the survivors or survivor, unless a contrary intention is expressed.

The Conveyancing Acts, 1881 and 1882, contain provisions as to the disclaimer and release of powers (*w*).

Succession to trusteeship.

When the sole trustee of a will dies, it is not always necessary to obtain the appointment of new trustees, for the testator may have indicated an intention that the persons in whom the trust property vests on the death of a sole trustee, shall exercise the trusts and powers contained in the will. The rules on this question depend partly on the language of the will, partly on the nature of the property, and partly on the date of the death of the sole trustee.

Before 1882.

(A) In the case of lands of inheritance, where the sole trustee has died before 1882, the principal rules are as follows:—

“Heirs or assigns.”

If a testator gives real property to two or more trustees, their heirs and assigns, upon certain trusts, and declares that the trusts are to be performed by the said trustees and the survivor of them, his heirs or assigns, and the surviving trustee devises the trust estate to A., B., and C., upon the trusts, &c., expressed in the will of the original testator, this gives A., B., and C. all the powers conferred on the original trustees (*y*).

If in such a case the surviving trustee allows the trust estate to descend, his heir can execute the trust (*z*).

“Heirs” only.

If the trust is made exerciseable by the survivor of the original trustees, or the heirs of the survivor, and the survivor devises the trust estate to A. and B. upon the trusts affecting the same, they

(*u*) *Crewe v. Dicken*, 4 Ves. 97; *Adams v. Taunton*, 5 Mad. 435; *Nicholson v. Wordsworth*, 2 Sw. 365.

(*v*) *Lane v. Debenham*, 11 Ha. 188; *Brassey v. Chalmers*, 4 D. M. & G. 528; *Re Bacon*, [1907] 1 Ch. 475.

(*w*) As to the kind of powers which can be disclaimed or released, under these statutes or otherwise, see *Re Eyre*, 49 L. T. 259; *Weller v. Ker*, 11 R.,

1 H. L. Sc. 11; *Re Radcliffe*, [1892] 1 Ch. 227. See also *Re Fisher and Haslett*, 13 L. R. Ir. 546.

(*y*) *Titley v. Wolstenholme*, 7 Bea. 425; *Ashton v. Wood*, 3 Sm. & G. 436; *Hall v. May*, 3 K. & J. 585. The doubt raised by *Ockleston v. Heap*, 1 De G. & S. 640, is not well founded.

(*z*) *Re Cunningham and Frayling*, [1891] 2 Ch. 567.

cannot execute the trust (a), because "assigns" were not mentioned, and the heir cannot execute it, because the property is not vested in him. In such a case the surviving trustee should allow the trust estates to descend, and then his heir can execute the trust. The same result follows if a testator simply devises the land to A. and B. and their heirs on trust to sell (b).

If a testator devises land to A. and B. and their heirs, upon trust that "my said trustees or the trustees or trustee for the time being of my will" shall sell (or whatever the trust may be), this enables the heir of the survivor of A. and B. to execute the trust (c).

"Trustees
for the time
being."

Conveyancing
Act, 1881,
s. 30.

(b) In the case of a sole trustee dying after 1881, the devolution of land (d) forming part of the trust estate is regulated by sect. 30 of the Conveyancing Act, 1881, which originally applied to lands of copyhold or customary tenure, as well as to freeholds (dd); the section has, however, been repealed as regards copyhold and customary land vested in the trustee as tenant on the court rolls (e). The result is that where X., a sole trustee of freeholds, dies since 1881, having devised them to A. and B. upon the trusts of the original will, A. and B. cannot execute the trust under the doctrine of *Titley v. Wolstenholme*, because the land does not pass to them, but to the personal representative of X. (ee). If, however, the will of the original testator is so expressed that under the old rule the trust would have been exercisable by the heirs of X., it is now exercisable by his personal representative (f). And, of course, if land is given to trustees upon trust that they "or their executors or administrators" shall sell (or whatever the trust may be), then the personal representatives of the surviving trustee can execute the trust.

(a) *Cooke v. Crawford*, 13 Sim. 91; *Wilson v. Bennett*, 5 De G. & S. 475; *Macdonald v. Walker*, 14 Bea. 556; *Ashton v. Wood*, 3 Sm. & G. 436; *Stevens v. Austen*, 3 E. & E. 685. In *Osborne to Rowlett*, 13 Ch. D. at p. 774, Jessel, M.R., refused to follow *Cooke v. Crawford*, but in this he was wrong: *Re Morton and Hallett*, *Re Crunden and Meux*, infra. See Chap. XXVI., where *Cooke v. Crawford* is discussed.

(b) *Re Morton and Hallett*, 15 Ch. D. 143.

(c) *Ibid.*

(d) Other than leasehold land, as to which see infra, under Rule (n).

(dd) *Hall v. Bromley*, 35 Ch. D. 642.

(e) Copyhold Act, 1887, s. 45; Copyhold Act, 1894, s. 88. As to the effect of this repeal as regards dealings with

copyholds in the interval, see *Re Mills' Trusts*, 37 Ch. D. 312, 40 Ch. D. 14. See further as to copyholds, post, Chap. XXVI.

(ee) See further as to the section, post, Chap. XXVI., where it is set out at length.

(f) *Re Waidanis*, 77 L. J. Ch. 12. The report in the Law Reports ([1908] 1 Ch. 123) does not give the terms of the will of the original testator. This omission seems to have produced an erroneous impression as to the point decided in the case: see the dictum of Neville, J., in *Re Routledge's Trusts*, [1909] 1 Ch. at p. 283 (which appears to refer to *Re Waidanis*, and, it is submitted, goes beyond the decision in that case), and some observations in *Solicitors' Journal*, Vol. 52, p. 189.

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No reference
to successor
in title.

(c) But if land is simply devised to A. and B. upon trust that they shall sell, or upon trust that they or the survivor of them shall sell (or whatever the trust may be), neither the heir nor the personal representative of the survivor can execute the trust, because there are no words indicating an intention that the trusteeship shall follow the legal estate (*g*).

Leaseholds.

(d) In the case of leaseholds, if the property is given to A. and B., their executors and administrators, upon certain trusts, and B. survives A. and dies without dealing with the trust property by will, his executors or administrators can execute the trusts. But if he bequeaths the leaseholds to X. and Y. to hold upon the trusts on which he held them, X. and Y. cannot execute the trusts, even if they are also appointed executors (*gg*).

It was at one time supposed that if a sole trustee died and his representatives acted as trustees under the doctrine laid down in *Re Morton and Hallett*, or even if they accepted the trust and were willing to act, this suspended the operation of an express power to appoint new trustees. This theory (which would have produced inconvenient results) has been held to be unsound (*h*).

Power not
connected
with office.

The better opinion seems to be that a bare power given to two or more persons by name, or as a class, without reference to any office of trust or administration, cannot be exercised by the survivors or survivor (*i*).

It seems that a power to A. and B. and their heirs is exerciseable after the death of A. by his heir and B. (*j*).

VIII.—Failure of Trust.—The question what becomes of a testator's residuary real or personal estate, when the trusts declared concerning it fail, wholly or in part, has been discussed in Chapter XXI. The question also occurs, though more rarely, in the case of a specific devise, or a specific or pecuniary legacy. In *Shelley v. Shelley* (*k*), a testatrix bequeathed jewels to A., to go and be held

(*g*) *Mortimer v. Ireland*, 6 Ha. 196; *Re Ingleby and Boak*, 13 L. R. Ir. 326; *Re Crunden and Meux*, [1909] 1 Ch. 690.

(*gg*) *Re Burt's Estate*, 1 Dr. 319. But the accuracy of this decision seems doubtful, as the leaseholds vest in the executor, and cannot pass to the specific legatee without his assent: see Davidson, *Prec.*, vol. iv. p. 54 n.

(*h*) *Re Routledge's Trusts*, [1909] 1 Ch. 280.

(*i*) Farwell on Powers, 455 seq., citing

Atwaters v. Birt, Cro. Eliz. 856; *Montefiore v. Browne*, 7 H. L. C. 241; *Vincent v. Lee*, Cro. Eliz. 26; *Sykes v. Sheard*, 2 D. J. & S. 6; *Jefferys v. Marshall*, 19 W. R. 94.

(*j*) Farwell, 453, citing *Mansell v. Mansell*, Wilm. 51; *Townsend v. Wilson*, 1 B. & Ald. 608; *Hall v. Dewes*, Jac. 189.

(*k*) L. R., 6 Eq. 540; as to the settlement directed in pursuance of the will, see ante, p. 696. On the general principle, see *Wood v. Cox*, 2 My. & C. 684;

as heirlooms by him and by his eldest son, and to descend to the eldest son of such eldest son, and so on, as far as the rules of law or equity would permit, with a request that A. would give effect to the testatrix's wish : it was held that in the event of these executory trusts failing, the jewels would belong to A. absolutely.

On the other hand, in *Stubbs v. Sargon* (l), a testatrix bequeathed a specific sum of 2,000*l.* to S., a married woman, for her sole use and benefit, " for the express purpose " of enabling her to present to or dispose of it by will in favour of " either branch of my family," as she might consider most prudent, and there was a reference to S. having " the sole use and power of the said sum "; it was held that this was a gift upon trust, and that, as the trust failed, the 2,000*l.* fell into residue.

This principle applies whenever property is given to a person in such a way as to shew that he takes as trustee and not beneficially (m).

Clarke v. Hilton, L. R., 2 Eq. 810 ; and other cases cited, ante, pp. 715-17 ; also *Bernard v. Minshull*, John. 276, cited, ante, p. 881.

(l) 3 My. & Cr. 507. This case and *Corporation of Gloucester v. Wood*, 3

Ha. 131, are referred to in Chap. XIV., ante, p. 481. In *Doe d. Toone v. Copestake*, 6 East, 328, the only point decided was as to the right of the trustees to recover at law.

(m) Ante, p. 866.

CHAPTER XXV.

SPECIFIC, GENERAL AND RESIDUARY DEVISES.

SPECIFIC DEVISES.

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What is a
specific
devise.

I.—What is a Specific Devise.—Neither Mr. Jarman nor Mr. Powell attempts to define a specific devise. At the present day, “devise” is the technical term for a gift of real estate by will (*a*), and a specific devise is a gift by will of a particular part of the testator’s real estate. Some of the rules for distinguishing specific bequests from general or residuary bequests (as to which see Chaps. XXIX. and XXX.), seem to apply to devises, so far as the physical differences between land and chattels will allow. In most cases no difficulty arises. A devise of “my house at X.,” or “my farm at X.,” or a devise to A. “of such one of my houses at X. as he shall select,” is clearly specific. So is a devise of “all my lands in the parish of A.” (*b*). But a devise of “all my freehold lands,” or of “the residue of my freehold lands,” is general or residuary, as the case may be (*c*).

Devise of
all land
in particular
locality.

Although a devise of all the testator’s land or real estate in a particular locality (such as “the county of A.”) is specific, yet, being expressed in general terms, it resembles in some respects a general or residuary devise, for *prima facie* it will pass all the

(*a*) As to what may be devised see Chap. IV. It has been already mentioned (*ante*, p. 82) that the use of the word “devise” is not essential to pass land by will. Any words indicating an intention to confer an absolute interest are sufficient; as where a testator willed land to the discretion of his father: *Whiskon and Cleyton’s Case*, 1 Leon. 156. So an absolute devise is not cut down by a superadded power of appointment (*Doe d. Herbert v. Thomas*, 3 A. & E. 123), even if it is in favour of a class

(*Brook v. Brook*, 3 Sm. & G. 280; *Howorth v. Dewell*, 29 Bea. 18). Conversely “devise” may operate to pass personalty (*ante*, p. 83).

(*b*) *Springett v. Jennings*, L. R., 6 Ch. 333.

(*c*) *Mason v. Ogden*, [1903] A. C. 1, affirming *C. A. Re Mason*, [1901] 1 Ch. 619, where *Springett v. Jennings* is discussed with reference to the distinction between a specific devise in general terms, and a residuary devise; see *post*, p. 951.

land or real estate in that locality which the testator acquires after the date of the will (*d*).

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It is often said that a general or residuary devise is specific, but this is a loose and inaccurate way of stating the law. Since the Wills Act, the essential characteristic of a residuary devise is that it includes all real estate not otherwise effectually disposed of by the will, unless a contrary intention appears; consequently lands acquired subsequently to the date of the will, or comprised in a devise which is revoked or fails or is void, will *primâ facie* pass under a residuary devise (*e*). When it is said that a residuary devise is specific, all that is meant is that, for the purpose of the payment of the debts of a testator, his specific and residuary devisees rank *pari passu* (*f*).

Difference between specific and residuary devises.

The question what property will pass by a particular description, is discussed in Chap. XXXV., and the effect of changes in the property between the date of the will and the testator's death in Chap. XII.

Description.

Sometimes a testator devises real estate by a description referring to his own title (*g*).

The question whether leaseholds will pass by a specific devise of "land," or "freehold land," or "real estate," either by a specific or general description, is discussed in connection with the operation of a residuary devise (*gg*).

Whether leaseholds pass as "land," &c.

II.—Operation of a Specific Devise.—As a general rule, a devise of a specific property gives the devisee all the testator's interest in it (*h*). Accordingly, where the owner of land in fee simple becomes entitled to a charge on it, a devise of the land will pass the charge, unless there are circumstances shewing that it was the intention, or to the interest, of the testator, to keep the charge alive (*i*).

What passes by a specific devise.
Charge on land.

It is on this principle that where a testator who has entered into a contract by which he gives a person an option of purchasing

Benefit of contract of sale or purchase.

(*d*) Ante, pp. 407 seq. and infra, p. 942, note (*e*).

(*e*) Post, p. 948.

(*f*) *Lancefield v. Iggulden*, L. R., 10 Ch. 136. See Mr. Jarman's note on the case of *Long v. Short*, post, Chap. LIV.

(*g*) As in *Doe v. Meyrick*, 1 Cr. & M. 820; *West v. Lawday*, 11 H. L. C. 375; *Emuss v. Smith*, 2 De G. & S. 722; *Re Brocket*, [1908] 1 Ch. 185, all referred to post, Chap. XXXV.

(*gg*) Post, pp. 961 et seq.

(*h*) See *Vallance v. Vallance*, 2 N. R. 229; *Mathews v. Mathews*, L. R., 4 Eq. 278; *Leckey v. Watson*, Ir. R., 7 C. L. 157; *Re Louman*, [1895] 2 Ch. 348; *Re Guyton and Rosenberg*, [1901] 2 Ch. 591, and other cases cited in Chap. XXXV. As to allotments, see *Hicks v. Sallitt*, 3 D. M. & G. 782; *Williams v. Phillips*, 8 Q. B. D. 437.

(*i*) See Chap. XXVI. As to a devise of mortgaged land by a mortgagee in possession passing the mortgage debt, see post, Chap. XXVI.

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his (the testator's) land, makes a will specifically devising the land, and the option is exercised after the testator's death, the devisee is entitled to the purchase price (*j*). But if a testator enters into a contract to purchase land, and specifically devises it, the devisee is only entitled to the property from the completion of the purchase (*k*). The effect of the Real Estate Charges Act, 1877, in cases where the vendor has a lien, has been already referred to (*l*).

Benefit of
contract for
erection of
buildings.

If a testator enters into a contract for the erection of buildings on land belonging to him, and devises the land to A., and dies before the buildings are completed, A. is entitled to have them completed at the cost of the testator's personal estate. But of course this principle does not apply if the contract is for the erection of buildings on land not belonging to the testator (*m*).

Burdens.

Conversely, a specific devisee takes the property subject to its burdens, even if they have been created by the testator himself (*n*), unless the testator's personal estate is primarily liable for them (*o*).

Questions sometimes arise as to the rights of devisees where the surface and the mines are devised to different persons (*p*).

Fixtures.

A devise of a house by an owner in fee of course includes the fixtures, of whatever nature they may be, unless expressly or impliedly excluded, for the rules which govern the rights in respect of fixtures as between landlord and tenant, or tenant for life and remainderman, or heir and executor, do not apply where the same person is absolutely entitled to both freehold and fixtures: the only question is whether the particular chattels are annexed to the freehold (*q*).

Decorative
chattels.

And where the owner of a house devises it, the devisee may be entitled not only to the fixtures strictly so called, but also to tapestry, pictures, and similar articles fitted to the house, as

(*j*) *Drant v. Vause*, 1 Y. & C. C. C. 580, and other cases cited ante, p. 731.

(*k*) *Puzley v. Puzley*, 1 N. R. 509, where the testator had taken a transfer of a mortgage on the property.

(*l*) Ante, p. 78.

(*m*) *Re Day*, [1898] 2 Ch. 510, following *Cooper v. Jarman*, L. R., 3 Eq. 98, and *Holt v. Holt*, 2 Vern. 322 (both cases of intestacy). But if the builder completed the buildings the executors would be bound to pay him out of the testator's personal estate; see *Wentworth v. Cock* (10 Ad. & E. 42), cited in *Cooper v. Jarman*.

(*n*) See *Re Tann*, L. R., 7 Eq. 434 (costs of partition).

(*o*) See Chap. LIV.

(*p*) *Re Scarth*, 10 Ch. D. 499.

(*q*) The principle is illustrated by the effect of a conveyance on sale or mortgage where the vendor or mortgagor is owner of both land and fixtures; see *Colegrave v. Dias Santos*, 2 B. & Cr. 76; *Holland v. Hodgson*, L. R., 7 C. P. 328, where the earlier cases are cited; *Hobson v. Gorringe*, [1897] 1 Ch. 182; *Monti v. Barnes* [1901] 1 K. B. 205. Most of the later cases deal chiefly with the question what amounts to annexation; e.g., *Re Samuel Allen & Sons, Ltd.*, [1907] 1 Ch. 575.

part of a general scheme of decoration, although not affixed to the freehold (r). CHAP. XXV.

An immediate devise of land in fee (s), whether specific or residuary, to a person in esse, carries the rents and profits from the death of the testator (t). If the devisee's interest is liable to be divested on the happening of a contingency (as on his death under twenty-one), he is entitled to the rents and profits until the contingency happens (u). The Apportionment Act, 1870, applies to rents, and consequently, in every case within the act, the first rents received after the testator's death must be apportioned in respect of time; that portion which accrued before the death forms part of the testator's general personal estate (v). The testator may of course, by apt words, give the devisee any rents accrued but not paid (w).

Rents and profits where devise is immediate.

The rule is different if the devise is to an unborn person, or to a person who may be in esse at a future time, or on the happening of a contingency; for, as Mr. Jarman points out (x), "where a specific devise is to take effect in futuro, so that, at the death of the testator, there is no person actually entitled to the immediate income, the rents and profits will, until the devise vests in possession, pass under the residuary clause, if any (xx), and, should the will contain no such clause, will descend to the testator's heir-at-law (y): and it is immaterial whether the future devise in question be vested

Where devise is future.

(r) *Re Whaley*, [1908] 1 Ch. 615, where *Leigh v. Taylor*, [1902] A. C. 157 is commented on.

(s) As to specific bequests of leaseholds, see Chap. XXX., and as to estates for life, see Chap. XXXIV.

(t) Including growing crops and emblements (*Cooper v. Woolfitt*, 2 H. & N. 122; *Blake v. Gibbs*, 5 Russ. 13 n.) unless they are separately bequeathed, e.g. as farming stock; see post, Chap. XXXV.

(u) *Andrew v. Andrew*, 1 Ch. D. 410.

(v) *Capron v. Capron*, L. R., 17 Eq. 288; *Hasluck v. Pedley*, L. R., 19 Eq. 271; where Jessel, M.R., expressed the opinion that the act applies to every will coming into operation after its passing. It does not, of course, affect the construction of a will executed before the passing of the act and containing words sufficient in themselves to pass accrued income: *Jones v. Ogle*, L. R., 8 Ch. 192; see Chap. XXX. As to rent payable in advance; see *Ellis v. Rowbotham*, [1900] 1 Q. B. 740.

(w) See *Roseingrave v. Burke*, Ir. R., 7 Eq. 186, and compare *Jones v. Ogle*, referred to in Chap. XXX., and *Scott v. Best*, 6 L. R. Ir. 7, where a gift of "all my interest" in certain property was held not to include arrears of rent: the decision seems open to question.

(x) First ed. p. 594.

(xx) "*Duffield v. Duffield*, 3 Bligh N. S. 260, though here the residue was devised upon trust for sale." (Note by Mr. Jarman.)

(y) *Stephens v. Stephens*, Ca. t. Talbot, 228; *Bullock v. Stones*, 2 Ves. sen. 521; *Hopkins v. Hopkins*, Ca. t. Talbot 44; 1 Atk. 580; 1 Ves. sen. 268, as corrected in *Hawkins on Wills*, App.; *Duffield v. Duffield*, 3 Bl. N. S. 260; *Hodgson v. Bective*, 1 H. & M. 376; *Holmes v. Prescott*, 33 L. J. Ch. 264; *Re Eddels' Trusts*, L. R., 11 Eq. 559; *Re Freme*, 65 L. T. 183; *Re Francis*, [1905] 2 Ch. 295. Lord Westbury's decision in *Sidney v. Wilmer*, 4 D. J. & S. 84, may be considered overruled: *Wade-Gery v. Handley*, 3 Ch. D. 374.

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Devisee en
ventre.

or contingent," or whether the devise be to the devisee directly or to trustees (z). The result is that if land is devised to the eldest son of A., and A.'s eldest son is en ventre at the testator's death, the rents accruing before his birth go to the residuary devisee or the testator's heir (a).

It is also immaterial that the real estate is given to trustees upon trust for a class of persons contingently on their attaining twenty-one, or the like. In such a case the first child who attains twenty-one is entitled to all the rents until another child attains twenty-one, and so on (b).

But of course if the testator directs that the intermediate rents be applied in the maintenance of the contingent devisee, this prevents them from falling into residue or passing to the heir, unless the devisee is unborn at the death of the testator, in which case the heir or residuary devisee takes them until the birth of the devisee (c).

Devise to
fluctuating
class.

The rule applicable to cases where land is given to a class which is capable of increase, so that it fluctuates from time to time, is considered elsewhere (d).

After-
acquired
property
may pass by
a specific
devise.

As a general rule, when a testator makes a specific devise, he has in his mind a particular property, and does not contemplate the possibility of his making additions to it after the date of the will. But if the words used by him are sufficient, the after-acquired property will pass: as where a testator devises "my cottage and all my land at S.," and afterwards buys an adjoining field and throws it into the land belonging to the cottage, it will pass under the devise, unless the circumstances are such as to negative this construction (e). It is a question which depends on the facts and the terms of the will in each case (f).

(z) *Re Eddels' Trusts*, *supra*, dissenting from *Riley v. Garnett*, 3 De G. & S. 629.

(a) *Re Mowlem*, L. R., 18 Eq. 9. In cases of intestacy the qualified heir is entitled: *Richards v. Richards*, John. 754, not following *Goodale v. Gawthorne*, 2 Sm. & G. 375.

(b) *Re Averill*, [1898] 1 Ch. 523.

(c) *Bullock v. Stones*, 2 Ves. sen. 521. This may be the real ground for the decision in *Best v. Donmall*, 40 L. J. Ch. 160.

(d) Chap. XLII.

(e) *Castle v. Fox*, L. R., 11 Eq. 542. In *Re Portal and Lamb*, 30 Ch. D. 50, the after-acquired land was of such a character as to shew that the testator

did not intend it to pass by the specific devise. See ante, pp. 406 seq., where the effect of sect. 24 of the Wills Act is discussed. *Re Champion*, [1893] 1 Ch. 101, was decided by North, J., on the principle above stated, among other grounds, but the decision of the C. A. went entirely on the question of republication. In *Doe v. Walker*, 12 M & W. 591, also a case of republication, the devise was of "all my lands in the parish of B.," and it was held that lands in B. purchased before the date of the codicil passed: see ante, pp. 200 seq., where this and other cases are referred to.

(f) See Chaps. XII. and XXXVI.

Where a partner in a business, the assets of which include land, by his will specifically devises his share in that land, then if the other assets of the partnership are sufficient to pay the partnership debts, the devisee takes the testator's share in the land free from liability to contribute to the partnership debts (*g*). But if the debts exceed the other assets, the devisee is not entitled to have the excess paid out of the testator's general estate (*h*).

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Devise of share in partnership land.

III.—Failure of Specific Devises.—A specific devise may fail because it transgresses some rule of law, such as the rule in *Whitby v. Mitchell*, or the Rule against Perpetuities (*i*), or because it is uncertain (*ii*).

Perpetuities, uncertainty, &c.

As a general rule, an absolute devise takes effect although it is induced by a mistake on the part of the testator. But where the language of the will is ambiguous, a devise which is apparently made under a mistaken belief that a certain state of facts exists, will, if possible, be construed as intended to be conditional on that state of facts existing (*j*).

Mistake.

In *Hounsell v. Dunning* (*k*), a testatrix devised to her two daughters "the share of my late husband's estate I take or to which I am entitled on his decease . . . and I make this provision for them in lieu of the various freehold and copyhold lands of my late husband which descend to my son on the intestacy of my late husband." In fact, her late husband was entitled to certain copyholds which on his death intestate passed to the testatrix, and not, as she erroneously supposed, to her son; consequently, but for the testatrix's explanatory declaration, it seems clear that they would have passed by the devise to the daughters; the point became immaterial, but Joyce, J., expressed the opinion that they did not pass, because the will shewed an intention that they should not. The accuracy of this view seems doubtful. In *Re Bagot* (*l*), Lindley, L.J., correcting a statement in *Harris v. Harris* (*ll*) as to the operation of a residuary devise where there is an "intentional exclusion" of certain property from its operation, says this: "The intention

(*g*) *Re Holland*, [1907] 2 Ch. 88.

(*k*) *Farquhar v. Hadden*, L. & R., 7 Ch. 1, where the partnership was insolvent and the bequest of the testator's share in certain leaseholds belonging to the partnership consequently failed.

(*i*) *Ante*, Chap. X. As to gifts to superstitious and charitable uses, see

ante, Chap. IX.

(*ii*) Chap. XIV.

(*j*) *See Doe v. Evans*, 10 Ad. & El. 228; *Allen v. Bewsey*, 7 Ch. D. 453 and other cases cited, *ante*, pp. 188 seq.

(*k*) [1902] 1 Ch. 512.

(*l*) [1893] 3 Ch. at p. 358.

(*ll*) Ir. R., 3 Eq. at p. 618.

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to exclude must not be founded on a mistake as to the ownership of the property : it must be an intention to exclude the property even if it is the testator's to dispose of." In *Hounsell v. Dunning*, no doubt, the devise was specific, but it was expressed in general terms ; on a question of this kind it is difficult to distinguish between a specific devise, so expressed, and a general devise : it is not a question whether such a specific devise carries a partial devise which fails (*m*). No doubt it is true, as Joyce, J., remarked, that if the testatrix in *Hounsell v. Dunning* had known that there was a possibility of the copyholds passing by the gift in question, she would have made a different disposition of her property ; but this is not construction, it is conjecture.

Lapse.

A devise may fail by lapse (*n*).

Ademption
by sale or
alienation.

A specific devise necessarily fails if at the death of the testator the devised property does not belong to him, and therefore if he devises Blackacre and afterwards sells or aliens it, the devise fails (*o*). In the case of legacies, this result is called ademption ; in the case of land it is sometimes called revocation by alteration of estate, apparently because in former times the doctrine was treated as a branch of the general principle that any alteration in the estate of the testator operated as a revocation of the devise, although the land was the property of the testator at the time of his death. The subject has accordingly been discussed in connection with revocation (*p*). The effect of a contract of sale or option of purchase has also been considered (*q*).

By contract
or option.Effect of s. 24
of Wills Act.

The case has been suggested of a testator devising specific realty, and afterwards selling it and purchasing other realty answering the same description : the question whether in such a case the after-acquired realty passes by the devise has been already considered (*r*).

Involuntary
conversion.

As a general rule, where conversion is caused by some act beyond the testator's control, the effect is the same as if it had been voluntarily caused by him (*s*) ; thus if a testator devises real property, and it is afterwards converted into money by act of parliament, during the testator's lifetime, the devisee has no claim to the money (*t*). So it is clear that if a testator devised a house which he had insured against fire, and it were burnt down immediately

(*m*) Compare *Springett v. Jennings*, L. R., 6 Ch. 333, explained in *Re Mason*, [1901] 1 Ch. 619.

(*n*) Chap. XIII.

(*o*) Ante, p. 162.

(*p*) Chap. VII.

(*q*) Chap. XXII., ante, p. 729.

(*r*) Ante, pp. 412 seq.

(*s*) As to sales by mortgagees, see ante, p. 731, and for the case of a lease being determined so as to entitle the testator to compensation, see *Coyne v. Coyne*, Ir. R., 10 Eq. 496, cited in Chap. XXII., ante, p. 731.

(*t*) *Frewen v. Frewen*, L. R., 10 Ch. 610.

before his death, the devisee could not claim the insurance moneys (*u*). Sales by the court, and purchases by companies under compulsory powers, are subject to special rules (*v*).

CHAP. XXV.

DEVISES FOR LIMITED INTERESTS.

Limited interests in land may be created not only by express devise, but also by implication or inference (*w*).

Express or implied.

The question what estate is taken by trustees where land is devised to them without words of limitation, for purposes which do not exhaust the fee, is considered elsewhere (*x*).

Devises to trustees for limited purposes.

Where land is devised during the minority of a person, and he dies before attaining majority, the question arises whether the devisee is entitled to hold the land until the minor would, if living, have attained majority, or whether his interest ceases. This question is discussed in another chapter (*y*).

Devise during minority.

A devise may take effect by the creation *de novo* of an easement, rent-charge, condition, or the like (*z*).

Creation of new right by devise.

GENERAL AND RESIDUARY DEVISES.

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I.—Operation of a Residuary Devise in regard to void, lapsed, and partial Specific Devises.—A. *Old Law*.—Mr. Jarman states the law on the subject, applying to wills not affected by the Wills Act, as follows (*a*): “A residuary bequest, it is well known, operates upon all the personal estate of which a testator is possessed at the time of his death, and, consequently, includes

Operation of a general bequest.

(*u*) Compare *Durrant v. Friend*, 5 De G. & S. 343 (chattels). Assuming that sect. 83 of the Fires Prevention (Metropolis) Act, 1774, applies to the whole of England (a view which is not free from doubt; see *Re Quicke's Trusts*, [1908] 1 Ch. 887), it might be contended that, in the case above supposed, the devisee would be entitled to require the insurance moneys to be laid out in rebuilding the house. But the words of the section—“any person interested in or intitled unto any

house” which may be burnt down—seem intended to apply to the interests and titles existing at the time of the fire; in the case supposed nobody could, immediately after the fire, have required the insurance moneys to be laid out in rebuilding.

(*v*) See Chap. XXII.

(*w*) Ante, pp. 629 seq.

(*x*) Chap. XLVI.

(*y*) Chap. XXI.

(*z*) Ante, p. 75; post, Chap. XXXIX.

(*a*) First ed. p. 587.

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Under old law, every general devise was specific in its nature.

Exceptions to this rule;

—in relation to partial and contingent devises;

all specific legacies which are void, or fail by the death of the legatee in the testator's lifetime (b); and such would undoubtedly be its operation, though all the specific legacies were in this situation, so that a bequest, in terms embracing the 'residue,' should become, in event, a gift of the whole. But as under the old testamentary law (which, it will be remembered, still applies to all wills made before the year 1838, whatever be the period of the testator's decease), a testator could only devise the real estate to which he was actually entitled at the time of making his will, it follows that every residuary devise in such a will, however general in its terms, is in its nature specific (c); being in fact a specific disposition of the lands not before given, or, to speak more accurately, not before *expressed to be given* by the will. Thus, if a testator, being seised of Blackacre and Whiteacre, and having no other real estate, [by a will made before 1838] devise Blackacre to A. in fee, and all the rest of the lands to B., B. takes exactly that which he would have taken under a specific devise of Whiteacre, and no more; and, consequently, if the devise to A. fail, from its being devoted to charity, or from the devisee being dead at the time, or from his subsequent death in the testator's lifetime, B. can no more take, by virtue of his residuary devise, the interest so given, or intended to be given, to A., than he could have done under a specific devise of another property" (d). But this general rule admitted of exception in certain classes of cases which will be here very briefly indicated (e).

If the specific devise comprised only a partial or contingent interest in the lands, leaving an ulterior or alternate interest undisposed of, which would, in the absence of disposition, descend to the heir, such undisposed-of interest, even in a will made before 1838, passed by a general residuary devise.

(b) *Brown v. Higgs*, 4 Ves. 708; *Shanley v. Baker*, ib. 732; *Jackson v. Kelly*, 2 Ves. sen. 285.

(c) See Lord Eldon's judgment in *Howe v. Earl of Dartmouth*, 7 Ves. 137; *Broome v. Monck*, 10 ib. 605; *Hill v. Cock*, 1 V. & B. 175; *Spong v. Spong*, 1 Y. & J. 300.

(d) *Goodright v. Opie*, 8 Mod. 123; *Wright v. Hall*, Fortesc. 182; s.c. nom. *Wright v. Horne*. 8 Mod. 222; *Roe v. Fludd*, Fort. 184; *Sprigg v. Sprigg*, 2 Vern. 394; *Doe d. Morris v. Underdown*, Willes, 293; *Watson v. Earl of Lincoln*, Amb. 325; *Oke v. Heath*, 1 Ves. sen. 135; *Cambridge v. Rous*, 8 Ves. 12; *Jones v. Mitchell*, 1 S. & St. 290.

In the first edition will be found some remarks by Mr. Jarman (reprinted in the second, third, and fourth editions), on certain observations of the court of K. B. in the case of *Doe d. Stewart v. Sheffield*, 13 East, 527, as to the application of the principle above stated to devises void ab initio. See also the observations of Romilly, M.R., in *Garner v. Hannynghton*, 22 Bea. 627; and Wood, V.-C., on *Doe v. Sheffield*, in the case of *Smith v. Lomas*, 33 L. J. Ch. at p. 582.

(e) For a fuller discussion of the old law on this subject, see the fourth edition of this work, vol. I. pp. 646 et seq.

Thus, where a person, by such a will, devised certain lands to A. for life or in tail, and the residue of his lands to B. and his heirs; B., under this devise, took the reversion in fee not included in the devise to A. (*f*); and, consequently, if A. died in the lifetime of the testator, he became, at the testator's death, tenant in fee in possession.

So, where a testator devised that A. and his heirs should sell his lands for payment of debts or other purposes, not exhausting the whole beneficial interest, and devised the residue of his real estate to B., the latter devise carried the beneficial interest not comprised in the former (*g*).

The same doctrine, it is clear, applied to executory and contingent devises in fee; for if an estate in fee were devised to a person on the happening of a certain event, it is obvious that the alternate fee depending on the converse event is undisposed of, and, therefore, is an interest on which the residuary clause will operate (*h*).

And a contingent remainder being an interest which has (*i*) an inherent liability to fail, as well through the event upon which it was limited not happening before the determination of the prior particular estate, as through its not happening at all, the interest, which upon a failure of the former kind was left undisposed of by the specific devise, was held to pass by a residuary devise in the same will (*j*).

But if, after carving out a partial or contingent interest, the testator limited the reversion in fee, or the alternative fee, to his own heirs, such devise, though inoperative in law to break the descent, until the enactment on this point (*k*), was considered to indicate an intention to exclude this property from the residuary

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—devises
of partial
interests;

—executory
and contin-
gent devises
in fee.

Contingent
remainder
failing by
destruction of
particular
estate.

Effect of
devise to the
testator's own
heirs in
excluding a
reversion
from a general
devise.

(*f*) *Wheeler v. Waldron*, Allen, 28, 3 P. W. 64, n.; *Cooke v. Gerrard*, 1 Lev. 212; *Rooke v. Rooke*, 2 Vern. 461, 1 Eq. Ca. Ab. 210, pl. 17; *Willows v. Lydcot*, 2 Vent. 285, 3 Mod. 229; see also *Doe d. Briscoe v. Clarke*, 2 B. & P. N. R. 343; *Bennett v. Lowe*, 7 Bing. 535, 5 Moo. & P. 485; *Saumarez v. Saumarez*, 4 My. & C. 331.

(*g*) *White v. Vitty*, 2 Russ. 484, 4 Russ. 584; see also *Goodtitle d. Hart v. Knott*, Cowp. 43.

(*h*) *Goodtitle d. Hart v. Knott*, Cowp. 43; Willes, 300; *Doe d. Moreton v. Fossick*, 1 B. & Ad. 186; *Doe d. Wells v. Scott*, 3 M. & Sel. 300; see also *Vick v. Sueter*, 3 Ell. & Bl. 219.

(*i*) Except in the cases provided for

by stat. 8 & 9 Vict. c. 106, s. 8, and 40 & 41 Vict. c. 33.

(*j*) *Perceval v. Perceval*, L. R., 9 Eq. 386. *Upjohn v. Upjohn*, 7 Beav. 59, is difficult to reconcile with the general current of authority. In that case there were three contingencies: first, if a certain purchase could be and was completed; secondly, if it could not; thirdly, if it could but was not; of these the first and second were provided for; but in the opinion of the M.R. the third, which actually happened, was not: yet he held the property did not pass by the residuary devise.

(*k*) 3 & 4 Will. 4, c. 106, s. 12.

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clause ; and, accordingly, such reversion devolved under the old law to the heir (*l*).

The mere fact, however, that the devisee of the partial or contingent interest specifically devised, was also the general residuary devisee, did not exclude him from taking the remaining interest in such lands in the latter character (*m*).

Destination of reversion during suspense of alternative contingencies.

If a will made before 1838 contained alternative contingent remainders in fee, the reversion, if not otherwise disposed of, vested in the heir pending the contingency, and, if the will contained a residuary devise, would have passed by it during the same period. Thus in *Egerton v. Massey* (*n*), where a testatrix devised estate A. to her niece for life, with remainder to her niece's children living at her death in fee, and for want of such child then to P. in fee ; and gave all the residue of her estate and effects not thereinbefore disposed of to her said niece in fee : it was held that the reversion in fee which, but for the residuary devise, would have vested in the heir-at-law pending the contingency, passed by that devise to the testator's niece.

Extent of general devise under Wills Act.

B. Present Law.—"The points embraced by the preceding positions," says Mr. Jarman (*o*), "can scarcely arise under wills which are subject to the new law, as the act of 1 Vict. c. 26, s. 25, expressly provides, that, unless a contrary intention shall appear by the will, real estate, or the interest in real estate, comprised in any void or lapsed devise, shall be included in the residuary devise, if any; and as such act (sect. 3) extends generally the devising power of a testator to all the real estates to which he shall be entitled at his decease; and, moreover, (sect. 24,) makes the will, with reference to the real and personal estate comprised in it, speak from that period, the result of the whole is, that any testator who dies leaving a will made or republished since 1837, containing a general or residuary devise of real estate (*p*), which takes effect, must be completely testate in

(*l*) *Amesbury v. Brown*, cited 2 W. Bl. 739 ; *Robinson v. Knight*, 2 Ed. 155 ; *Smith d. Davis v. Saunders*, 2 W. Bl. 736, Cowp. 420.

(*m*) *Morgan v. Surman*, 1 Taunt, 289. The position in the text is rather an inference from, than a point expressly decided in, this case ; see also *Williams v. Goodtitle d. David*, 10 B. & Cr. 895 ; *Saumarez v. Saumarez*, 4 My. & C. 331 ; *Ridgeway v. Munkittrick*, 1 D. & War. 84 ; *Egerton v. Massey*, 3 C. B. (N. S.)

338.

(*n*) 3 C. B. (N. S.) 338. The niece (who never had a child), executed a conveyance of the estate which, as the reversion was vested in her by the residuary devise, destroyed the contingent remainders.

(*o*) First ed. p. 593.

(*p*) A will may contain a general devise and also a separate residuary devise ; *West v. Lawday*, 11 H. L. C. 375. And see *Mason v. Ogden*, post.

regard to every portion of his real estate to which he is entitled at his decease, whensoever acquired, and whether originally intended to have been otherwise specifically disposed of or not, if such intention should, for any reason whatever, fail of effect."

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The construction which Mr. Jarman puts on these sections of the Wills Act goes somewhat beyond their literal meaning, for sect. 25 is confined to real estate comprised in any devise "which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect." Suppose that a testator devises Blackacre to A., and his residuary real estate to B., and that A. disclaims the devise: is Blackacre included in the residuary devise? (q) The devise to A. is not, in itself, "incapable of taking effect": it fails by reason of the disclaimer. But Mr. Jarman's construction is, it is submitted, the right one, for the obvious intention of the act was to give to residuary devises the same effect as residuary bequests have always had, and there seems no doubt that a residuary bequest includes disclaimed bequests (r). Moreover, the effect of disclaimer relates back to the death of the testator (s), so that the devise is, in the event, incapable of taking effect.

Effect of disclaimer.

If a testator who is really the owner of Blackacre, erroneously recites in his will that it belongs to A. and makes a general devise of all his real estate to B., Blackacre passes by the devise to B. (t).

Erroneous recital.

A devise may of course be residuary, although it does not contain the word "residue," "remainder," or any similar word (u).

What is a residuary devise.

And if a testator includes in one devise certain lands by their specific description and all the residue of his real estate, the specifically described lands form part of the residuary devise (v).

A testator may except certain property from a general devise, either expressly, or by limiting the devise to real estate answering

Limited general devise.

(q) I am indebted to my learned friend, Mr. T. Cyprian Williams, for drawing my attention to the difficulty caused by the wording of sect. 25: it occurred in a case in his experience.

(r) Post, Chap. XXIX.

(s) Ante, p. 556.

(t) In *Re Bagot*, [1893] 3 Ch. 348, this rule was applied to a residuary bequest, but it seems clear that it applies also to a residuary devise, and that the decisions in *Circuit v. Perry*, 23 Bea. 275; *Harris v. Harris*, Ir. R., 3 Eq. 610; *Hawks v. Longridge*, 29 L. T. (N. S.) 449 and *Clibborn v. Clibborn*, 9 Ir. Jur. 381, so far as they lay down

any other principle, are erroneous. See *Hounsell v. Dunning*, [1902] 1 Ch. 512, where the gift was specific; ante, p. 943. Compare *Doe d. Howell v. Thomas*, 1 M. & Gr. 335, 344, post, p. 957.

(u) *Re Bawden*, [1894] 1 Ch. 693, stated post, Chap. LIV. Conversely a gift of "my said residuary estate" will not operate as a residuary devise if the only residue previously referred to is the residuary personalty: *Re Hudson*, [1908] W. N. 50.

(v) *Bray v. Stevens*, 12 Ch. D. 162; *Thorman v. Hilhouse*, 5 Jur. N. S. 563, post, Chap. LIII.

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a certain description. Thus in *Simmons v. Rudall* (vv) a testator gave all his residuary real and personal estate to trustees in trust for A. for life with remainder in trust, as to one-fourth, as A. should appoint, and upon further trust to transfer all the rest residue and remainder of the trust property to B., C., and D.; A. made no appointment, and it was held that there was an intestacy as to the one-fourth. Again, in *Leach v. Jay* (w) a testatrix was entitled as heir at law to some freehold houses of which wrongful possession was taken by another; she died without having ever been in possession, having devised "all real estate (if any) of which I may die seised" to the plaintiff; the testatrix's title had not been barred by the Statute of Limitations: it was held that "seised" was a technical word and had no secondary or popular meaning (x), and that consequently the houses did not pass by the devise.

Excepted
property un-
disposed of.

In such a case, and also where the testator expressly excepts certain property from a general devise, and makes no disposition of it, the property passes as on an intestacy (y). But if after excepting it he gives it to A., and the gift fails by lapse or otherwise, it will, as a general rule, be presumed that the object of the testator in making the exception was simply to give the property to A., and there is therefore no reason why upon the failure of the gift, it should not be held to be included in the general devise (z). It follows that if a testator devises all his real estate, except Blackacre, to A., and devises Blackacre to B., and B. dies in the testator's lifetime, then Blackacre passes under the general devise to A.; if, however, after B.'s death the testator makes a codicil referring to the fact, but not altering the devise of Blackacre, the presumption

(vv) 1 Sim. N. S. 115.

(w) 9 Ch. D. 42.

(x) It is not very easy to follow this argument, for "seised of" is frequently used by professional lawyers in the sense of "entitled to." Thus where a person has mortgaged his land in fee simple, the effect of which is that the seisin is in the mortgagee, (*Copestake v. Hoper*, [1908] 2 Ch. 10,) the most learned conveyancer would not think it inaccurate to say that the mortgagor is "seised in fee simple" of the land, subject to the mortgage; (see *Key & Elph. Con.*, 9th ed. vol. i. p. 865).

(y) *Simmons v. Rudall*, supra; *Re Fraser*, [1904] 1 Ch. at p. 734; compare *Davers v. Dawes*, 3 P. W. 40, cited post, Chap. XXIX.

(z) See *Blight v. Hartnoll*, 23 Ch. D. 218, cited post, Chap. XXIX. In *Re Sinclair*, [1903] W. N. 113, a testator devised his real estate, with the exception of a certain house, "the disposal of which I leave to the discretion of my trustees," upon certain trusts: it was held by Swinfen Eady, J., that as there was no attempt on the face of the will to dispose of the beneficial interest in the house, it was excepted from the general devise for all purposes. But was it not the testator's intention to give his trustees a power of disposing of the beneficial interest, and was not this sufficient to shew that he merely intended to except it from the residue for this purpose, and not for all purposes?

above referred to does not arise, and there is an intestacy as to Blackacre (a). CHAP. XXV.

A declaration by a testator in his will, however emphatic, that a particular piece of land does not belong to him, will not prevent it from passing by a residuary devise (b).

The question whether sect. 24 of the Wills Act applies to an exception from a general devise, has been already considered (c). Whether exception is within sect. 24 of Wills Act.

A gift of "all other land" (d), or "all land not hereinbefore devised" (e), is a mere gift of residue, and shews no intention, within the act, to exclude lapsed specific gifts. And this is so, even although the residuary devise gives an estate for life to the same person as is named specific devisee in fee (f). What will not limit a residuary devise.

If a will contains a residuary devise to A., and the testator at the end of his will appoints B. his residuary devisee, it seems that the residuary devise to A. is not revoked (g).

In order that a devise should be a residuary devise within sect. 25, so as to include lapsed specific gifts, it is not necessary that it should be a devise of the residue of all the testator's real estate. Thus in *Mason v. Ogden* (h) a testator devised a freehold house at Wimbledon to his son in fee, and "as to all other my freehold messuages and tenements at Wimbledon aforesaid and elsewhere, and all my leasehold estates whatsoever and wheresoever," he devised the same to A. and B. At his death the testator owned freeholds at Wimbledon and elsewhere, and no copyholds. The specific devise of the house to the son having failed, it was held that it passed by the devise of the testator's other freeholds to A. and B. It follows that there can be a residuary devise of a testator's freeholds to A. and of his copyholds to B. (i). Limited devise may be residuary.

But a devise of a particular residue is not a residuary devise within sect. 25. Thus in *Springett v. Jennings* (j), a testatrix gave certain lands in the parish of H. to A., B., and C. as joint tenants in fee, and devised to the plaintiff "the rest of my freehold Particular residue.

(a) In *Re Fraser*, [1904] 1 Ch. 726, the property excepted was chattels real, but the principle clearly applies to real estate.

(b) *Re Maber*, 12 T. L. R. 267.

(c) Ante, pp. 419 seq.

(d) *Cogswell v. Armstrong*, 2 K. & J. 227.

(e) *Green v. Dunn*, 20 Beav. 6. See also *Culsha v. Cheese*, 7 Hare, 236; *Carter v. Haswell*, 26 L. J. Ch. 576; *Burton v. Newbery*, 1 Ch. D. 234; *Johns v. Wilson*, [1900] 1 Ir. R. 342.

(f) *Green v. Dunn*, supra.

(g) *Johns v. Wilson*, [1900] 1 Ir. R. 342, where B. was appointed residuary legatee; no question seems to have arisen as to the real estate; see Chap. XXIX., where other cases on double residuary gifts are referred to.

(h) [1903] A. C. 1, affirming decision of C. A. in *Re Mason*, [1901] 1 Ch. 619.

(i) Per Rigby, L.J., [1901] 1 Ch. at p. 630.

(j) L. R., 6 Ch. 333, following *Re Brown's Trusts*, 1 K. & J. 522, post.

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hereditaments in the parish of H., and all my freehold hereditaments" in certain other parishes. The devise to A., B., and C. having failed, it was held that the lands comprised in that devise did not pass under the devise to the plaintiff of "the rest of my freehold hereditaments in the parish of H.," but were undisposed of. It was said by James, L.J., that the devise to the plaintiff was as specific as if the testatrix had given certain lands in H. to A., B., and C. and certain other lands in H. (being all the others which she had in that place) to the plaintiff (*k*).

A particular residue may indeed, upon failure of the gift of a part, include that part, if the testator has used language shewing an intention to that effect (*l*). But such intention must be shewn, while in the case of a proper residuary devise the act says it shall be presumed.

Void appointment will fall into residuary devise.

The word "devise" in sect. 25 of the Wills Act, as generally throughout the act, includes a gift by will, in exercise of a general power of appointment of real estate (*m*); and consequently, where a testator, in exercise of such a power, makes a testamentary appointment of realty which fails or is void, the gift will fall into the residuary devise (if any), unless a contrary intention appears by the will (*n*).

Effect of residuary devise failing as to aliquot share.

If a general residuary devise itself fails to take complete effect, the property will, to that extent, be undisposed of. As where a testator devised land to several in certain shares, as tenants in common, and devised the residue of his real estates to the same persons in the same proportion: some of the specific devisees died in the testator's lifetime, whereupon their shares fell into the residue; but so much of the same shares as came back to them (so to speak), under the residuary devise lapsed to the heir (*o*). So if a testator devises his residuary real estate to several persons as tenants in common, and afterwards revokes the devise as to one of them, there is an intestacy as to his share (*oo*).

(*k*) But a devise of a particular residue of lands in a particular place passes lands in that place acquired by the testator after the date of the will: *Doe d. York v. Walker*, 12 M. & Wel. 591; ante, p. 938.

(*l*) *Springett v. Jenings*, supra. Compare the cases on the effect of a bequest of a particular residue; post, Chap. XXIX.

(*m*) See sect. 27 of the act.

(*n*) See *Freme v. Clement*, 18 Ch. D.

499. In this case the doctrine stated in the text was extended by Jessel, M.R., to appointments in exercise of special powers; but his Lordship's decision on this point was disapproved by the Court of Appeal in *Holyland v. Levin*, 26 Ch. D. at p. 272. See also ante, p. 811.

(*o*) *Greated v. Greated*, 26 Bea. 621. See further on this subject, Chap. XXIX.

(*oo*) Per Lord Cairns, in *Sykes v. Sykes*, L. R., 3 Ch. at p. 303.

If a testator devises his residuary real estate to several persons as tenants in common, and by codicil revokes the devise as to one of them and directs that his share shall fall into residue, it is divisible between the other residuary devisees (*x*).

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Share directed to fall into residue.

II.—In regard to Rents and Profits.—An immediate residuary devise carries the rents and profits from the testator's death; they are, if necessary, apportioned, and those accruing before the death form part of the testator's personal estate.

Immediate residuary devise.

If the residuary devise be contingent or future, i.e., deferred in point of enjoyment, the income accruing in the interval from the residuary real estate does not pass by such devise, but is undisposed of and goes to the heir (*p*), a residuary devise differing in this respect from a residuary bequest of personalty, which, it is well known, does (though contingent in its terms) carry the prior income (*q*). The distinction between real and personal estate has been said to flow from the very nature (under the old law) of a residuary devise; for being confined to what the testator had when he made his will, it was as specific as if the property were particularly described (*r*). It is said to be still more clearly deducible from the rule of law that the freehold cannot be in abeyance (*s*). And the profits necessarily go with the estate (*t*). These reasons, however, are purely technical, and no good reason can be given for the rule. Nevertheless, it is clearly established. "It is impossible to contend that, in the absence of any words clearly leading to what the Court considers judicially to imply a gift of the intermediate rents and profits (*u*), any such gift can be introduced into the testator's will. Neither the persons waiting until the executory devise shall take effect, nor the person who shall first come into esse when the executory devise has taken

Future residuary devise does not carry interim income.

(*x*) *Re Palmer*, [1893] 3 Ch. 369, where the head note seems inaccurate; there was no trust for conversion of the real estate.

(*p*) *Hopkins v. Hopkins*, Ca. t. Talb. 44, extr. from R. L. Hawkins, Construction of Wills, App. I.; *Wills v. Wills*, 1 Dr. & W. 439; *Hodgson v. Bective*, 1 H. & M. 376, 10 H. L. Ca. 656 (but not appealed on this point); *Wade-Gery v. Handley*, 1 Ch. D. 653; 3 Ch. D. 374. The Wills Act does not affect the question; see 1 H. & M. p. 396, and a note by Mr. Jarman in the first edition of this work, p. 596.

(*q*) *Green v. Ekins*, 2 Atk. 473;

Trevanion v. Vivian, 2 Ves. sen. 430; i.e., until accumulation is stopped by the law: thenceforth it goes to the next of kin; *Bective v. Hodgson*, 10 H. L. Ca. 656, 671; *Wade-Gery v. Handley*, supra.

(*r*) By Wood, V.-C., 1 H. & M. 396.

(*s*) See acc. per Lord Westbury, 10 H. L. Ca. 665.

(*t*) 1 Atk. 424, 2 Atk. 476, Co. Lit. 55 b, n. (8).

(*u*) For examples of such a gift in a shifting clause, see *Turton v. Lambarde*, 1 D. F. & J. 495; *D'Eyncourt v. Gregory*, 34 Beav. 36.

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effect, nor all the persons who may be interested under the series of devises following that executory devise, by way of accumulation, can establish their claim" (v). And the rule is the same with regard to trusts (w).

Otherwise if real and personal estate are blended.

But if the real and personal estates are blended in one gift, it is considered to denote an intention that both species of property shall be subject to the rule applicable to personalty. Thus in *Genery v. Fitzgerald* (x), Lord Eldon decided that a gift of all the residue of the real and personal estate to the eldest of three persons who should attain twenty-one, charged with a sum of money to the others if they should attain that age, comprised the rents accruing between the testator's decease and the attainment by the devisee of the prescribed age. He said, "The general principles are these. When personal estate is given to A. at twenty-one, that will carry the intermediate interest. If a testator gives his estate Blackacre at a future period, that will not carry the intermediate rents and profits. But when he mixes up real and personal estate in the same clause, the question must be, whether he does not show an intention that the same rule shall operate on both."

What constitutes a blending.

What amounts to such a mixing up of real and personal property in one mass as to bring a specific case within the rule, has been much discussed. It is clear that if there are separate trusts of the realty and the personalty, and the trusts are not identical, so that they may or may not carry the property to the same persons, the rule in *Genery v. Fitzgerald* does not apply (y). But in *Re Dumble* (z), where a testator devised his residuary real estate upon certain trusts (including trusts for maintenance, &c.) and bequeathed his residuary personal estate upon trusts which were identical with those declared of the real estate, except that they did not include trusts for maintenance, &c., it was held by Pearson, J., that the rule in *Genery v. Fitzgerald* applied (a).

(v) Per Wood, V.-C., 1 H. & M. 392; and see Sir E. Sugden's remarks in *Wills v. Wills*, 1 D. & War. 451, 452, upon *Duffield v. Elwes*, 2 S. & St. 544; and ante, p. 719. *Sidney v. Wilmer*, 4 D. J. & S. 84, contra, is not law; *Wade-Gery v. Handley*, 3 Ch. D. 374.

(w) Per Lord Talbot, *Hopkins v. Hopkins*, supra, cited by Sugden, C., 1 D. & War. 455; *Wade-Gery v. Handley*, 1 Ch. D. 653, 3 ib. 374.

(x) Jac. 468; see also *Gibson v. Montfort*, 1 Ves. sen. 485; *Glanvill v. Glanvill*, 2 Mer. 38; *Ackers v. Phipps*,

3 Cl. & Fin. 665; *Lachlan v. Reynolds*, 9 Hare, 796; *Re Taylor*, [1901] 2 Ch. 134. The decision on this point in *Green v. Tribe* (*Re Love*), 47 L. J. Ch. 783, seems to have been given per incuriam.

(y) *Hodgson v. Bective*, 1 H. & M. 376; *Re Williams*, 54 L. T. 831.

(z) 23 Ch. D. 360.

(a) See further on this point *Re Drakeley's Estate*, 19 Beav. 395; *Marrriott v. Turner*, 20 ib. 557; *Re Williams*, 54 L. T. 831; *Re Burton's Will*, [1892] 2 Ch. 38.

Where re-
mainderman
is excluded.

But a testator may make such a disposition of his real and personal estate during the period preceding the future or contingent interest, as to exclude the presumption that he meant it to carry the intermediate income. Thus in *Re Townsend's Estate* (b), a testator gave his real and personal estate upon trust to pay the income to A. for life, and after his death upon trust for his children : there was a gift over, in the event of A. dying without issue, to a class to be ascertained at his death ; the gift to A. for life failed and he had no children : it was held that during A.'s life and until he had a child, the income of the trust funds (which consisted of real estate only) went to the heir at law. So if a testator directs the intermediate income to be accumulated, and the accumulation is stopped by the Thellusson Act, the income goes to the heir at law and next of kin (c).

III.—In regard to Reversions and Remainders.—"It remains to be considered," says Mr. Jarman (d), "whether reversions will pass under a general devise of lands. In regard to this question, an undisposed-of interest which, on his decease, would become a reversion left in the testator after other dispositions of his own will, is obviously distinguishable from a reversion of which he is the owner at the time of his will (e) ; but they have been generally treated as belonging to the same class, and approximate sufficiently in principle to warrant at least their juxtaposition.

Operation of
a general
devise on
reversions.

"Reversions in fee, then, will pass under a general devise of lands or hereditaments (f), although the testator be seised of real estate in possession to satisfy the words of the devise (a fact however, which, in regard to wills made since 1837, would be immaterial) ; and although he may have been ignorant when he made his will of his having such a disposable interest (g) ; or it may have been unlikely, from its remoteness or liability to be defeated by the act of another, ever to fall into possession, as in the case of a reversion expectant on an estate tail (h).

(b) 34 Ch. D. 357. See also *Re Sanderson's Trust* 3 K. & J. 497 ; *Marriott v. Turner*, 20 Bea. 557.

(c) See *Talbot v. Jevors*, L. R., 20 Eq. 255 ; *Weatherall v. Thornburgh*, 8 Ch. D. 261 ; *Re Travis*, [1900] 2 Ch. 541, and the other cases cited, *supra*, p. 389.

(d) First ed. p. 599.

(e) See *Tennent v. Tennent*, 1 Jo. & Lat. 379.

(f) *Chester v. Chester*, 3 P. W. 56 ;

Ridout v. Pain, 3 Atk. 486 ; *Atkyns v. Atkyns*, Cowp. 808, 3 B. P. C. Toml. 408 ; see also *Doe d. Crump v. Sparkes*, 4 D. & Ry. 246.

(g) "Persons not professionally informed do not readily apprehend the alienable nature of reversionary contingent interests." (Note by Mr. Jarman.)

(h) *Dalby v. Champenoon*, Skinn. 631, where, however, it was controlled by the context.

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Devise of lands "not settled," includes unsettled reversion in settled lands.

"It has been even held that a testator's reversion in fee in settled lands will pass under a devise of his '*lands not settled*' (i), or of his lands and hereditaments '*out of settlement*' (j), or '*in the towns of L., M. and N., or elsewhere, not by him formerly settled or thereby disposed of*' (k). The argument in these cases was, that, although certain estates in those lands were settled, yet that the reversion was not, and consequently it fell within the restrictive terms of the testator's description."

So, in *Att.-Gen. v. Vigor* (l) Lord Eldon expressed a decided opinion that the reversion in lands, settled on the marriage of the testator's son with Lady K., passed by a devise of all the testator's lands, which he had not settled or assured, or agreed to settle or assure, to the use of his said son and the issue male of his body, upon his marriage with Lady K. his wife. And in *Incorporated Society v. Richards* (m), where the testator—having upon his marriage agreed to settle certain estates in trust for himself for life, remainder to provide a jointure for his wife, remainder to his issue in tail, remainder to himself in fee—devised all his unsettled real estate to his wife for life, remainder over, Sir E. Sugden, C., held that the reversion passed as part of the unsettled estates.

The foregoing cases also show that the possession by the testator at the date of his will of lands, no estate or interest in which has been settled, and to which the devise is applicable, will not exclude the operation of the will.

Mr. Jarman continues (n): "Though the rule of construction established by the preceding cases has been much condemned, as savouring of extreme technicality, and inimical to popular notions and probable intention (o), they have, it is conceived, placed it beyond the reach of controversy.

"On a principle not very dissimilar, it has been held, that a devise of lands '*not before devised*,' or '*not before disposed of*,'

"Lands not before devised."

(i) *Cooke v. Gerrard*, 1 Lev. 212; *Glover v. Spendlove*, 4 Br. C. C. 337 ("lands not settled in jointure"). The dictum contra of Lord Ellenborough, in *Goodtitle d. Daniel v. Miles*, 6 East, 494, (except so far as it may be supported on special grounds,) must be regarded as untenable.

(j) *Strode v. Russell*, 2 Vern. 621, 1 Eq. Ca. Ab. 210, pl. 18, 3 Ch. Rep. 169, and (nom. *Falkland v. Lytton*) 3 B. P. C. Toml. 24.

(k) *Chester v. Chester*, 3 P. W. 56, 2 Eq. Ca. Ab. 330, pl. 9.

(l) 8 Ves. 256, 272.

(m) 1 D. & War. 258; see also *Jones v. Skinner*, 5 L. J. (N. S.) Ch. 87; *Crowe v. Noble*, Sm. & Bat. 12.

(n) First ed. p. 601.

(o) Sir J. Mansfield, in *Morgan v. Surman*, 1 Taunt. 292, characterised *Chester v. Chester* as "a shocking decision"; but he admitted it had been followed by numerous others; and see the rule defended by Sir E. Sugden, 1 Dr. & War. 285; and by Pepys, M.R., 5 L. J. (N. S.) Ch. 87.

carries the reversion in lands which the testator had previously devised for life (p).

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“The inclination of the Courts at the present day not to exclude a reversion from a general devise upon slight or equivocal grounds, is strongly illustrated by *Doe d. Howell v. Thomas* (q), in which a reversion in fee in an estate limited to the testator’s first and other sons in strict settlement, was held to pass under a devise of estates over which the testator had a power of disposal, though in another part of the will he referred to the estate in question as *property over which he had no power*” (r). And in *Ridgeway v. Mun-Kittrick* (s), where a testator directed his trustees to let a certain mill, and also dispose of his stock in trade and other properties to the best advantage, Sir E. Sugden held that the mill was included in the term “other properties.”

Reversion not excluded by equivocal expressions.

In *Mostyn v. Champneys* (u), an attempt was made to exclude a reversion in fee expectant on an estate tail from a devise of all the testator’s real estate, whatsoever and wheresoever, over which he had any disposing power, to trustees for a term for raising debts, funeral charges and legacies, on the ground that the testator himself was tenant in tail of the lands in question; and that he could not intend to describe such a remote reversion as property over which he had a disposing power, he having taken no steps to enlarge his estate tail, as he might have done, into a fee simple. The testator had other real estate in possession, to which it was admitted the devise in question extended. The Court of C. P. certified that, the words of the devise being sufficient to include the reversion, and no intention to exclude it being expressed, or necessarily implied from other parts of the will, such reversion passed.

Mostyn v. Champneys.

But of course, a testator may refer to a particular reversion in such a way as to shew that he does not intend it to pass by a general devise (v).

A question which was formerly much debated, in regard to the operation of a general devise upon a reversion, is whether the

Whether inapt limitations exclude a reversion.

(p) *Rooke v. Rooke*, 2 Vern. 461; *Willows v. Lydcot*, 2 Vent. 285; *Taaffe v. Ferrall*, 10 Ir. Ch. Rep. 183.

(q) 1 M. & Gr. 335.

(r) *Morris v. Lloyd*, 33 L. J. Ex. 202 illustrates the general principle. And see *Kelly v. Duffy*, 4 L. R. Ir. 601.

(s) 1 D. & War. 84.

(u) 1 Scott, 293.

(v) *Strong v. Teatt*, 2 Burr. 912; 3 Br. P. C. 219; *Doe v. Saunders*, Cowp. 420. See *Hyley v. Hyley*, 3 Mod. 228; *Doe d. Morris v. Underdown*, Willes,

293. The decision in *Roe v. Avis*, 4 T. R. 605 was disapproved by Mr. Jarman (first ed. p. 606; fourth ed. p. 659 seq.) and that in *Goodtitle v. Miles*, 6 East, 494, by Sir E. Sugden in *Incorporated Society v. Richards* (ante, p. 956). The modern tendency of the courts is to give effect to the literal wording of a general devise (post, p. 958). *Honywood v. Honynwood*, 2 Y. & C. C. C. 471, is not a valuable authority, as the grounds of the decision are not stated.

inaptitude of some of the limitations is a ground for excluding the reversion. The general principle is now well established, namely, that in construing a general devise "the words of the will should be taken to comprehend every subject which falls within their proper meaning, unless that meaning is excluded by the context or by the circumstances of the case; and that mere conjecture will not do" (w). In the case from which the foregoing remark is quoted a testator who was entitled to an estate in remainder expectant on the death of his wife, by his will gave all his property to his wife for life and after her decease to his children; it was held that the remainder passed by the devise.

In the first edition of this work Mr. Jarman divided the cases on this subject into two classes: first, those in which there were other lands to which the limitations in question were applicable; and secondly, those in which the reversion was the only property of the testator that the devise could apply to. As the distinction in question is immaterial as regards wills made since 1837, it will be sufficient to say that the former class comprises the cases of *Doe d. Earl Cholmondeley v. Weatherby* (x), *Doe d. Moreton v. Fossick* (y), *William d. Hughes v. Thomas* (z), *Freeman v. Duke of Chandos* (a), and *Doe d. Nethercote v. Bartle* (b). The latter class includes *Strong v. Teatt* (c), *Roe d. James v. Avis* (d), *Goodtitle d. Daniel v. Miles* (e), *Att.-Gen. v. Vigor* (f), and *Church v. Mundy* (g). A detailed examination of these cases will be found in the fourth and earlier editions of this work. Mr. Jarman, after criticising the remarks made by Sir W. Grant (h) on the decision in *Church v. Mundy* (i) (which established the modern doctrine) proceeds as follows (j):—"Since this period, in every instance in which the question whether a reversion passes by a general devise has been agitated, it has been decided in the affirmative; and though in all these cases, there happened to be other real estate to which the limitations inapplicable

(w) Per Turner, V.-C., in *Ford v. Ford*, 6 Ha. 486. See also *Morris v. Lloyd*, 33 L. J. Ex. 202.

(x) 11 East, 322.

(y) 1 B. & Ad. 186.

(z) 12 East, 141.

(a) Cowp. 363.

(b) 5 B. & Ald. 492. To these may be added *Goodright v. Downshire*, 2 B. & P. 600.

(c) Burr. 912; s.c. in D. P. 3 Br. P. C. 219.

(d) 4 T. R. 605.

(e) 6 East, 494.

(f) 8 Ves. 256.

(g) 15 Ves. 396. See also *Wintour v. Clifton* 3 Jur. N. S. 74; *Alliston v. Chapple*, 6 Jur. N. S. 288; *Taafe v. Ferrall*, 10 Ir. Ch. R. 183; and *Tennent v. Tennent*, 1 Jo. & Lat. 379, where Sugden, L.C., said: "*Roe v. Avis* has been overruled by the current of later authorities."

(h) In *Welby v. Welby*, 2 V. & B. 187.

(i) 15 Ves. 396.

(j) First ed. p. 610. Mr. Jarman's observations on this subject were approved by Turner, V.-C., in *Ford v. Ford*, supra.

to the reversion might be referred, yet little or no stress seems to have been laid on that circumstance, and they were decided on the broad ground, that the words of the devise being sufficient to comprise the property, it would pass, without going into the question, whether the testator could be supposed to have had it actually in his contemplation when he framed the devise or not.

“The sound conclusion, then, seems to be, that a general devise will in all cases operate on a reversion or remainder belonging to the testator, notwithstanding the remoteness of such reversion or remainder, as being expectant on an estate tail or otherwise (whether such estate tail be vested in the testator or another), and notwithstanding the inapplicability of some of the limitations or purposes of the devise to the interest in question; and, that, too, whether the testator had at the time of the making of the will any other real estate to which such inapplicable limitations or purposes can be applied or not. Indeed, the latter fact would, of course, be wholly immaterial in the case of a will made or republished since the year 1837, any general devise in which would, under the new law, comprise after-acquired real estate; precluding, therefore, all inquiry into the *then* state of the testator’s property, as affording any insight into the intention.”

General conclusion from the cases.

But if the testator is possessed of a reversion to which none of the limitations are applicable, the question, it is conceived, is by no means the same. Sir W. Grant, indeed, thought there would be no room for arguing such a case; for that would be to say, the reversion passed, although it were so given that nobody could take it (*k*). There seems to be no decision on the point.

Where none of the limitations are applicable. Opinion of Sir W. Grant.

IV.—In regard to Copyholds.—The statutes dispensing with the necessity of a surrender to the use of the will (*l*) have placed freeholds

Unsurrendered copyholds now pass by general devise.

(*k*) *Welby v. Welby*, 2 V. & B. 187. The point was touched upon in argument in *Tennent v. Tennent*, Dru. 161, 1 Jo. & Lat. 379, where, first, the T. estate was entailed on R. J., and then the residue was devised to R., with a direction at his death to entail the subject of disposition on R. J. in the same manner as the T. estate was entailed on him. It was argued that as the prescribed entail would be wholly inoperative upon the reversion in the T. estate, this reversion was not subject to the direction; and if not, so neither were certain other estates which were included with it in the devise to R., and which he thus took in fee. But Sugden, C., rejected this argument: he

treated the gift to R. and the direction to entail as parts of one devise or series of limitations, so that the case became one where some, not all, of the limitations were inapplicable to the reversion. “It is now settled,” he said, “that a reversion in fee will pass under a general devise unless a clear intention to include it is shown, though it is limited in part to the same uses to which the particular estate is already dedicated.” There was thus no decision on the point in question.

(*l*) 55 Geo. 3, c. 192; 1 Vict. c. 26 ss. 3 & 4. See ante, p. 68. As to the law before 55 Geo. 3, c. 192, see the fourth and earlier editions of this work.

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and copyholds on the same footing in regard to the operation of a general devise, so that even before the Wills Act copyholds passed under a devise of lands, tenements, or hereditaments, or other general words descriptive of real estate, unless a contrary intention appeared. Thus, in *Doe d. Clarke v. Ludlam* (m) where a testator, having both freehold and copyhold estates at C., devised the whole of his real and personal estates and effects whatsoever and where-soever, which he might be possessed of at the time of his decease, to A., his heirs and assigns for ever, and died without having made any surrender of the copyholds to the uses of his will, it was held that the copyholds, as well as the freeholds, passed by the devise.

And the circumstance that some of the limitations and clauses in the will were inapplicable to copyholds, (for instance, estates for life, limited without impeachment of waste,) would not prevent their passing by such a general devise (n), the testator having other property to which the inapplicable clauses might be referred.

Equitable
interests in
copyholds.

If the testator had only the equitable estate in copyholds, it did not, at least before the statute 55 Geo. 3, pass by a general devise of lands; for it could not be surrendered, and there was no other clear indication of an intention to pass copyholds (o). But it has been said (p), that possibly, since the statute, an equitable interest in copyholds would pass under such a general devise, for equity would follow the law; and as, since the statute, general words included legal copyholds (q), the same rule might apply in cases of trusts of copyholds.

Lord Eldon, in *White v. Vitty* (r), suggested whether, as the act of 55 Geo. 3, c. 192, makes a surrender unnecessary for a devise of copyholds, a surrender to the use of the will could now be considered as any evidence of intention that copyholds should pass by a general devise; and, certainly, if unsundered copyholds had been held not to pass in *Doe v. Ludlam*, it might have been a question whether the same principle did not apply to surrendered copyholds; but the sound decision of the Court of C. P. in that

(m) 7 Bing. 275, 5 Moo. & P. 48; see also *Edwards v. Barnes*, 2 Scott, 411; 2 Bing. N. C. 252; *Doe d. Edmunds v. Llewellyn*, 2 C. M. & R. 503; *Usticke v. Peters*, 4 K. & J. 437. The stat. 55 Geo. 3, c. 192, was held not to be retrospective, *Doe d. Smith v. Bird*, 5 B. & Ad. 695.

(n) *Car v. Ellison*, 3 Atk. 73; *Weigall v. Brome*, 6 Sim. 99; see also *Borrell v. Haigh*, 2 Jur. 229; *Jackson*

v. Noble, 2 Kee. 590.

(o) *Torre v. Brown*, 5 H. L. Ca. 555, 24 L. J. Ch. 757.

(p) By Lord Cranworth, *ibid.*

(q) Referring to *Doe v. Ludlam*. See also *Seaman v. Woods*, 24 Beav. 372, where this point seems to have been assumed in favour of the devisee. The devise was of "all the estate of whatever kind or nature."

(r) 2 Russ. at p. 488.

case precludes any such question. However it was deemed expedient to provide expressly by the Wills Act, s. 26, that copyhold estates shall pass, together with freeholds, under a general devise (*s*).

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Provision in Wills Act.

General devise of copyholds.

Under a general devise of copyhold lands, unsundered copyholds were held to pass even before the statute of 55 Geo. 3 (*t*), although the testator had other copyholds which were surrendered (*u*). In order to restrain the devise to the surrendered copyholds in such a case, it was necessary to shew restrictive words (*v*); hence, under the old law, the question was much discussed, whether a reference to the fact of the testator having surrendered the copyholds, restricted the devise to copyholds so surrendered (*w*).

These questions are now of no importance in the case of wills made since 1837, and the only question which is now likely to arise, is whether a testator in making a general devise, has so restricted it as to exclude copyholds. Thus in *Reeves v. Baker* (*x*) a devise of "all the rest, residue and remainder of my property," though followed by the words "whether freehold or personal, and wheresoever situate," was held to include copyholds, the latter words being considered to be merely an imperfect enumeration of particulars.

Exclusion of copyholds from general devise.

The question whether copyholds can pass under a devise of freeholds is discussed in Chapter XXXV.

Whether a devise of freeholds will carry copyholds.

The effect of a devise of copyholds, whether specific or general, as regards admittance and the extinguishment of the widow's right to free-bench, &c., has been already discussed (*y*).

V.—In regard to Leaseholds.—(A) *Leaseholds for Years.*—Mr. Jarman continues (*z*): "The next inquiry is, whether property in which the testator is possessed of a term of years only, will pass by a general devise. [In reference to wills made before the year 1838,] the rule on this subject, of which the early case of

Leaseholds for years, when they pass under a general devise.

Rules under the old law.

(*s*) As to devises by unadmitted devisees or surrenderees of copyholds, see ante, p. 70.

As to the liability of copyholds for the testator's debts, under the old law, see *Coombes v. Gibson*, 1 Br. C. C. 273; *Growcock v. Smith*, 2 Cox, 397, and the other cases referred to in the fourth and earlier editions of this work.

(*t*) *Byas v. Byas*, 2 Ves. sen. 164; *Frank v. Standish*, 1 Br. C. C. 588, n., 15 Ves. 391, n.

(*u*) *Blunt v. Clitherow*, 10 Ves. 589.

(*v*) *Wilson v. Mount*, 3 Ves. 191.

(*w*) *Banks v. Denshaw*, 3 Atk. 585,

1 Ves. sen. 63; *Gascoigne v. Barker*, 3 Atk. 8; *Kings Head Inn Case*, cited 1 Ves. sen. 63, 121; *Wilson v. Mount*, 3 Ves. 191; *Strutt v. Finch*, 2 S. & St. 229; *Pullin v. Pullin*, 10 J. B. Moo. 464; 3 Bing. 47; *Oxenforth v. Cawkwell*, 2 S. & St. 558; *Rumbold v. Rumbold*, 3 Ves. 65; *Hills v. Downton*, 5 Ves. 557.

(*x*) 18 Bea. 372. As to the possibility of a testator making separate general devises of freeholds and copyholds, see *Re Mason*, [1901] 1 Ch. 619, ante, p. 951.

(*y*) Ante, pp. 70 seq.

(*z*) First ed. p. 616.

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Rose v. Bartlett (a) is the well-known leading authority, is, that 'where a man hath lands in fee and lands for years, and deviseth all his *lands and tenements*, the fee simple lands pass only, and not the leases for years; but if he hath no fee simple, the lease for years passeth, [for otherwise the will should be merely void].'

"Both these propositions are law at the present day, in reference to wills made before the year 1838. The former indeed, was long vexata quæstio; and the reluctance to assent to it arose from the conviction, that it subverted the intention of testators, who, it is obvious, employ general words of this nature in a comprehensive sense, and without having in view the purely technical distinction respecting the quality of the estate" (b).

Leaseholds
pass by a
devise of land
under Wills
Act.

As Mr. Jarman points out (c):—"The exclusion of leaseholds from a general devise, where the testator has freeholds, founded as it is on a distinction purely technical, has been considered to militate so strongly against intention, that this rule of construction has been abrogated by the recent act of the 1 Vict. c. 26, the 26th section of which provides, that a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise, which would (d) describe a customary, copyhold or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold and leasehold estates of the testator, or his customary, copyhold and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will."

(a) Cro. Car. 292; *Hobson v. Blackburn*, 1 Myl. & K. 571.

(b) The cases establishing these propositions are stated and examined in the fourth and earlier editions of this work: the principal ones are—*Davis v. Gibbs*, 3 P. W. 26; *Knotsford v. Gardiner*, 2 Atk. 450; *Pistol v. Riccardson*, 2 P. W. 459, n.; *Thompson v. Lawley*, 2 B. & P. 303, where Lord Eldon reviewed the authorities and fully recognized the rule. See also *Whitaker v. Ambler*, 1 Ed. 151; *Parker v. Marchant*, 5 M. & Gr. 498, 2 Y. & C. C. C. 279. The rule applied where the will was inoperative from defect of execution, *Chapman v. Hart*, 1 Ves. sen. 271; see also *Sampson v. Sampson*, 2 V. & B. 337; *Watkins v. Lea*, 6 Ves. 633. The rule, of course, yielded to an indication of contrary intention.

As to what was deemed to amount to evidence of such intent, see *Hartley v. Hurle*, 5 Ves. 540; *Swift v. Swift*, 1 D. F. & J. 160; *Doe d. Belasyse v. Lucan*, 9 East, 448; *Lane v. Stanhope*, 6 T. R. 345; *Arkell v. Fletcher*, 10 Sim. 299; *Addis v. Clement*, 2 P. W. 456; *Dixon v. Dawson*, 2 S. & St. 327; *Hobson v. Blackburn*, 1 My. & K. 571; *Goodman v. Edwards*, 2 My. & K. 759. As to leaseholds passing with copyholds of inheritance, see *Roe d. Pye v. Bird*, 2 W. Bl. 1301. As to leaseholds passing by a devise of "farms," see *Holmes v. Milward*, 47 L. J. Ch. 522, post, Chap. XXXV.

(c) First ed. p. 627.

(d) That is, "would before the act have described"; see judgment in *Wilson v. Eden*, 5 Ex. 752.

The burden of proof is thus shifted to those who assert that leaseholds do not pass by a devise of "land": and the proof must appear on the will itself. The subject was much discussed in *Wilson v. Eden* (e), where a testator, after bequeathing his personal estate to A. absolutely, devised all his messuages, lands, tenements and hereditaments situate at or near W., and other specified places in the county of D., and at other places in the county of Y., and all other his real estates in the said counties and elsewhere in Great Britain, to uses in strict settlement in favour of A. and his issue. Lord Langdale, M.R., thought that renewable chattel leaseholds situate near W., and contiguous to, and occupied with, the freeholds, were not included in this devise: not only were uses in strict settlement inapplicable in their integrity to leaseholds, but the ambiguity of the word "land" was removed by the subsequent words "other real estates." So that the case did not come within the act (f). But on a case from Chancery, the Courts of Exchequer and Q. B. successively came to the opposite conclusion. Lord Campbell observed that if (as was admitted) the devise of lands at or near W., taken by itself, was within the act (g), he could not understand why it was the less so because of the use of the subsequent words. Accordingly, it was decided by Sir J. Romilly that the leaseholds passed; he remarked that though general words might be cut down by the effect of previous enumeration, yet it was new to him to say that those general words cut down the prior enumeration.

But leaseholds will clearly not pass by a devise of "lands," if a contrary intention appears from the whole scheme of the will; as in the ordinary case of "lands" being devised in strict settlement, and "personal estate" being bequeathed on corresponding trusts (h).

In *Wilson v. Eden*, Lord Langdale was clearly of opinion, and (for the purpose, at least, of the ultimate decision) it was assumed by the other judges, that the act had not the effect of making leaseholds pass by a general devise of "real estate"; and this appears to be the proper construction of sect. 26,

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Unless a contrary intention appears by the will.

Wilson v. Eden.

Strict settlement of freeholds and leaseholds.

General devise of "real estate."

(e) 11 Beav. 237, 5 Ex. 752, 14 Beav. 317, 18 Q. B. 474, 16 Beav. 153.

(f) See also per K. Bruce, V.-C., *Parker v. Marchant*, 2 Y. & C. C. C. 282.

(g) It is stated in the report that seventy-two acres of the leaseholds were on the northern side of a high ridge, the greater portion being on the southern side, and that the former were

two miles from the house and estate at W. It is not stated whether they were disconnected. If they were, it might be a little difficult to reconcile the decision as to the seventy-two acres with *Doe d. Ashforth v. Bower*, 3 B. & Ad. 453.

(h) *Prescott v. Barker*, L. R., 9 Ch. 174.

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which was probably intended merely to abolish the rule of construction established by *Rose v. Bartlett* (i). And Chitty, J., so decided in *Butler v. Butler* (j), where the testator gave "my real estates wheresoever situate," to one set of beneficiaries, and "my personal estate wheresoever situate" to another set of beneficiaries. There can, of course, be no question if the testator gives his "real estate" to one person and his "leasehold estate" to another (k).

Devise of
"real estate
at A."

But if the devise were of "real estate at A.," there can be little doubt that leaseholds at A. would have passed under the old law if the testator had had no freeholds there; and notwithstanding that the words appear rather to point to specific property, it seems to have been assumed, since the act, that this is a "general devise" within the meaning of sect. 26.

Moase v.
White.

Thus, in *Moase v. White* (l), a testator having freeholds and leaseholds at E., and leaseholds but no freeholds at W., gave all his "real estate" at E. and W. upon certain trusts: it was held by Bacon, V.C., that all the leaseholds passed, although in one of the other clauses of the will "leaseholds" were expressly referred to as forming part of the personal estate.

Specific devise
of "freehold"
where no
freehold.

And leaseholds will still, as before the act, pass even as "freehold," if the devise is clearly specific in form, and the testator has at the date of his will no freehold property to answer the description (m). Thus, where a man devised all his "freehold houses in Aldersgate-street," to A. and his heirs, and he had some leasehold but no freehold houses there, the leaseholds passed; it being the plain intention of the will to pass some houses, and the word "freehold" should rather be rejected than the will rendered void (n). And as such a gift points to a specific property as then belonging to the testator, the construction of it is not affected by sect. 24 of the Wills Act (o).

(i) *Supra*, p. 962.

(j) 28 Ch. D. 66. See also *Turner v. Turner*, 21 L. J. Ch. 843. In *Gully v. Davis*, L. R., 10 Eq. 562, leaseholds were held to pass by a general devise of "real estate." The decision turned partly on the fact that the testator never had any freeholds, and partly on the admission (by demurrer) that the testator thought his leaseholds were freeholds.

(k) *Re Guyton and Rosenberg*, [1901] 2 Ch. 591.

(l) 3 Ch. D. 763. See also *Best v. Standeren*, [1872] W. N. 44; *Re Davi-*

son, 58 L. T. 304 (see the remarks of North, J., on the decision in *Butler v. Butler*). See also *Re Uttermare*, [1893] W. N. 158, where an appointment by will of "all real estate in the county of S." was held to pass long leaseholds intermixed with freeholds.

(m) *Nelson v. Hopkins*, 21 L. J. Ch. 410. See *Stone v. Greening*, 13 Sim. 390.

(n) *Day v. Trig*, 1 P. W. 286; *Doe d. Gunning v. Lord Cranstoun*, 7 Mee. & W. 1.

(o) *Nelson v. Hopkins*, *supra*.

In *Mathews v. Mathews* (*p*), a testator devised all his "freehold land, messuages, or tenements and hereditaments," comprising a specified set of buildings; he died, seised in fee of part of the property subject to a lease, possessed of another part for a term of years, and possessed of a third part, X., for a term of years, and he was also seised of the reversion of X. in fee from the expiration of three years after the end of the term; it was held that both the leasehold and freehold interest in X. passed by the devise.

Where testator has freehold and leasehold interest in same property.

But in the absence of special circumstances, a devise of "real and freehold" property will not include leaseholds (*q*).

(B) *Leaseholds for Lives*.—Even under the old law, leases for lives, being freehold interests, clearly passed under a general devise of "lands and hereditaments," or "real estate," with freeholds of inheritance, unless an intention to exclude them could be collected from the context (*s*).

Leaseholds for lives not within the rule in *Rose v. Bartlett*.

VI.—In regard to Powers of Appointment.—This subject has been already discussed (*t*).

(*p*) L. R., 4 Eq. 278.

(*q*) See *Greer v. Waring*, [1896] 1 Ir. R. 427. In that case (which was one of a charge, not a devise) the testator referred in one part of the will to his "real freehold and leasehold property."

(*s*) *Sheffield v. Mulgrave*, 5 T. R. 571, 2 Ves. jun. 526; *Fitzroy v. Howard*, 3 Russ. 225; *Weigall v. Brome*, 6 Sim. 99.

(*t*) Ante, Chap. XXIII. As to general powers, see p. 809; as to special powers, see p. 827.

CHAPTER XXVI.

DEVISES BY MORTGAGEES AND TRUSTEES.

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Devises by
mortgages.

MR. JARMAN points out (a) that : “ As mortgages are of a complex nature, involving on the one hand a personal debt (b), with all the claims and obligations incident to the relation of creditor and debtor, and on the other an interest in real estate for the purpose of securing the debt, absolute at law after forfeiture, but redeemable in equity, it follows that the testamentary disposition of a mortgagee presents two distinct subjects for consideration.

Whether
beneficial
interest in
mortgage will
pass under
devise of
lands.

I.—In regard to the Beneficial Interest in Mortgages.—“ With respect to the *beneficial interest in the mortgage*, it is clear that a general devise of lands will not commonly have the effect of including it (c). The contrary, indeed, is laid down by a respectable writer (d), but his position is not warranted by either authority or principle. The case of *Ex parte Sergison* (e) cited by him does not support it, for the devisee was executor and residuary legatee, and consequently entitled, *in that character*, to the beneficial interest in the mortgage : besides, the only question in the case related to the *legal estate* in the lands (f). The position is opposed, too, by the established principle of equity, which considers the mortgagee as holding the land in a fiduciary character only, and the estate as still substantially belonging to the mortgagor. The person taking the mortgaged lands therefore by devise or descent, from the deceased mortgagee, it is obvious, is a trustee

(a) First ed. p. 633.

(b) See *Re Gibbon*, [1909] 1 Ch. 367.

(c) *Strode v. Russel*, 2 Vern. 621, 3 Ch. Rep. 169, 2 Vent. 851, 3 P. W. 61 ; *Casborne v. Scarfe*, 1 Atk. 603 and n. by Sanders, 2 J. & W. 194.

(d) 1 Rob. on Wills, 3rd ed. 403.

(e) 4 Ves. 147. Stated post, p. 972.

(f) “ Mr. Roberts evidently confounds the two questions ; his positions are inapplicable to either.” (Note by Mr. Jarman.)

for the person entitled to the money or debt, by virtue of the will or otherwise (*g*), unless, of course, both these interests happen to unite in the same person.

“Nor is it, I apprehend, universally true, that an *express* devise of the lands, or (which seems to be the same in effect) a devise of all the testator’s lands in a particular place, he having no other than mortgaged lands there, will carry the beneficial interest to the devisee, though the affirmative has been sometimes laid down in very unqualified terms (*h*).

Effect of
devise of
mortgaged
lands on
beneficial
interest.

“It is observable that in the cases cited in support of the doctrine referred to, *the testator was in possession* at the time (*i*), and in most of them the operation of the devise was not called in question, the only point being as to the right of redemption. The fact of such possession, particularly where it has been of long continuance, and accompanied with acts of ownership, certainly strongly favours the supposition that the testator, in expressly devising the property, means to give the beneficial interest. Having himself enjoyed the property beneficially, he can hardly but intend that his devisee’s enjoyment should be of the same nature, especially where it is given not to the devisee simply in fee, but to several persons consecutively for limited estates (*j*). The testator, too, may be ignorant whether the right of redemption, on which the nature of the property depends, be barred or not; and may therefore choose to avoid using any expressions which might be construed into a recognition of it (*k*). Indeed, in such cases there would be strong ground to contend that the beneficial interest would pass, even under a general devise of lands, especially if there were no other lands to satisfy the devise, a circumstance, however, which would be immaterial, in regard to a will which is governed by the *existing* law.

Fact of the
mortgagee
being in
possession.

“In *Martin d. Weston v. Mowlin* (*l*), Lord Mansfield held that a copyhold estate, of which the testator was in possession as mortgagee, did not pass under a devise of all his ‘lands, tenements and hereditaments, within and parcel of the manor of W.,’ the surrender to the use of the will referring to the property as subject to a condition of redemption and resurrender; and the will containing a recital that the mortgagor stood indebted to him, and

(*g*) *Att.-Gen. v. Meyrick*, 2 Ves. sen. 44.

(*h*) 1 Pow. Mortg. Cov. Ed. 409.

(*i*) *Clarke v. Abbot*, 2 Eq. Ab. 606, Barn. Ch. Rep. 457. In *How v. Vignes*, 1 Ch. Rep. 32, this fact, though not stated, seems very probable, as the

object of the suit was to foreclose.

(*j*) *Woodhouse v. Meredith*, 1 Mer. 450.

(*k*) But now see stat. 37 & 38 Vict. c. 57, s. 7.

(*l*) 2 Burr. 939.

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giving her time for payment of the debt. It appeared, moreover, that the testator was seised of other lands, also surrendered to the use of his will, in the manor of W.

Beneficial interest in mortgage, held to pass under devise of lands in K.

"In *Woodhouse v. Meredith* (m), Sir W. Grant held that the testator's beneficial interest in leasehold property at K., of which he was in possession as mortgagee, and of which an assignment in trust for sale had been executed to him, passed under a devise of all his freehold, copyhold and leasehold messuages, farms, lands and tenements whatsoever and wheresoever, in the county of H. and the town of K., to various limitations, the testator having no other than the mortgaged lands at K., though the will contained a subsequent devise of all estates vested in him as mortgagee or trustee, but which was satisfied by other lands of which the testator was seised as mortgagee. The same observation applied to the bequest of securities for money, which also occurred (n).

Cases suggested in which devise of mortgage-estate would not carry beneficial interest.

"It is observable that the M.R. considered, from the nature of the limitations and provisions in the will, (which consisted of successive estates for life, with an estate interposed in trustees to preserve contingent remainders,) that, if the property passed at all, it was the beneficial interest, and not the mere legal estate, which was disposed of.

"But cases might be suggested in which an express devise of lands, even by a mortgagee in possession, would not carry the beneficial interest; for instance, if the will contained a specific bequest of the mortgage debt, which would show that the devisee of the land was intended to be a trustee for the legatee. But it is clear that a general bequest of mortgages or securities for money would not have such effect (o), for, as such a bequest would pass after-acquired property of this description, the testator is not necessarily presumed to have any specific subject in his contemplation when he makes his will."

An intention not to give the devisee any interest in the mortgage debt may also appear from other circumstances. Thus in *Re Clowes* (p) a testator who was absolutely entitled to a freehold estate specifically devised it to H. Afterwards he sold the estate and took a reconveyance from the purchaser by way of mortgage

(m) 1 Mer. 450. This decision was followed in *Re Carter*, [1900] 1 Ch. 801.

(n) But as to which see next note.

(o) See Mr. Justice Le Blanc's judgment in *Doe d. Freestone v. Parratt*,

5 T. R. 652 ["Le Blanc" appears to be a misprint for "Lawrence"]; and Lord Eldon's in *Thompson v. Lawley*, 2 B. & P. at p. 314.

(p) [1893] 1 Ch. 214.

for securing part of the purchase money: it was held that the mortgage debt did not pass by the specific devise to H. The decision of the Court of Appeal seems to have turned, not on the fact that the testator was not a mortgagee in possession (*q*), but on the doctrine of revocation by change of estate, laid down in *Moor v. Raisbeck* (*r*).

The decision in *Re Carter* (*s*) seems to have been based partly on the fact that the testator was in possession as mortgagee, and partly on the general principle that a devise of specific property is intended to pass all the interest of the testator in the property. But these considerations are not necessarily conclusive. Thus in *Bowen v. Barlow* (*t*) an owner in fee demised a piece of land for a term of years to B., who assigned the term by way of mortgage to the lessor, and afterwards built four houses on the land. The lessor then made his will, and thereby devised his four freehold houses specifically on one set of trusts, and bequeathed his personal estate on another set; at his death he was in possession as mortgagee; and it was held that the mortgage debt was a distinct subject from the reversion, and did not pass by the devise, but by the bequest of personal estate. That the debt was charged on the term, that the term was merged at law, and that the testator had entered into possession, were considered immaterial facts, so long as the equity of redemption remained unbarred.

If a testator expressly devises "all his estate and interest" in certain lands, this may be sufficient to pass his beneficial interest in a sum charged on the lands (*u*). Devise of
"estate and
interest."

It has been suggested that sect. 30 of the Conveyancing Act, 1881, has altered the general rule above stated (*v*), on the ground that a testator cannot now dispose by will of the legal estate in land of which he is mortgagee, and that consequently by a devise of the land he must mean his beneficial interest in it, namely the mortgage debt (*w*). The argument attributes to testators an acquaintance with the details of real property law which they do not always possess.

"And here it may be observed," continues Mr. Jarman (*x*),

(*q*) As suggested by Cozens-Hardy, J., in *Re Carter*, supra.

(*r*) 12 Sim. 123; ante p. 163.

(*s*) [1900] 1 Ch. 801.

(*t*) L. R. 11 Eq. 454; 8 Ch. 171.

(*u*) *Mackesy v. Mackesy*, [1896] 1 Ir. R. 511. In that case the testator was the owner of the land subject

to a mortgage debt, vested in trustees, to which he was beneficially entitled. See also *Kilkelly v. Powell*, [1897] 1 Ir. R. 457.

(*v*) Ante p. 966.

(*w*) See *Re Clowes*, supra. Coote on Mortgages, 866.

(*x*) First ed. p. 636.

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Devises of land contracted to be sold, held not to pass benefit of the contract.

Passes by word "mortgages."

Charge when extinguished by union of character of mortgagor and mortgagee.

"that a devise by a testator to his wife of an estate which he had lately contracted to sell to A.' has been held to be a mere devise of the legal estate, to enable her to carry the contract into execution, and did not entitle the devisee to the purchase-money (y).

"Upon the whole, it is clear that the proposition which states that an express devise of mortgaged lands will carry the beneficial interest in the mortgage, must be received with some qualification.

"In the case of *Wilkinson v. Merryland* (z) it was doubted whether the benefit of a mortgage would pass by the word 'mortgages,' collocated with other personal chattels; but the affirmative is now perfectly clear (a).

As to the Extinction of the Charge by Union of Character of Mortgagor and Mortgagee.—"In conclusion of this branch of the subject, it may be observed, that where a person having a mortgage or other charge upon lands, becomes himself entitled to the inheritance of the lands so charged, a question frequently arises between his representatives, whether the charge is to be considered as subsisting for the benefit of his personal representatives, or is merged for the benefit of the person taking the land. The rule in these cases is, that if it be indifferent to the party in whom this union of interest occurs, whether the charge be kept on foot or not, it will be extinguished in equity by force of the presumed intention (b), unless an act declaratory of a contrary intention, and consequently repelling such presumption, be done by him (c). But if a purpose beneficial to the owner can be answered by keeping the charge on foot, as if he be an infant, so that the charge would (under the old law allowing infants to bequeath personal estate) be disposable by him, though the land would not (d); or a beneficial use might have been made of it against a subsequent incumbrancer (e), or the other creditors of the person from whom

(y) *Knollys v. Shepherd* cited in *Wall v. Bright*, 1 Jac. & W. at p. 499, stated ante p. 731.

(z) *Cro. Car.* 447; *Sir W. Jones*, 380, stated next chapter.

(a) *Att.-Gen. v. Bowyer*, 3 Ves. 714; *Dicks v. Lambert*, 4 Ves. 725.

(b) As to the implication of such an intention from the terms of the will, see *Re Nunn's Estate*, 23 L.R. Ir. 286.

(c) *Price v. Gibson*, 2 Ed. 115; *Donisthorpe v. Porter*, ib. 162, Amb. 600; *Lord Compton v. Oxenden*, 2 Ves. jun. 261; *Johnson v. Webster*, 4 D. M. & G. 474; *Price v. John*, [1905] 1 Ch. 744; *Re Duke of Somerset*, 55 L. T. 753; *Re Hole*, [1906] 1 Ch. 673; *Re Gibbon*, [1909] 1 Ch. 367; *Swinfen v.*

Swinfen (No. 3), 29 Bea. 199; *Re Butlin's Estate*, [1907] 1 Ir. R. 159. The union of interest must happen in the lifetime of the party, and no other person must at that time have any interest in the charge, *Tucker v. Loveridge*, 1 Gif. 377, 2 De G. & J. 650; *Wilkes v. Collin*, L. R., 8 Eq. 338. General powers to appoint the land and the charge, which (in default) are respectively limited to the heirs and next of kin of the donee, do not produce the required union, *Clifford v. Clifford*, 9 Hare, 675.

(d) *Thomas v. Kemys*, 2 Vern. 348, 1 Eq. Ca. Ab. 269, pl. 9.

(e) *Gwillim v. Holland*, July 29, 1741, cit. 2 Ves. jun. 263.

the party derived the onerated estate (*f*); in these, and similar cases, equity will consider the charge as subsisting, although it may have become merged by mere operation of law (*g*). And the same rule obtains in favour of the creditors of the person in whom these interests centre (*h*). So, if mesne estates intervene between the charge and the estate of inheritance of the person entitled to it, the charge will subsist " (*i*).

II.—Operation of General Devise on Legal Estate.—We now proceed to consider the question of a general devise on real estate vested in the testator as mortgagee or trustee. The important changes in the law as to the devolution of trust and mortgage estates which have been successively introduced by the Vendor and Purchaser Act, 1874, and the Conveyancing and Law of Property Act, 1881, in cases of deaths of testators after the 6th August, 1874, and the 31st December, 1881, respectively, render it convenient to consider separately different classes of cases which may arise according to the date of the testator's death.

Operation
of general
devise on
legal estate.

First, as regards testators who died before the 7th August, 1874, the date on which the Vendor and Purchaser Act, 1874, came into operation (*j*), the rule at length established after much fluctuation of authority (*k*) is, that such property will pass

Old law.

(*f*) *Forbes v. Moffatt*, 18 Ves. 384; *Lord Clarendon v. Barham*, 1 Y. & C. C. 688; *Davis v. Barrett*, 14 Beav. 542; see *Wigzell v. Wigzell*, 2 S. & St. 364; *Anderson v. Pignet*, L. R., 8 Ch. 180. The relative values of the estate and such other charges will not generally be inquired into; but semb. the charges must be substantial, per Wood, V.-C., *Richards v. Richards*, Johns. at p. 767.

(*g*) See Sir W. Grant's judgment in *Forbes v. Moffatt*. Those cases, where the charge and the inheritance become united by descent or devise, are to be distinguished from *Mocatta v. Murgatroyd*, 1 P. W. 393; *Toulmin v. Steere*, 3 Mer. 210, as to which, see 1 Ll. & Go. 251, 1 D. M. & G. 244, and *Adams v. Angell*, 5 Ch. D. 634.

(*h*) *Powell v. Morgan*, cit. 2 Vern. 208. See also Lord Northington's judgment in *Donisthorpe v. Porter*, 2 Ed. 162; *Pears v. Weightman*, 2 Jur. N. S. 586.

(*i*) *Wyndham v. Earl of Egremont*, Amb. 753. As to the evidence required to rebut the presumption of extinguishment, see *Tyruwhitt v. Tyruwhitt*, 32 Beav. 244, and cases there cited. And as to the effect of a declaration against

merger, see *Re Gibbon*, [1909] 1 Ch. 367.

(*j*) Although the effect of recent legislation is to render obsolete as regards persons dying after 1881 (with certain exceptions which will hereafter be considered) the decisions discussed in the following pages, yet these decisions are still of practical importance as affecting titles in which questions may arise respecting the devolution of trust and mortgage estates generally of persons who died before that date, and also as affecting copyholds and customary lands vested in persons who have died since that date as trustees or mortgagees. It has therefore been thought advisable to reproduce here in a slightly abbreviated form the elaborate discussion of this difficult and complicated question, which was contained in previous editions of this Work. [Note by Mr. Robbins, in the 5th ed. of this work.]

(*k*) See contra, the decisions of Lord Loughborough, *Att.-Gen. v. Buller*, 5 Ves. 339; and of Lord Eldon, *Ex parte Brettell*, 6 Ves. 577; but see the observations of Lord Eldon on these decisions in *Braybroke v. Inskip*, 8 Ves. at p. 434.

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under a general devise of lands, unless a contrary intention can be collected from the testator's expressions, or from the purposes or limitations to which he has devoted the subject of disposition. And it is clear that the circumstance of there being other property to which the devise is applicable, is no ground of exclusion.

Legal estate held to pass.

Thus, in an early case (*l*), it is laid down, that if a man had but the trust of a mortgage of lands in D. and had other lands in D., by a devise of all his lands in D. the trust would pass.

Ex parte Sergison.

In *Ex parte Sergison* (*m*), a mortgagee in fee devised all the rest, residue, and remainder of his estate, both real and personal, and of what nature or kind soever and wheresoever, not theretofore specifically given, devised and bequeathed, to A., his heirs, executors, administrators and assigns, for ever, on the side of his mother, and appointed A. executor. A. was an infant. On petition for an order for him to convey under stat. 7 Anne, c. 19, Sir R. P. Arden, M.R., was of opinion that the legal estate in the mortgaged lands passed by the devise, though, as the infant was executor, and therefore entitled to the money, he could not compel him to convey. Lord Loughborough also inclined to think that the estate passed by the devise; and it was stated at the bar that this corresponded with the opinion of Lord Northington and Lord Thurlow, who had overruled Lord Hardwicke's dictum in *Casborne v. Scarfe* (*n*). In the principal case, however, the heir, under the circumstances, was ordered to convey; the L.C. observing, that the infant devisee, when he was of age, might join, which would give a title *quâcunque viâ*.

Opinions of Lord Northington, Lord Thurlow, and Sir R. P. Arden.

Rule finally established in *Lord Braybroke v. Inskip*.

The present doctrine was finally established by *Lord Braybroke v. Inskip* (*o*), where real estate having been devised to trustees, upon trust to pay debts, and settle the estates to certain uses; the question was, whether the estate passed by the will of

(*l*) *Littleton's Case*, 2 Vent. 351. See also *Marlow v. Smith*, 2 P. W. 198.

(*m*) 4 Ves. 147.

(*n*) 1 Atk. 603. "But it has been suggested that his Lordship may have referred to the beneficial interest (see Mr. Sanders's note); and, perhaps, in regard even to the legal estate, the position is not erroneous, as a devise, in the terms supposed, would confer only a life estate; and it has never been held that a general devise conferring less than a fee would operate to pass estates vested in the testator as mortgagee or trustee. Such a question of

course, is less likely to arise now than under a will made or republished since 1837, an unrestricted devise will carry the fee." (Note by Mr. Jarman.) In *Greenwood v. Wakeford*, 1 Beav. 576, it was held that the legal estate of lands vested in a surviving trustee during the life of a married woman, passed by a devise of "all the lands and hereditaments vested in him as trustee or mortgagee in fee," the question apparently being whether the words, "in fee" referred as well to "trustee" as to "mortgagee."

(*o*) 8 Ves. 417

the heir of the surviving trustee, who gave and devised all his real estates whatsoever and wheresoever, unto his wife G., her heirs and assigns, for ever, and gave all his personal estate to her; and appointed his said wife and B. executrix and executor. The heirs at law were two infants and a married woman. Lord Eldon held that the legal estate passed by the will. After reviewing the cases, he stated the rule to be, that trust estates would pass under a general devise, unless it could be collected, from expressions in the will, or purposes or objects of the testator, that he did not mean that they should pass. In this case he observed there was no one circumstance to cut down the effect of the devise.

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Trust estates will pass under a general devise containing nothing inconsistent.

So, in *Bainbridge v. Lord Ashburton* (p), where the surviving trustee under a will, after devising certain specific real estates to various persons, gave and devised all his real estates, not therein-before otherwise disposed of, unto his godson, his heirs, executors, administrators and assigns, according to the tenure and nature thereof respectively, to and for his and their own use and benefit. It was held that the trust estate passed under the devise.

Bainbridge v. Lord Ashburton.

It is clear that the fact of the testator having reserved to the devisee a power of appointment, does not constitute a ground for excluding trust estates (q).

Reservation of power of appointment.

The converse of the rule established by the preceding cases is equally clear; namely, that if the property comprised in the general devise be subjected to the payment of debts, legacies, annuities, or any other species of charge (r), or the will contain any limitations or provisions to which it cannot be supposed that the testator intended to subject property not beneficially his own, as uses in strict settlement (s), or executory

What will exclude trust estates from a general devise.

Charges of debts, executory limitations, &c., will exclude trust estates.

(p) 2 Y. & C. 347; and see *Sharpe v. Sharpe*, 17 L. J. Ch. 384, 12 Jur. 598; *Langford v. Auger*, 4 Hare, 313.

(q) *Ex parte Shaw*, 8 Sim. 159; but qu. was any power created in that case?

(r) *Wynne v. Littleton*, 2 Ch. Rep. 51, 1 Vern. 3, (but as to this see 1 Cov. Pow. Mortg. 414); *Roe d. Reade v. Reade*, 8 T. R. 118; *Ex parte Morgan*, 10 Ves. 101; *Rackham v. Siddall*, 16 Sim. 297, 1 Mac. & G. 607; *Hope v. Liddell*, 21 Beav. 183; *Dimes v. Grand Junction Canal Company*, 9 Q. B. 469, 3 H. L. Ca. 794; *Re Bellis's Trusts*, 5 Ch. D. 504. The foregoing are cases of trust estates. The following are cases of mortgage, *Duke of Leeds v. Munday*, 3 Ves. 348; *Re Horsfall*, McClell. & Y. 292; *Doe d. Roylance v. Lightfoot*,

8 M. & Wels. 553; *Re Packman and Moss*, 1 Ch. D. 214. As to *Re Stevens' Will*, L. R., 6 Eq. 597, vide post, p. 977. In *Re Brown and Sibly*, 3 Ch. D. 156, Malins, V.-C., dissented from *Re Packman and Moss*, supra.

(s) *Thompson v. Grant*, 4 Mad. 438; *Att.-Gen. v. Vigor*, 8 Ves. 256; overruling *Ex parte Bowes*, cited 1 Atk. 605, n., by Sanders, where Lord Hardwicke held that a general devise of real estate in S. K. and M. and elsewhere in England to certain uses, under which an infant was then entitled to an estate tail, passed the legal estate in lands of which the deviser was mortgagee in fee; see *Burdus v. Dixon*, 4 Jur. N. S. 967, where the testator had attempted to make the mortgaged

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limitations (*t*) ; or a trust for sale (*u*) ; or for a charity (*v*), or for the separate use of a married woman (*w*), or for an unascertained class (*x*) ; or words of severance making the devisees tenants in common, with a clause of accruer amongst them (*y*), the mortgage or trust lands will not pass. And considering the inconvenience arising from the devolution of a trust estate in shares, it would seem that the words of severance alone are sufficient to exclude it from a general devise (*z*).

And it is wholly immaterial whether the testator has other lands to which the devise can be applied or not ; for in these cases the Courts have not adopted the principle applicable to reversions, that, where there are other lands, to which the inconsistent limitations can be referred, they apply exclusively to those lands, *reddendo singula singulis* (*a*).

Devise confined to mortgages in which the devisor had the beneficial interest.

In *Ex parte Morgan* (*b*), Lord Eldon held, that lands of which the testator had merely the legal estate, as heir at law of the preceding mortgagee, did not pass under a devise to trustees of “all such real estates as are now vested in me by way of mortgage, the better to enable them my said trustees, and the survivor of them, and the executors and administrators of such survivor, to recover, get in and receive the principal monies and interest, which may be due thereon.”

As Mr. Jarman remarks (*c*) : “The rule under consideration, of course, does not deny the power of a testator to limit estates vested in him as mortgagee or trustee to uses in strict settlement, or in any other manner equally inconsistent with a due regard to the testator’s duty as mortgage creditor or trustee : it merely refuses to see an intention so to do in a general devise. Should a testator unequivocally devise an estate vested in him as mortgagee or trustee in the manner suggested, the intention must prevail ; and it would be left to the persons who may become damnified

property his own, by a pretended sale to another, who was a trustee for the testator, and the legal estate was held to pass notwithstanding the uses and trusts.

(*t*) Per Lord Eldon, *Braybroke v. Inskip*, 8 Ves. at p. 434.

(*u*) *Ex parte Marshall*, 9 Sim. 555.

(*v*) *Att.-Gen. v. Vigor*, 8 Ves. 256.

(*w*) *Lindsell v. Thacker*, 12 Sim. 178.

See, however, per Kindersley, V.-C., *Lewis v. Mathews*, L. R., 2 Eq. at p. 180.

(*x*) *Re Finney’s Estate*, 3 Gif. 465.

(*y*) *Thirtle v. Vaughan*, 2 W. R. 632, 24 L. T. 5 ; *Martin v. Laverton*, L.

R., 9 Eq. 563 ; *Re Franklyn*, W. N. 1888, p. 217.

(*z*) *Martin v. Laverton*, L. R., 9 Eq. at p. 568, per Malins, V.-C. *Ex parte Whiteacre*, 1 Sand. Uses, 359, n., is sometimes cited contra, but the devise contained the words “mortgages and securities,” to which vide *infra*.

(*a*) 5 Ch. D. p. 508, notwithstanding 3 Ch. D. 156.

(*b*) 10 Ves. 101. And see *Re Smith’s Estate*, 4 Ch. D. 70 ; *Re Morley’s Will*, 10 Hare, 293.

(*c*) First ed. p. 646.

by such a proceeding, to obtain satisfaction out of the estate of the deceased testator " (d).

Whether lands held by a testator as mortgagee will, in cases not affected by recent legislation, pass by the words "mortgages" or "securities for money," has been the subject of much controversy. The affirmative was supposed to have been decided in the early case of *Crips v. Grysil* (e); and although on an examination of the record (f), it appeared that the will contained, in addition to the word "mortgages," other expressions more unequivocally applying to the land, yet the ratio decidendi was that the word "mortgages" made a good devise of the lands. And it is now settled that the words "mortgages," "securities for money," and similar expressions, will comprise the entire benefit of the mortgage security (including the inheritance in the lands (g)), unless a contrary intention appears by the context; and that the fact of those words being found among terms descriptive exclusively of personal estate (h), and followed by a limitation to executors and administrators only, and not to heirs, or by a charge of debts and legacies (i), or a trust for sale (j), or for several as tenants in common (k), will not affect the construction. The broad principle is, that the testator meant to substitute the object of his bounty in his own place as mortgagee, and to enable him to enforce payment of the mortgage money by giving him the legal estate in the mortgaged lands (l).

Words
"mortgages"
and "se-
curities for
money" pass
the legal
estate.

(d) The reader will remember that such a devise as that above suggested is now inoperative (*infra* p. 989). In cases governed by the old law, if, after a contract for sale, but before completion, the vendor dies leaving an infant heir, or having, by will executed before the date of the contract, devised the estate to a person incompetent to convey, the vendor's estate will not have to bear the costs of the suit rendered necessary to complete the conveyance, *Hanson v. Lake*, 2 Y. & C. C. 328; *Hinder v. Streeten*, 10 Hare, 18, 16 Jur. 650; *Re Manchester and Southport Railway Company*, 19 Beav. 365; *Bannerman v. Clarke*, 3 Drew. 632; overruling *Prytharch v. Havard*, 6 Sim. 9; *Midland Counties Railway Company v. Westcomb*, 11 Sim. 57; *Eastern Counties Railway Company v. Truffnell*, 3 Rail. C. 133. But if after contract to sell the vendor execute such a will, the costs of suit will be thrown on his estate, *Wortham v. Lord Dacre*, 2 K. & J. 437; *Purser v. Darby*, 4 ib. 41.

(e) Cro. Car. 37.

(f) See 9 B. & Cr. at p. 282.

(g) See *Renvoize v. Cooper*, 6 Mad. 371; *Silberschildt v. Schiott*, 3 V. & B. 45, per Sir W. Grant; *Re Walker's Estate*, 21 L. J. Ch. 674; *Knight v. Robinson*, 2 K. & J. 503; *Rippen v. Priest*, 13 C. B. N. S. 308; *Garnham v. Skipper*, 54 L. T. 940; but the old case of *Wilkinson v. Merryland*, Cro. Car. 449, is contra.

(h) *Renvoize v. Cooper*, 6 Mad. 371; *Re King's Mortgage*, 5 De G. & S. 644.

(i) *Re Field*, 10 Hare, 414; *Re King's Mortgage*, 5 De G. & S. 644; *Rippen v. Priest*, 13 C. B. N. S. 308; *Knight v. Robinson*, 2 K. & J. 503.

(j) *Ex parte Barber*, 5 Sim. 451.

(k) *Ex parte Whiteacre*, Rolls, 22 July, 1807, 1 Sand. Uses and Trusts, 359, n.

(l) The special grounds relied on in *Ex parte Barber*, 5 Sim. 451, and *Mather v. Thomas*, 6 Sim. 115, were therefore not essential. *Silvester v. Jarman*, 10 Pri. 78, and *Galliers v. Moss*, 9 B. & Cr. 267, are overruled: so is *Ex parte*

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Devise "that A. shall receive money on mortgage," or "on securities."

But further, in *Doe d. Guest v. Bennett (m)*, where a testator made his will as follows: "I leave my wife to receive all monies upon mortgages and on notes out at interest, and at her decease I leave my niece to pay my wife's debts and to take all that remains of my property, land or personal property": the Court of Exchequer held that the wife took the legal estate in the mortgaged property.

And in *Re Arrowsmith's Trusts (n)*, a mortgagee in fee devised to a trustee all his real and personal estate in trust, at the death of his wife, to get in all debts owing to him on any security; it was held by K. Bruce and Turner, L.J.J., that the legal estate in the mortgaged property passed to the trustee, that construction being necessary to give full dominion over the mortgaged estate for the purpose of carrying into execution the trusts of the will.

Gift "money on securities."

Sir R. Kindersley, however, held that the legal estate did not pass by a gift of "money in the funds and on securities." He thought *Doe v. Bennett* was distinguishable; but if it was meant that a legatee who was to receive the money was also to take the legal estate, he could not concur (o). If that principle were to be carried out, it would apply to a case where a testator merely left his personal estate to his executors, it being obviously his intention in that case that they should receive the mortgage money (p). But hitherto the principle has been confined to cases where the intention has been expressed.

Gift of real and personal estates, n trust to sell and get in.

As already stated, a general devise of real estate on trust for sale will not include the legal estate in mortgaged property (q). But where the real and personal estates are devised and bequeathed together, expressly in trust to sell and get in, the trustees cannot execute these trusts as regards the personalty without having dominion over the mortgaged estate; and, though it has never been so held, there is a strong inclination to say that the express trust to sell and get in the personalty, neutralizes the restrictive effect which the trust for sale would otherwise have upon the devise of real estate, and to hold that thus the latter devise carries the mortgaged estate (r).

Gorsett, 19 L. J. Ch. 173, unless it can be distinguished on the ground that the security was in the form of a trust for sale, sed. qu.

(m) 6 Exch. 892.

(n) 27 L. J. Ch. 704.

(o) But see per Grant, M.R., *Silberschildt v. Schiott*, 3 V. & B. 49.

(p) *Re Cantley (or Cautley)*, 22 L. J. Ch. 391.

(q) Ante, p. 974.

(r) See per Jessel, M.R., *Lysaght v. Edwards*, 2 Ch. D. at p. 515, and *Re Smith's Estate*, 4 Ch. D. at p. 72 ("whatever might have been the case if the mortgage money had belonged to the testator in his own right"); and per Shadwell, V.-C., *Ex parte Barber*, 5 Sim. at p. 455, where however the word "securities" occurred.

Gift of real and personal estate subject to debts.

But a gift of the real and personal estate charged (as in *Re Arrowsmith's Trusts*) with debts, or charged with debts and legacies, but not aided by express mention of "mortgages," or "securities," nor by an express trust to sell and get in the personalty, will not include the mortgaged estate. Thus, in *Doe d. Roylance v. Lightfoot (s)*, where a mortgagee devised all his real and personal estates after payment of his debts and legacies to A. and B. as tenants in common in fee; it was held, that the legal estate did not pass by the will, on the ground that the testator could not have intended that estates should pass of which he was seised only as mortgagee, but only those which he had power to subject to his debts and legacies, namely, those which were equitably as well as legally his own.

Re Stevens' Will.

A decision which at first sight seems opposed to this was made in *Re Stevens' Will (t)*, where a mortgagee in fee directed all her debts to be paid; she then gave several pecuniary legacies, and as to all the rest and residue of her real and personal estate and effects, she gave the same to J. for her own absolute use and benefit, and appointed other persons executors: Giffard, V.-C., decided that the legal estate passed to J., but the decision seems to have turned on the admissions made during the argument (u).

Since *Re Stevens' Will* the authority of *Doe v. Lightfoot* has been fully recognized (v); and in *Re Packman and Moss (w)*, where a mortgagee gave and bequeathed all his property, real and personal, to trustees (whom he appointed executors) upon trust, first, to pay debts, and as to the residue on certain trusts for his wife and children, Sir G. Jessel decided that the legal estate did not pass, on this, among other grounds, that the testator's debts could only be paid out of his own property.

Mortgage terms, when included in a general devise.

Mr. Jarman continues (x): "Hitherto the point of construction under consideration has been viewed in reference to mortgages *in fee*. With respect to mortgages for terms of years, it is conceived they fall under the principle established by *Rose v. Bartlett (y)*, that leaseholds for years will not, under the old law, pass by a general devise of lands, unless the testator have no freeholds on which it might operate. If there be no such lands, or the will be subject

(s) 8 M. & W. 553. The statement of the devise is taken verbatim from the report. The tenancy in common was not adverted to.

(t) L. R., 6 Eq. 597.

(u) See the examination of the case in the 4th edition of this work, p. 701, and (slightly abbreviated) in the 5th

edition, p. 653.

(v) By Jessel, M.R., *Re Bellis's Trusts*, 5 Ch. D. at p. 509.

(w) 1 Ch. D. 214. See also *Re Horsfall*, M'C. & Y. 292.

(x) First ed. p. 650.

(y) See ante, p. 962.

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to the new law, and if the devise contain nothing inconsistent, and there be no specific bequest which will carry the legal interest in the mortgage term, it is clear that such interest will pass under a general devise. The question, however, could hardly arise on the mere legal interest, since it would vest primarily in the executor, or the administrator *cum testamento annexo*, as part of the testator's personal estate, and it is unlikely that the legatee would claim his assent to the bequest, unless there was ground to contend, that the bequest included the beneficial interest.

Rule as to
copyholds.

" Estates of copyhold tenure, held by the testator in the character of mortgagee or trustee, are not distinguishable from freeholds, in regard to the effect of a general devise, whether the will is subject to the old or new law; supposing, of course, that its antiquity is not such as to exempt it from the operation of the act of 55 Geo. 3, c. 192, which first dispensed with the necessity of a surrender to the use of the will, in regard to testators dying after the passing of the act.

As to devises
of lands con-
tracted to be
sold by
testator.

" It has been sometimes a question [under the old law (z)], how far the principle which governs the construction of devises of lands vested in a testator as mortgagee or trustee, applies to property which, belonging to him beneficially, he has contracted to sell; for though in such cases the testator is, in the event of the contract being carried into effect, a trustee for the purchaser, yet, as this may not happen, and consequently the property may remain unconverted, the trust is of a qualified and contingent nature. It has been decided (a), however, that if a testator, after having contracted for the sale of an estate, devises it as, All that his estate called A., which he had contracted to sell, the effect is to vest in the devisee the legal estate only, for the purpose of enabling him to carry the contract into effect for the benefit of the executor, *and does not entitle the devisee to the purchase-money*. It is conceived, however (though the point did not arise in the case referred to), that if from any circumstances, the contract had proved not to be binding on or had been rescinded by the testator, the devisee would have been entitled to the land, and this (as already hinted) constitutes a difference between the case, and that of a dry mortgage and trust estate, which renders the construction that has been applied to the latter, to a certain extent, inapplicable to the former. Thus, in the case of *Wall v.*

Difference
between a
vendor and a
mere trustee.

(z) As to the law since 1881, see post, p. 984.

(a) *Knollys v. Shepherd*, cited 1 J. &

W. 499, Sug. Law of Prop. 223, ante, p. 163.

Bright (b), where a testator, after having contracted for the sale of an estate, devised all his lands to trustees, upon trust to sell, with the usual powers to give discharges to purchasers, Sir T. Plumer, M.R., held, that the contracted for property passed by the devise (c).

“ In this case, the construction adopted by the Court was very convenient, as it enabled the devisees, in performance of the testator’s contract, to convey the estate to the purchaser, which otherwise would have descended to an infant, who, in the then state of the law, could not, even with the aid of the Court of Chancery, have made an effectual conveyance to the purchaser. Still, however, it is to be remembered, that a trust for sale was no less inappropriate to property which had been actually sold, than a devise in strict settlement, or any other such limitations would have been, though, as it confers on the trustees an estate in fee, it happened to be more convenient ; and much of the reasoning of the M.R. would have applied, if the devise had been such as to have rendered it impossible for the devisees, without the aid of the Court (d), to make an effectual conveyance to the purchaser. He does, however, more than once advert to the convenience attending the construction in the particular case ; and the prudent practitioner, knowing the influence which such considerations, whether acknowledged or not, do often exert in questions of this nature, will hesitate too readily to assume the application of the same doctrine to cases in which a different result would follow. Nor, indeed, does it seem to be altogether inconsistent with sound principles of construction, especially that rule which has been the subject of discussion in the present chapter, that the fact of the devise being such as to enable the devisee to carry the testator’s contract into effect or not, should have some weight in determining whether it was intended to apply to the property ” (e).

But, as pointed out by Sir G. Jessel (f), if the contract is a valid one, binding on both parties, and continues such at the time of the vendor’s death, no subsequent event can affect the question ;

Remarks
upon *Wall*
v. *Bright*.

If the contract is valid at the vendor’s death, he is a trustee.

(b) 1 J. & W. 494.

(c) The lengthy quotation from the M.R.’s judgment given by Mr. Jarman, is omitted, as the question is gradually losing its practical interest.

(d) 1 Will. 4, c. 60.

(e) In such a case the purchase-money would be payable, not to the trustees by virtue of the devise, but to the executors as part of the personal estate of the testator, *Eaton v. Sanxter*,

6 Sim. 517 ; so that this construction (as was observed by Jessel, M.R., 2 Ch. D. at p. 520) could not be maintained where the proceeds of the real estate and the personal estate were given beneficially to different persons. In *Wall v. Bright* the personal and real estate were given to the same trustees upon trust for conversion.

(f) 2 Ch. D. at p. 507.

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*Lysaght v.
Edwards.*

the property is converted, and the vendor is a constructive trustee; not a bare trustee, for he has a beneficial interest left in him, viz. a lien or charge on the estate for the security of the purchase-money (g), but still a trustee. Therefore, where (h) a testator by his will, dated 1873, devised all his real estate to A. and B. on trust to sell, and devised the real estate which at his death might be vested in him as trustee to A., and afterwards entered into a valid contract to sell part of his real estate, it was held by Sir G. Jessel, M.R., that this part passed by the devise of trust estates. He acquiesced in the decision in *Wall v. Bright*, because, viewing the testator as being entitled to the estate simply as a security for his purchase-money, he thought the trustees could not execute the trusts expressly annexed to the personal estate unless they had the legal estate; but he dissented from Sir T. Plumer's definition of the position of a vendor pending the completion of the contract. The sole question was, did a valid contract exist at the testator's death; if the title proved bad, he agreed there was no conversion and no trust; but that was because in contemplation of equity there was in that case no valid contract (i); but whether the purchaser was able to pay or not was immaterial; if a contract valid at the vendor's death was cancelled for non-payment of the purchase-money after his death, or for any other cause not affecting the original validity of the contract, the conversion was not therefore undone or the consequent trusteeship annulled.

(g) In *Goold v. Teague*, 5 Jur. N. S. 116, it was held that such a lien did not pass by a bequest of securities for money. But the case is questioned, Sug. V. & P. p. 684. See also per Chitty, J., *Callow v. Callow*, 42 Ch. D. 550.

(h) *Lysaght v. Edwards*, 2 Ch. D. 499. In *Purser v. Darby*, 4 K. & J. 41, the testator, after contracting to sell an estate, specifically devised it, so that, of course, it could not pass by a devise of his mortgage and trust estates contained in another part of the will. But it was said by Wood, V.-C., that he had held—and the decision had been since affirmed—"that where there is merely a constructive and not an express trust, a devise of trust estates does not supersede the necessity of a decree." The decision referred to by the V.-C. appears not to be reported. The meaning of the dictum is supposed by Jessel, M.R., to be only that where a person under disability would take the

estate if the contract were not established in a court of equity, there the purchaser cannot safely complete without establishing the validity of the contract by decree: 2 Ch. D. at p. 511. And generally a vesting order will not be made under the Trustee Acts without suit, *Re Carpenter*, Kay, 418, approved by the Court of Appeal in *Re Colling*, 32 Ch. D. 333. But it is otherwise where the purchase-money has been paid, *Re Cuming*, L. R., 5 Ch. 72; *Re Crowe's Mortgage*, L. R., 13 Eq. 26; *Re Russell's Estate*, 12 Jur. N. S. 224. In the last case reliance was also placed on the sale being compulsory; sed. qu.

(i) "But assuming the purchaser to know this, he might very well be in doubt whether he had an enforceable title, and might therefore make his will with a dubious aspect." (Note by Mr. Vincent in the 4th edition of this work. "Purchaser" is no doubt a misprint for "vendor.")

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But where the purchase has been completed by payment of the purchase-money and delivery of possession, though the deed of conveyance has not passed the legal estate, the vendor is in the position of a bare trustee, and there is no difficulty in holding that a general devise of lands by the vendor in a manner inconsistent with his duties as trustee (charged, for instance, with the payment of his debts) will not include the legal estate (*k*).

Distinction where purchase-money paid and possession given.

As Mr. Jarman points out (*l*), "Where a mortgage in fee is foreclosed subsequently to the making of a will, it is clear that the equity of redemption so acquired will not pass by a will made before and not republished on or since the 1st of January, 1838; and it has been determined, that the period of foreclosure is the date of the final order of the Court, following default of payment on the day appointed, and not the date of the decree (*m*). But though the equity of redemption *subsequently* acquired by foreclosure, will not pass by the will, it is clear that the devise of the *legal estate* takes effect, notwithstanding the mere acquisition of the equity of redemption, by this or any other means. Where, however, such equity is purchased by the mortgagee, and he and the mortgagor in the usual manner join in conveying the property to a releasee to uses, to prevent dower, for the benefit of the former, the devise, being in a will which is subject to the old law, will be revoked (*n*).

Effect on devise by mortgagee of subsequent foreclosure.

"In one instance (*o*) Sir W. Grant held, that an estate devised after foreclosure passed by a description applicable to it only as a mortgage; his Honor thinking that the intention, though inaccurately expressed, appeared upon the whole will to give the interest in the land. And Sir L. Shadwell, V.-C., recently came to the same conclusion, upon the same devise (*p*). This was simply a question of intention, as the testator might, of course, if he chose, continue to describe it as mortgaged property; and it would pass, unless an intention appeared that the devisee should be entitled only in case it retained its mortgage character. [But a mere general devise of 'all estates whereof he is seised as mortgagee,' by a testator, who afterwards purchases the equity of redemption, shows no such intention. The result here is ademption (*q*).]

"It is obvious that the question, whether lands are comprised in a general devise, must frequently depend on the fact, whether

(*k*) *Dimes v. Grand Junction Canal Company*, 9 Q. B. 469, 3 H. L. Ca. 794.

(*l*) First ed. p. 654.

(*m*) *Thompson v. Grant*, 4 Mad. 438.

(*n*) Ante, p. 161.

(*o*) *Silberschildt v. Schiott*, 3 V. & B. 45.

(*p*) *Le Gros v. Cockerell*, 5 Sim. 384.

(*q*) *Yardley v. Holland*, L. R., 20 Eq. 428.

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Inquiry whether equity of redemption be barred, material, when.

As to mortgages in fee :

— mortgages for years.

the testator had or had not at the time acquired the equity of redemption by length of possession and non-recognition of any adverse title (*r*). A question of this kind occurred on the will of Sir George Downing (*s*) : and it was held, that lands comprised in a certain old mortgage in fee, purchased by the testator, passed under a general devise : it being considered, that from the length of possession, under the circumstances, a release of the equity of redemption was to be presumed (*t*).

“ With respect to mortgages for years the question would be somewhat different ; the point, if material at all, being, whether the equity of redemption was acquired, not at the date of the will, but at the testator’s decease ; since they would pass under a bequest of property of that denomination, to which they belonged at the latter period. Thus, suppose a will to contain a bequest of mortgages to A., and of leaseholds generally to B., a mortgage for years, which was redeemable at the date of the will, and which would at that period have passed under the former bequest, having become, by continued possession *in the lifetime of the testator*, or by express contract, irredeemable, would, by this change in the nature of the property, pass under the bequest of the leaseholds. Such, it may be collected, was the opinion of Lord Eldon in *Att.-Gen. v. Vigor* (*u*) ; and it seems necessarily to result from the acknowledged principle, that a general bequest of chattels of a particular species, carries all the chattels of that kind, which the testator is possessed of at the time of his decease. And the same principle, of course, would apply even to mortgages in fee, if the will containing the devise in question were made or republished on or since the 1st of January, 1838.”

Vendor and Purchaser Act, 1874.

Secondly, as to trust or mortgage estates vested in persons who died between the 7th of August, 1874, and the 1st of January, 1882, when the Conveyancing and Law of Property Act, 1881, came into operation. By the Vendor and Purchaser

(*r*) Now see stat. 3 & 4 Will. 4, c. 27, s. 28, and 1 Vict. c. 28 ; 2 Hayes’s *Introd.*, 5th ed. 275 and 282 ; 37 & 38 Vict. c. 57, s. 7.

(*s*) *Att.-Gen. v. Bowyer*, 3 Ves. 714, 5 ib. 300 ; *Att.-Gen. v. Vigor*, 8 Ves. 256. See also *Burdus v. Dixon*, 4 Jur. N. S. 967, ante, p. 973, n. (*s*).

(*t*) In *Re Loveridge, Drayton v. Loveridge*, [1902] 2 Ch. 859, and *Re Loveridge, Pearce v. Marsh*, [1904] 1

Ch. 518, the question arose on two successive intestacies. At the death of the mortgagee the equity of redemption was not statute barred, and it was held that the land passed as personalty to his next of kin ; the statutory period expired during the lifetime of one of the next of kin, and it was held that his moiety of the land descended to his co-heiresses.

(*u*) 8 Ves. at p. 276.

Act, 1874, it is enacted (sect. 4) that the legal personal representative of a mortgagee of freeholds, or of copyholds to which the mortgagee has been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption or an assurance upon trust; and by sect. 5 (which applies to deaths occurring between the 7th of August, 1874 and the 1st of January, 1876) it is enacted that upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee. But this section is repealed by the Land Transfer Act, 1875, s. 48, and in lieu thereof it is enacted that, as from the 1st of January, 1876, upon the death of a bare trustee, intestate as to any corporeal or incorporeal hereditament of which he was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee.

Land Transfer Act, 1875, s. 48.

Effect of the acts: as to mortgagees;

as to trustees,

Who is a "bare" trustee?

As regards a mortgagee, the power to convey or surrender under sect. 4 of the Vendor and Purchaser Act, 1874, is confined to the single case of payment of the debt; it does, not enable the legal personal representative to convey or surrender in case of a transfer (*v*); nor does it apply to the exercise of a power of sale in the mortgage deed (*w*). The effect of the mortgagee's will on the legal estate may therefore still come in question. As regards trust estates, the act of 1875 applies only when a bare trustee dies intestate. His legal personal representative takes his estate, and not merely (like the representative of a mortgagee) power to convey it. If there is no representative, the estate descends in the meantime to the heir (*x*). "Bare trustee" is not a term of art, and its exact meaning in the sections above quoted has not been finally determined, but the better opinion seems to be that it is intended to exclude a trustee with active duties which have not been performed, and the performance of which has not been effectually dispensed with. It would therefore apply to a trustee who has no other duty than to convey the trust estate at the cestui que trust's direction (*y*).

(*v*) *Re Brooks' Mortgage*, 46 L. J. Ch. 865; *Re Spradbery's Mortgage*, 14 Ch. D. 514.

(*w*) *Re White's Mortgage*, 29 W. R. 820.

(*x*) *Christie v. Ovington*, 1 Ch. D. 279.

(*y*) *Per Hall, V.-C.*, 1 Ch. D. at p. 281;

see also *Re Cunningham and Frayling*, [1891] 2 Ch. 567; but *Jessel, M.R.*, doubted whether a trustee without interest was not a bare trustee, although he had active duties to perform, *Morgan v. Swansea Urban Sanitary Authority*, 9 Ch. D. 582. See *Dart, V. & P.*; *Williams, V. & P.* 181 n.

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Conveyancing
Act, 1881,
s. 30.

The law with regard to the devolution of trust and mortgage estates, as regards persons dying after the 31st of December, 1881, has been put on an entirely new footing by the 30th section of the Conveyancing Act, 1881, which enacts as follows:—“(1) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives for the time being of the deceased, shall be deemed in law his heirs and assigns within the meaning of all trusts and powers (z). (2) Sect. 4 of the Vendor and Purchaser Act, 1874, and sect. 48 of the Land Transfer Act, 1875, are hereby repealed. (3) This section, including the repeals therein, applies only in cases of death after the commencement of this Act.”

Effect of
these
enactments.

The Conveyancing Act, 1881, came into operation on the 1st of January, 1882, and inasmuch as sect. 30 and the repeals thereby effected apply only in cases of death on or after that date, it follows that, as regards deaths before that date, sect. 4 of the Vendor and Purchaser Act, 1874, remains in force. Thus, in the case of a sole mortgagee who died between the 7th of August, 1874, and the 31st of December, 1881, both dates inclusive, his personal representatives have still power to convey the legal estate in the mortgaged property, but, until they exercise the power, the legal estate remains vested in the heir or devisee.

Where a sole trustee or mortgagee has by his will appointed executors, they are able under the new law to convey before probate the legal estate in all the trust or mortgaged hereditaments, except customary or copyhold hereditaments to which their

(z) As to the effect of these words, see Chap. XXIV., ante, p. 935.

testator had been admitted (a). For executors derive their title under the will and not by virtue of the probate, which is merely the proof of their title. And if all the executors should die after such conveyance, but without having proved the will, their act will stand good. Their title will, in such a case, be sufficiently proved by letters of administration of the estate of their testator with the will annexed thereto (b).

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But a question of some importance may arise, where a sole trustee or mortgagee has died intestate or without having appointed executors of his will, as to where the legal estate is vested under the present law pending the grant of letters of administration. This question was raised by Sir J. Pearson, J., in *Re Pilling's Trusts* (c), but its decision was, under the circumstances, rendered unnecessary; his Lordship, however, inclined to the opinion that the words of the statute seemed to indicate an intention to exclude the heir altogether. It would at all events seem clear that the heir cannot convey, and the proper course, where there is no representative of a deceased sole trustee, is to obtain an order vesting the property in new trustees for such estate as was vested in the deceased trustee at the time of his death (d).

Where there is no personal representative.

Inconvenience may also be caused by a testator who is sole surviving trustee of the will of A., attempting by his will to appoint special executors for the purpose of executing the trusts of A.'s will (e).

Devolution of trusts and powers.

The effect of the section on the devolution of trusts and powers is considered in Chapter XXIV. and in the next section of this chapter.

General and special executors.

Lands of copyhold or customary tenure were originally within sect. 30 of the Conveyancing Act, 1881 (f), but the Copyhold Act, 1887, enacted that it should not apply to any such land vested in a trustee as tenant on the Court rolls. The act of 1887 was repealed and re-enacted by the Copyhold Act, 1894 (see sect. 88). The result, it seems, is that in the case of a sole trustee who was admitted to land of copyhold or customary tenure, and died between

Copyholds to which trustee has been admitted.

(a) Post.

(b) Wentw. Off. Ex. 82; *Brazier v. Hudson*, 8 Sim. 67; see also *Wankford v. Wankford*, 1 Salk. 299.

(c) 26 Ch. D. at p. 433.

(d) *Re Rackstraw's Trusts*, 33 W. R. 559; *Re Williams' Trusts*, 36 Ch. D. 231; *Fairholme v. Kennedy*, 24 L. R.Ir. 498. Administration, limited to the trust property, may be granted: *In bonis Builer*, [1898] P. 9; *In bonis Ratcliffe*, [1899] P. 110.(e) *Re Parker's Trusts*, [1894] 1 Ch. 707.(f) *Re Hughes*, [1884] W. N. 53; *Hall v. Bromley*, 35 Ch. D. 642.

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31st of December, 1881, and the 16th of September, 1887, the land was by the Copyhold Act, 1887, divested out of the personal representative and revested in the customary heir, or devisee of trust estates, unless in the meantime, a conveyance had been made by the personal representative (*g*). In the case of a sole trustee, who has been admitted, dying since the 16th of September, 1887, the land passes to his customary heir or devisee as if sect. 30 had not been enacted.

Where trustee has not been admitted.

But it seems that where a sole trustee dies without having been admitted, sect. 30 applies to the right of admittance, and that it vests in his personal representative under that section (*h*).

Devise of copyholds held in trust.

It follows that where a sole trustee has been admitted, he can devise the copyholds if he so desires. Whether the devisee can execute the trust is another matter (*i*). Sometimes a testator devises his trust copyholds to the use of such persons as his trustees shall, within twenty-one years after his death, by deed appoint, and in default of and until such appointment, he devises them to his trustees (*j*).

Incorporeal hereditaments.

It will be noticed that sect. 30 applies to incorporeal hereditaments.

Completion of contracts for sale of realty.

The provisions of the Conveyancing Act, 1881, s. 4, with reference to the completion of a contract for the sale of realty where the vendor has died before completion, have been already referred to (*k*).

Land Transfer Act, 1897.

It seems clear that the provisions of Part I. of the Land Transfer Act, 1897 (*l*), do not affect land which is vested in a person as sole trustee, and that it devolves to his personal representatives, not under that act, but under sect. 30 of the Conveyancing Act, 1881 : for in the first place, the Land Transfer Act, 1897, is evidently only intended to apply to land which can be disposed of by will, and in the second place, land which devolves to personal representatives under that act is to be held by them as trustees for the persons "beneficially entitled thereto."

(*g*) *Re Mills' Trusts*, 37 Ch. D. 312 ; 40 Ch. D. 14.

(*h*) Wolstenholme, Conv. and S. L. Acts, notes to section 30.

(*i*) Post, p. 987, and Chap. XXIV.

(*j*) Pridaux, Prec. 14th edition, vol. ii. p. 538. As to the object and effect of such a devise, see Hayes and Jarman's Concise Forms of Wills, 8th edition, p. 121 n., where reference

is made to *Flack v. Downing College*, 17 Jur. 697, *Glass v. Richardson*, 2 D. M. & G. 658, and to an article by Mr. George Sweet in 17 Jur. pt. 2, p. 274, criticizing the decision in *Flack v. Downing College*. See also Sol. J. vol. 32, pp. 556, 674, 690.

(*k*) Ante, p. 163.

(*l*) Ante, p. 64.

III.—Whether Trust can be performed by Devisee of Trust Estate.

The first edition of this work contained some observations by Mr. Jarman (*m*) on the case, then recently decided, of *Cooke v. Crawford* (*n*), in which Shadwell, V.-C., decided that where land was devised to A., B., and C. upon trust that they or the survivors or survivor of them, or the heirs of the survivor, should sell, a devisee of the survivor could not execute the trust: the survivor ought, as the V.-C. pointed out, to have allowed the land to descend to his heir, who could have executed the trust. Mr. Jarman thought that the case contradicted previous opinions and practice, and went “to establish a rule most inconvenient in its operation” (*o*).

Devisee of trust estate held unable to make a title to a purchaser.

In *Osborne to Rowlett* (*p*), Jessel, M.R., also disapproved of the decision, holding that where real estate is devised to trustees and their heirs in trust for sale, the trust should be considered as annexed, not to the person, but to the fee simple estate taken by the trustees, so that the trust can be executed by the devisees of trust estates of the surviving trustee; and he treated *Cooke v. Crawford* as overruled. But in *Re Morton and Hallett* (*q*), James and Baggallay, L.JJ., said that they were not prepared to dissent from *Cooke v. Crawford*, and it still applies to cases not within sect. 30 of the Conveyancing Act, 1881.

In commenting on *Cooke v. Crawford*, Mr. Jarman objected to any distinction being made between cases in which assigns are mentioned, and those in which they are not, and he expressed the wish (*r*), that “instead of adopting any such distinction, the Courts would establish the general rule, that trusts for sale and other trusts relating to real estate, and which are not specially restricted to the trustee personally, but extend to his representatives, should be held to devolve to every person to whom the

Mr. Jarman's theory.

(*m*) First ed. vol. ii. pp. 713 seq.

(*n*) 13 Sim. 91, where *Bradford v. Belfield*, 2 Sim. 264, and *Townsend v. Wilson*, 1 B. & Ald. 608; 3 Mad. 261, are referred to. In the former case it was held that a trust for sale vested in A. and his heirs could not be executed by an assignee of the heir of A., i.e., a person to whom the heir in his life-time had conveyed the estate. But Lord Langdale, M.R., drew a distinction between such an assignment and a devise.

(*o*) First ed. vol. ii. p. 717. See also *Dauids. Prec. iv. 53 n.*

(*p*) 13 Ch. D. 774. The M.R. went through the authorities, including *Macdonald v. Walker*, 14 Bea. 556;

Wilson v. Bennett, 5 De G. & Sm. 475; *Hall v. May*, 3 K. & J. 585, and *Stevens v. Austen*, 3 E. & E. 685. The case of *Beasley v. Wilkinson*, 13 Jur. 649, does not throw any light on the question. These cases are stated and criticized in earlier editions of this work.

(*q*) 15 Ch. D. 143. See also the remarks of Stirling, J., in *Re Rumney and Smith*, [1897] 2 Ch. at p. 356; Lewin on Trusts; Williams, V. & P. 281, citing *Crewe v. Dicken*, 4 Ves. 97; *Cole v. Wade*, 16 Ves. 27, 46, 47. But as to this latter case see *Re Smith*, [1904] 1 Ch. 139, post.

(*r*) First ed. vol. ii. p. 716.

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estate happens to come, either by devise or descent, unless the author of the trust has shewn a special intention, by negative words, to restrict it to the heirs, properly so called, of the trustee. Convenience requires, and principle, it is conceived, allows such a general doctrine; and the Courts might surely adopt it without going the length of enabling a trustee to transfer the trust estate to a third person in his lifetime. *This* would be a substitution of a stranger for the person nominated by and enjoying the confidence of the author of the trust; *that* operates only to regulate the transmission of the estate and office when they can no longer be held and exercised by the trustee himself, in short, substitutes the hæres factus for the hæres natus of the trustee. The former is clearly as much within the scope of the confidence of the creator of the trust, as the latter, who is equally unknown to him, and may be connected with the original trustee by only a very remote degree of relationship, and may, moreover, be subject to personal or legal disability. The writer cannot help expressing his hope, if not his conviction, that eventually the more liberal doctrine will be established, notwithstanding the cloud brought upon the prospect by the case of *Cooke v. Crawford*."

Where trust
is annexed to
estate.

Mr. Jarman's hope has been realized in some degree, for the general principle now is that "every power given to trustees which enables them to deal with or affect the trust property is *primâ facie* given them *ex officio* as an incident of their office, and passes with the office to the holders or holder thereof for the time being: whether a power is so given *ex officio* or not depends in each case on the construction of the document giving it, but the mere fact that the power is one requiring the exercise of a very wide personal discretion is not enough to exclude the *primâ facie* presumption, and little regard is now paid to such minute differences as those between 'my trustees,' 'my trustees A. and B.,' and 'A. and B. my trustees'; the testator's reliance on the individuals to the exclusion of the holders of the office for the time being must be expressed in clear and apt language" (s). This doctrine has been acted on in several recent cases (t).

Effect of Con-
veyancing
Act, 1881.

The effect of sect. 30 of the Conveyancing Act, 1881, in cases within the act, is twofold. In the first place, the personal representatives of a sole trustee merely take the place of his heir or devisee, so

(s) Per Farwell, J., in *Re Smith*, [1904] 1 Ch. p. 144. The question whether a power given to executors is annexed to the office is discussed elsewhere (see Chapter XXIV.).

(t) Ante, Chap. XXIV., p. 935, where the cases of *Re Waidanis*, 77 L. J. Ch. 12, and *Re Routledge's Trusts*, [1909] 1 Ch. 280, are referred to.

that if land is given to A. and B. upon trust for sale, the personal representatives of the survivor cannot sell (*u*), any more than, in a case before 1882, his heir could have sold (*v*). But if the devise is to A. and B. and their heirs, or their heirs and assigns, then the personal representatives of the survivor can sell (*w*). In the second place, it is now not only unnecessary, but also useless, to make any devise of trust or mortgage estates, except in the case of lands of copyhold or customary tenure to which the testator has been admitted (*x*). It has indeed been suggested (*y*) that the section does not take away the power of devising real estate held in trust, and that such a devise by a sole trustee, to persons other than his executors, would create a difficulty as to the execution of the trust by the executors. It is submitted, however, that the section does take away the power of devising trust estates, and that its effect is to enable the personal representatives of a deceased trustee to exercise all trusts and powers which, under the old law, he could have transmitted to a devisee of his trust estate.

(*u*) *Re Ingleby and Boak* 13 L. R. Ir. 326; *Re Crunden and Meux*, [1909] 1 Ch. 690.

(*v*) See *Re Morton and Hallett*, 15 Ch. D. 143.

(*w*) See *Re Pixton and Tong's Contract*, 46 W. R. 187, where the devise

included the heirs, and the power of sale was exercisable by the trustees for the time being; see *Re Crunden and Meux*, *supra*.

(*x*) *Wolstenholme, Conv. & S. L. Acts*, 88; *Challis & Hood*, 100.

(*y*) *Williams, V. & P.* 285.

CHAPTER XXVII.

WHAT GENERAL WORDS CARRY REAL ESTATE.

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General words.

Dictum of Kindersley, V.-C., as to meaning of "estate."

I. Preliminary.—If a testator gives all his "estate," or all his "property," these words will *primâ facie* carry his real estate, for they are sufficient to include both real and personal estate (*a*).

It is true that in *D'Almaine v. Moseley* (*b*), Kindersley, V.-C., qualified the general rule ; he said : " One rule is, that the word *estate* simply, is sufficient to pass real estate ; but in most cases the word *estate* is not used simply ; and another rule is, that, supposing that there is nothing in other parts of the will to control the meaning of the gift, the effect of the word *estate*, coupled with other words, is this : if the other words would without the word *estate* not be sufficient to pass the whole personal estate, the word *estate* will be considered as used to effect a complete passing of the personal estate ; but if the other words are sufficient to pass all the personal estate, then the word *estate* must be read as intended to apply to real estate." The second rule appears to be based on a misapprehension of the *eiusdem generis* principle of construction as laid down by Lord Hardwicke, when he said that in a bequest of " all my mortgages, household goods and estate," the word " estate "

(*a*) *Barnes v. Patch*, 8 Ves. 604 ; *Hawksworth v. Hawksworth*, 27 Bea. 1. " The word ' estate ' is *genus generalissimum*, and includes all things real and personal," *Countess of Bridgewater v. Duke of Bolton*, 1 Salk. 236. See *O'Toole v. Browne*, 3 E. & B. 572, and

the cases there cited ; *Beachcroft v. Beachcroft*, 2 Vern. 690 (" worldly estate ") ; *Doe v. Chapman*, 1 H. Bl. 223. Also *Scott v. Alberry* and *Mayor of Hamilton v. Hodsdon*, cited post. As to " property," see post, p. 999.

(*b*) 1 Dr. at p. 632.

would be restrained to personal estate (c). But the modern cases do not recognize the rule stated by Kindersley, V.C.; the assumption is that when a man makes his will he does not intend to die intestate as to any part of his property, and such a general word as "estate" has its full meaning given to it, unless the context clearly restricts it to personal property (d).

The same principle applies where the word "property" is used (e). There are other expressions, such as "my fortune," "all I am worth," or the like (f), which will pass the whole of the testator's real and personal estate, unless the context shews that they are used in a restricted sense (g). So the appointment of a person as the testator's "heir" may operate as a general devise of real estate (h).

The question what will pass by a specific devise of "land," or of a "house," "farm," &c., or of the "rents and profits," or the "use and occupation" of land or house, &c., is discussed in Chapter XXXV.

II. Words "Estate," "Property," &c., whether restrained by Association with Words descriptive of Personality.—"It is obvious," says Mr. Jarman (i), "that the question, whether real estate passes under a devise, cannot occur, unless the testator has either used terms not properly and technically descriptive of such property, or else, though using terms properly applicable thereto, has created doubt by their position, or their improper use in other parts of the will. General expressions, when collocated with words descriptive

"Property."
"Fortune"
and other
informal
expressions.

When
restrained by
association
with person-
ality.

(c) *Tilley v. Simpson*, 2 T. R. 659 n, cited post, p. 993.

(d) See *Loftus v. Stoney*, 17 Ir. Ch. 178, where Messrs. Wolstenholme and Vincent's note in the second and third editions of this work, stating that the modern cases are founded on a principle which is inconsistent with the doctrine laid down by Kindersley, V.C., was cited and approved. See also *Smyth v. Smyth, Mayor of Hamilton v. Hodsdon*, and other cases cited post, p. 999. In the older case of *Scott v. Alberry* (post, p. 993), the construction suggested by Lord Hardwicke was excluded by the context. The proposition laid down by Kindersley, V.C., in *D'Almaine v. Moseley*, was cited with approval by Buckley, J., in *Kirby-Smith v. Parnell*, [1903] 1 Ch. 483, where, however, the point did not arise, as the other words were sufficient to pass the personal estate.

(e) *Jones v. Skinner*, 5 L. J. Ch. 87; *Morrison v. Hoppe*, 4 De G. & S. 234; *Loftus v. Stoney*, 17 Ir. Ch. 178 ("the remainder of my properties, debentures, funded and securities"); *Re Green-wich Hospital*, 20 Bea. 458.

(f) See *Baring v. Ashburton*, 54 L.T. 463; *Huxtep v. Brooman*, 1 Br. C.C. 437, and other cases cited post, p. 1011.

(g) "Patrimony" would probably have the same meaning. In Roman law, *patrimonium* meant not only that which is derived by inheritance from a father, but also the whole private property of a man (Dirksen *Man. Lat. s.v.*), and "patrimony" is often used in this sense, but the word may of course be used in a restricted sense; see *Mannox v. Greener*, L. R., 14 Eq. 456; *Green v. Giles*, 5 Ir. Ch. 25.

(h) *Ante*, p. 82.

(i) First ed. p. 657.

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of personal estate, are sometimes restrained by that association to subjects of the same species, agreeably to the maxim *noscitur a sociis*; and accordingly we find many instances, especially among the early authorities, in which the word *estate*, and other such terms clearly capable, *viribus suis*, of comprehending real estate (*j*), have been restrained by the context to personalty."

When not
restrained.

As instances of this mode of construction, Mr. Jarman examines in detail several cases (*k*), many of which, it is clear, would not be followed at the present day, and continues as follows (*l*): "But it is not to be inferred from the preceding cases, that the words *estate* and *property*, and others of the like import, when accompanied by words descriptive of personal estate merely, are by that association invariably restricted to property *eiusdem generis*. On the contrary, the presumption generally is against such a construction, as it supposes the testator to use words in another sense than that which judicial construction has given to them, and frequently in a sense which is fully expressed in the context, and therefore renders them inoperative. It should be observed, however, that the circumstance of there being other words adequate to carry the whole personal estate, always affords an argument for making the words under consideration include land, since the contrary construction reduces them to silence; an argument upon which, it will be seen, great stress was laid by Lord Hardwicke, in *Tilley v. Simpson* (*m*), stated in the sequel. But it must be remembered, that the fact of the word being wanted to give completeness to the disposition of the personal estate, does not raise so strong an argument in favour of the restrictive construction: since there is no reason why a testator should not have used the words for both purposes.

Cases in
which
general words
have been
held to be
unrestricted.

"The following cases seem fully to sustain the position, that to warrant the confining of the word 'estate' and other such expressions to personal estate, there must be a clear indication of an intention in the will so to confine them, for where this indication has been wanting, or has been less clear than in the preceding cases, the words have been held to be used in their proper, i.e. their unrestricted sense.

(*j*) *Barnes v. Patch*, *supra*.

(*k*) *Wilkinson v. Merryland*, Cro. Car. 447 and 499, Sir W. Jones, 380; *Cliffe v. Gibbons*, 2 Lord Raym. 1324; *Marchant v. Twisden*, Gilb. Eq. Ca. 30; *Doe d. Bunny v. Rout*, 7 Taunt. 79; *Woollam v. Kenworthy*, 9 Ves. 137; *Bebb v. Penoyre*, 11 East, 160; *Timewell v.*

Perkins, 2 Atk. 102; *Roe d. Helling v. Yeud*, 2 B. & P. N. R. 214. Mr. Jarman's criticisms on these cases will be found in all the previous editions of this work, and some of them are referred to later in this chapter.

(*l*) First ed. p. 663.

(*m*) 2 T. R. 659, n.

“ Thus, in *Terrell v. Page* (n), where the testator bequeathed certain legacies, and devised some lands, and then devised as follows :—‘ All the rest and residue of my money, goods and chattels, and other estate whatsoever, I give to J. S., whom I make my executor ’ ; it was held, that the lands not previously devised passed under the latter clause.

“ Money, goods and chattels, and other estate.”

“ So, in *Scott v. Alberry* (o), where the testator, ‘ as touching the worldly estate it had pleased God to bestow ’ upon him, devised in these words :—‘ I give to my cousin T. S., all that my parcel of land lying in W. A. Item, I gave to my said cousin T. S., my wearing apparel, linen, books, with all other my estate whatsoever and wheresoever, not hereinbefore given and bequeathed ; and him, the said T. S., I make the sole executor of this my will for performing the same.’ The question was, whether the reversion in fee in the lands in W. A., before devised to T. S. (p), which were copyhold surrendered to the use of testator’s will, passed under the latter devise ; and it was held that it did.

“ Wearing apparel, &c., with all other my estate.”

“ Again, in *Tilley v. Simpson* (q), where a testator, after declaring his intention to dispose of all his worldly estate, and making several devises to different persons, devised *all the rest and residue of his money, goods, chattels and estate whatsoever* ; Lord Hardwicke held that the fee passed : he said, where the Court had restrained the word ‘ estate ’ to personal estate only, it had been where the intention of the testator that it should be so used had appeared ; as where it had stood coupled with a particular description of part of the personal estate, as a bequest of all mortgages, household goods and estate, in which the preceding words were not a full description of the personal estate ; that if the testator had said, ‘ All the rest and residue of my personal estate and estates whatsoever,’ a real estate would have passed (r) ; that this bequest amounted to the same, for the word ‘ chattels ’ is as full a description of the personal estate as the words ‘ personal estate ’ ; that therefore, *when he had used words comprehending all his personal estate, and then made use of the word ‘ estate,’ that word would carry a real estate.* That the word ‘ whatsoever ’ was used here, which was the same as if he had said of *whatever kind it be* ; and, if that had been the case, it would most certainly have carried the real estate. He observed

“ Residue of money, goods, chattels and estate whatsoever.”

Lord Hardwicke’s reliance upon the fact, that the other words were adequate to describe the personal estate.

(n) 1 Ch. Cas. 262, 1 Eq. Ca. Ab. 209, c. 11.

(o) Com. 337, 8 Vin. 229 pl. 14 ; see also *Aubrey v. Middleton*, 4 Vin. Ab. 460, pl. 15, 2 Eq. Ca. Ab. 497, pl. 16.

(p) As to indefinite devises, see Chap.

XLV.

(q) In Chancery, 1746, before Lord Hardwicke, stated 2 T. R. 659, n. ; and see 1 Cox, 362.

(r) As to this, see *Jones v. Robinson*, 3 C. P. D. 344.

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that *Terrell* and *Page* was very material to the present question, and he thought could not be distinguished: the only difference was, in that case there was the word 'other,' which he did not think could distinguish it. If the devise had been, *and all the rest and residue of my household goods, mortgages and all other estate*, he did not think the words would have extended to the testator's real estate.

"Goods, estates, bonds, debts."

"So, in *Jongsma v. Jongsma* (s), where a testator gave to his executors 'all his goods, estates, bonds, debts, to be sold.' The question was, whether this would pass a copyhold estate surrendered to the use of the will. Sir Lloyd Kenyon, M.R., said that, according to the case of *Tilley v. Simpson* (t), wherever the word 'estate' or 'estates' was restrained to personalty, it was done upon the ground of the testator's showing his intention by joining it with words which related to personalty only; but, on the other hand, *where such other words were in themselves sufficient to pass all the personal estate, then, in order to give some effect to the word 'estate,' it was holden to pass realty.* In this case, the word 'goods' seemed to be sufficiently comprehensive; and the copyhold, therefore, passed by the word 'estates.'

Residue of "effects, real and personal," after an express devise of lands.

"In *Hogan v. Jackson* (u), a testator, after commencing his will with the words 'as to my worldly substance,' devised certain lands to his mother M. for life: and, after giving certain legacies to be raised out of those lands, concluded as follows:—'I give and bequeath unto my dearly-beloved mother M. all the remainder and residue of *all the effects both real and personal, which I shall die possessed of.*' It was contended that the words 'real effects' meant real chattels, and that the words 'bequeath,' 'effects' and 'possessed,' were applicable rather to personal than real property; but the Court held that the clause amounted to a disposition of the whole of the testator's real and personal estate.

Remark on *Hogan v. Jackson.*

"This is a strong decision, and has been much cited in subsequent cases (v). It is clear, however, that the word *effects*, without *real*, would not, proprio vigore, comprehend land, though followed by the words, 'of what nature, kind or quality soever' (w).

(s) 1 Cox, 362; see also *Smith v. Coffin*, 2 H. Bl. 444; *Roe d. Penwarden v. Gilbert*, 3 Br. & B. 85; *Churchill v. Dibben*, 9 Sim. 447, n.; *King v. Shrivess*, 4 Moo. & Sc. 149, 5 Sim. 461.

(t) Which he denominated *Tiddy v. Simms*.

(u) Cowp. 299, 3 B. P. C. Toml. 388; see also *Lord Torrington v. Bowman*,

22 L. J. Ch. 236, where there was no previous devise of land.

(v) It was followed in *Lord Torrington v. Bowman*, 22 L. J. Ch. 236.

(w) *Camfield v. Gilbert*, 3 East, 516; *Doe d. Chillcott v. White*, 1 East, 33; *Macnamara v. Lord Whitworth*, G. Coop. 241; *Doe d. Hick v. Dring*, 2 M. & Sel. 448; *Doe d. Haw v. Earles*, 15 M.

“In *Grayson v. Atkinson* (x), a testator, prefacing his will with the expression, ‘as to all my temporal estate,’ gave certain legacies, and directed A. to sell any part of his real and personal estate for the payment of his debts and legacies; and, as to all the rest of his ‘*goods and chattels, real and personal, moveable and immoveable, as houses, gardens, tenements*, share in the Copperas Works,’ &c., he gave the same to A. Lord Hardwicke held that this devise carried a fee, though he did not think that the words ‘goods and chattels, real and personal,’ would have included the lands, if the deviser had not gone on to explain himself by the subsequent words, ‘as houses,’ &c. (y); [‘all the rest,’ &c., he thought plainly related to something mentioned before, and that mentioned before, which he was about to dispose of, was ‘all his temporal estate,’ which passes a fee when the testator has one.]

“Goods and chattels, real and personal, as houses, &c.”

“In *Fletcher v. Smiton* (z), a testator, after directing all his debts to be paid, gave to M., his wife, all his household goods, &c., and a legacy and annuity; and then proceeded as follows:—‘The profit of my four shares in the Corn Market during her life; also the income and profit of my estates as follows, during her life, my lands lying, &c., (enumerating them,) as also the residue of my personal estate to be laid out in Bank Annuities; and then my wife to have the income, during her life only, of this and the estates before mentioned; and after her decease, as follows:—I give to W. the income of my four shares in the Corn Market for his natural life; and all the rest of my estates, with all moneys in securities, to be divided in equal shares, to’ B. C., &c. The question was, whether the reversionary interest in the shares of the Corn Market, which were freehold of inheritance, passed to B. C., &c. It was contended that it did not; for that the word ‘estates’ in the last clause must have the same signification with the same word in the first clause, where it could not possibly extend to the Corn Market; but the Court, relying much on *Tilley v. Simpson*, held that the reversion in fee passed.

Realty passed by the word “estates,” although the word was before used exclusively of the particular subject.

& Wels. 450. The rule as stated by Mr. Jarman is still recognized by the Courts, but it is applied less inflexibly than when he wrote. See *Hall v. Hall*, [1892] 1 Ch. 361, and other cases post, s. VI. It would perhaps be more accurate to say that the word “effects” *primâ facie* means personal estate only; see Hawkins on Wills, 55.

(x) 1 Wils. 333.

(y) “If, without the words ‘houses,’ &c., the devise would not have carried real estate, it is difficult to find a satisfactory ground for giving to the devisee the fee. His lordship seems to have relied more upon the introductory words for this purpose than is consistent with later authorities. See *infra*.”

(Note by Mr. Jarman.)

(z) 2 T. R. 656.

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"Goods and chattels, rights, credits, personal and testamentary estate," held to pass land.

"In *Smith v. Coffin* (a), a testator, after prefacing his will with the words, 'as to my worldly estate,' &c., and devising certain freehold lands, gave and bequeathed all the residue of his 'goods and chattels, rights, credits, *personal and testamentary estate whatsoever*,' to his wife, for her own use and disposal. The real estate was held to pass.

"In a subsequent case (b), where there were also the prefatory expressions, 'as to my temporal estates and effects,' and a devise of all the testator's lands to J. G., the reversion in fee in those lands was held to pass to him under these words:—'And all the rest and residue of my goods and chattels, *personal and testamentary estate and effects whatsoever*, I give and bequeath unto the said J. G., whom I make whole and sole executor.'

"By confining the devise to personal estate, in the two preceding cases, the words 'and testamentary' would have been rendered inoperative.

Residue of "money, stock, *property*, and effects," held to carry a fee.

"So, in *Doe d. Andrew v. Lainchbury* (c), where a testator said,—'As to the little money and effects with which the Almighty has intrusted me, I dispose thereof as follows'; and, after several devises of land, concluded thus:—'And as to all the rest, residue and remainder of my money, stock, *property and effects*, of what kind and nature soever, at the time of my decease, I leave and bequeath the same, and every part thereof, unto my nephew J., and my niece S., for to be equally divided between them, share and share alike; and I do hereby also appoint my said nephew J., and my said niece S., executor and executrix, and likewise joint and equal residuary legatees,' &c.; it was held that real estate passed, which construction Lord Ellenborough considered to be strengthened by the circumstance of the testator having, in a preceding part of his will, directed money to be laid out in the purchase of land, 'to be added to his other adjoining *property*,' which he said gave a standard of his meaning of the word '*property*,' and showed that he meant by it real estate.

Circumstance of there being a prior devise of lands.

"In most of the preceding cases, the will contained specific devises of land; a circumstance which, as before observed, always favours the extension of the subsequent general words to property of the same description; but the cases do not warrant the considering the absence of the circumstance as conclusively establishing the exclusion of real estate from such terms, though associated

(a) 2 H. Bl. 444.

(b) *Roe d. Penwarden v. Gilbert*, 3 Br. & B. 85 (the marginal note omits

the material word); see also *Doe d. Evans v. Walker*, 15 Q. B. 28.

(c) 11 East, 290.

with words descriptive of personal property only. On the contrary, real estate has sometimes been held to pass in cases of this nature.

“ Thus, in *Tanner v. Morse* (d), real estate was held to pass under the following words:—‘ As to my temporal estate, I bequeath to my nephew T. (who was the heir-at-law) the sum of 50*l.*’; then follow several legacies: ‘ And all the rest and residue of my estate, goods and chattels whatsoever, I give and bequeath to my beloved wife M. C., whom I make my full and sole executrix.’ Lord King laid much stress upon the words ‘ temporal estate,’ in the introductory clause.

Although no such devise, land passed in following cases.

Residue of “ estate, goods, and chattels.”

“ So, in *Doe d. Wall v. Langlands* (e), where a testator, after giving several pecuniary legacies, bequeathed as follows:—‘ to R. D., and E. W., I give and bequeath the residue of my property, goods and chattels, to be divided equally between them, share and share alike;’ it was contended, that the word ‘ property ’ was restrained by the subsequent words, the clause being read, *videlicet*, ‘ my goods and chattels ’; but Lord Ellenborough held that the more obvious and natural sense was, that they are to be taken *cumulatively*, that is, as *property, and goods and chattels*, and, consequently, that the real estate passed under the former word.

Residue of “ my property, goods and chattels.”

“ Again, in the case of *Doe d. Morgan v. Morgan* (f), where a testator, after bequeathing two pecuniary legacies, devised as follows:—‘ All my *property* and effects of all claims that I shall have, I give to my brother J. M., but my mother is at liberty to give 1,000*l.* of my property where she please.’ It was contended, that the gift of the pecuniary legacies, the use of the word ‘ effects ’ conjunctively with ‘ property,’ and the clause respecting the 1,000*l.*, shewed that the testator, by the latter term, intended to denote personal estate only; but the Court held that the real estate passed.

“ All my property and effects.”

“ Lastly, a similar construction prevailed in *Doe d. Evans v. Evans* (g), where a testator, after bequeathing certain articles of personal estate, gave, bequeathed and devised to his wife A., all his money, securities for money, goods, chattels, *estate* and effects, of what nature or kind soever, and wheresoever the same might or should be at the time of his death.

“ The last three cases are certainly important authorities, and they demonstrate the inclination of the Courts at the present day,

General remark on preceding cases.

(d) Cas. t. Talb. 284, s. c. sub. nom. *Tanner v. Wise*, 3 P. W. 295; see also *Lumley v. May*, Pre. Ch. 37.

(e) 14 East, 370.

(f) 6 B. & Cr. 512, 9 D. & Ry. 633;

see also *Bradford v. Belfield*, 2 Sim. 264.

(g) 9 Ad. & E. 719; s. c. 1 Per. & Dav. 472, see also *D'Almaine v. Moseley*, 1 Drew. 629, cited post, p. 999.

to hold lands to pass under words capable per se of comprehending them, notwithstanding their association with terms applicable to personality only. To reconcile all the cases would require the adoption of some very subtle and unsubstantial distinctions; but the preceding review will convince the reader of the necessity of withholding implicit reliance from some of the early decisions in which the restricted construction prevailed" (h).

Many of the early authorities proceeded on the principle that the heir was not to be disinherited except by clear words (i); at the present day, however, more respect is paid to the intention of testators, and in seeking to ascertain in any particular case what the intention is, the court proceeds on the theory that a man who makes a will does not, as a general rule, wish to die intestate as to any part of his property (j).

The following cases, decided since Mr. Jarman wrote, may be shortly referred to as illustrating the modern principle of construction.

In *Sanderson v. Dobson* (k), *O'Toole v. Browne* (l), and *Dobson v. Bounness* (m) the word "estate," although used in collocation with words descriptive of personal property, was held to pass real estate. In *O'Toole v. Browne* the testator owned no land at the date of the will (n).

"Estate" held to pass realty notwithstanding context.

In *Mayor &c. of Hamilton v. Hodsdon* (o), a testator directed any shares he might have in a vessel to be sold "for the benefit of his estate," and after making some specific devises of "houses and lands," in some of which the fee was not exhausted, and bequeathing to his wife certain specific chattels "which she had from her father's estate," he gave "all the remainder of his estate that was then in his possession or might thereafter be his" to his wife; and directed "his estate," after payment of debts and legacies, to be "kept together" until the time thereby appointed for "dividing" it; and declared his wife entitled, in a certain event, to one-third of "his personal estate." It was argued

(k) This passage was cited with approval by Malins, V.-C., in *Smyth v. Smyth*, 8 Ch. D. 561.

(i) See *Shaw v. Bull*, 2 Eq. Ca. Abr. 320, 321.

(j) See per Malins, V.-C., in *Smyth v. Smyth*, 8 Ch. D. 561; per Buckley, J., in *Kirby-Smith v. Parnell*, [1903] 1 Ch. 483.

(k) 1 Exch. 141; 7 C. B. 81, 10 Bea. 478.

(l) 3 E. & B. 572.

(m) L. R., 5 Eq. 404. The question arose on the same will as in *Sanderson v. Dobson*.

(n) See also *Edwards v. Barnes*, 2 Bing. N. C. 252; *Ridgeway v. Munkittrick*, 1 Dr. & War. 84, where the word was "properties," and *Waite v. Morland*, 12 Jur. N. S. 763, where a disposition of "all my property, brewery, &c." was held to mean "all my brewery property."

(o) 11 Jur. 193.

that the trusts and purposes of the will showed the testator's mind to be directed to personal estate only, and that he had himself supplied a vocabulary for the interpretation of the term "estate." Lord Brougham, in delivering the judgment of the Privy Council, observed (in effect) that "estate" meant both realty and personalty, and that the realty was not to be excluded merely because there was personalty upon which the term could operate; that, when realty was meant to be excluded, the expression personal estate was used; and that the will was to be construed *reddendo singula singulis*, by which method all parts of it became consistent; so that there was not that clear intent on the will to restrict the meaning of the term estate which was necessary to prevent its natural operation in comprising realty as well as personalty. The unexhausted reversion was, therefore, held to pass.

In *D'Almaine v. Moseley* (p), where a testator gave "all the rest and residue of my estate and effects," Kindersley, V.-C., in deciding that the word "estate" was sufficient to pass real estate, said: "The cases on this subject are very numerous, and not very easy to be reconciled; but the tendency of modern decision is to give less effect to minute and trivial matters than was attributed to them in former times. Now in this case, it is said on the part of the Crown, that in the former part of the will there is no gift of any real estate: but it appears to me that to lay stress on that would be to rely on grounds too minute; and that no indication of intention is afforded by it."

There are numerous other modern decisions to the effect that "estate" or "estates," used in conjunction with words descriptive of personalty, will pass real estate unless a clear intention to the contrary appears (q).

Operation of word "estate."

"Property" is a word of almost, if not quite, as strong operation as the word "estate" (r).

But a testator may shew by the context that he uses the word "estate" or "property" in a restricted meaning. Thus if he disposes of his "personal estate and property," or "personal

Restricted construction of "estate," "property," &c.

(p) 1 Drew. 629. Passages from other parts of the V.-C.'s judgment are cited in *Kirby-Smith v. Parnell*, [1903] 1 Ch. 483, stated post, p. 1009.

(q) *Midland Counties Railway Company v. Oswin*, 1 Coll. 74; *Paterson v. Huddart*, 17 Beav. 210; *Gyett v. Williams*, 2 J. & H. 429; *Hamilton v. Buckmaster*, L. R., 3 Eq. 323 (in none of which was there a devise of lands specifically); *Meeds v. Wood*, 19 Beav.

215, *Hawksworth v. Hawksworth*, 27 Beav. 1.

(r) *Edwards v. Barnes*, 2 Bing. N. C. 252; *Wilce v. Wilce*, 7 Bing. 664; *Footner v. Cooper*, 2 Drew. 7; *Saumarez v. Saumarez*, 4 Myl. & Cr. 331; *Re Greenwich Hospital*, 20 Bea. 458; *Re Smart's Estate*, [1882] W. N. 77. See also the cases cited ante, pp. 996, 997, in some of which the word "property" was used.

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property, estate and effects," the word "personal" will as a general rule override the whole (*s*).

So if a testator gives a share of his real and personal property to A., and the remainder to other persons, and then provides that in the event of A. dying under twenty-one, "the said property and effects" shall go to B., this means the share given to A., and not all the testator's property (*t*).

"Estate" followed by an enumeration of particulars explanatory and restrictive of it.

If a testator uses a general word, such as "estate" or "property," followed by an enumeration of particulars, the question arises whether the enumeration shews an intention to make the gift as sweeping as possible, or whether it should be held to be explanatory and restrictive of the prior general expression. The latter principle of construction was applied in several of the older cases. Thus, in *Timewell v. Perkins* (*u*), where a testator devised in these words, "All those my freehold lands, with the messuages, &c., now in the occupation of L., and all other the rest and residue and remainder of my estate, consisting in ready money, plate, jewels, leases, judgments, mortgages, or in any other thing whatsoever or wheresoever, I give unto A. H. and her assigns for ever." In the preamble of the will occurred the clause, "as touching the temporal (*v*) estate with which it hath pleased God to bless me, I dispose thereof as follows." The question was, whether land not described in the will passed under the residuary clause. Fortescue, J., held that it did not, relying on the analogy of the case to *Wilkinson v. Merryland*.

Remark on *Timewell v. Perkins*.

"In the case just stated," as Mr. Jarman points out (*w*), "there was a preceding specific devise of land; but the intention to confine the word 'estate' to personalty, was inferred from the subsequent explanatory words of description; which, however, were themselves followed by expressions scarcely less strong than many which have been held sufficient to include real estate (*x*).

(*s*) *Buchanan v. Harrison*, 31 L. J. Ch. 74; *Belaney v. Belaney*, L. R., 2 Eq. 210; 2 Ch. 138; *Jones v. Robinson*, 3 C. P. D. 344. The testator may, however, shew by the context that he means real estate to pass by a gift of his "personal estate and effects": *Re Wass*, 95 L. T. 758.

(*t*) *Re Willomier*, 16 Ir. Ch. R. 389.

(*u*) 2 Atk. 102; see also *Doe v. Rout*, 7 Taunt. 79, ante, p. 992.

(*v*) Mr. Jarman, in commenting on *Timewell v. Perkins*, gives the word "personal" instead of "temporal,"

and suggests that the introductory clause, referring to personal estate only, may be considered a circumstance of distinction. No such argument can be drawn from the use of the expression "temporal estate," which includes real and personal property. See *Tanner v. Wise*, 3 P. W. 295; *Grayson v. Atkinson*, supra, p. 995.

(*w*) First ed. p. 662.

(*x*) See *Hopewell v. Ackland*, 1 Com. 164, and *Wilce v. Wilce*, 7 Bing. 644, stated post, p. 1011, 1012.

Timewell v. Perkins is unquestionably a strong case, and has generally been much relied upon as an authority for the restricted construction on subsequent occasions.

“So, in *Roe d. Helling v. Yeud* (y), where a testator, after giving certain legacies, and appointing certain persons executors, added, ‘and to whom I give *all the remainder of my property whatever and wheresoever*, to be equally divided amongst them, share and share alike, after their paying and discharging the before-mentioned annuities, legacies, debts and demands, or any I may hereafter make by codicil to this my will, all my goods, stock, bills, bonds, book debts and securities in the Witham Drainage, in Lincolnshire, and funded property.’ The question was whether real estate passed. The Court held that it did not; considering that the enumeration at the end of the clause was explanatory of the words ‘remainder of my property’ (z).

“Property”
restrained by
subsequent
explanatory
particulars.

“The two preceding cases, *Timewell v. Perkins*, and *Roe v. Yeud*, were much relied upon by Gibbs, C.J., in the subsequent case of *Doe v. Rout*” (a).

It may be doubted, however, whether this restricted construction would find favour with the courts at the present day. The three cases last referred to were all decided on the principle that clear words are required to disinherit the heir, a principle which has little, if any, force at the present day (b). Accordingly in *Mullally v. Walsh* (c), where a testator bequeathed a legacy “to be paid by my wife or by my executors,” and then gave to his wife “the remaining part of my whole property, both in stock, household furniture and cash, &c., &c.,” it was held by the Court of Appeal that chattels real (with which alone the suit was conversant) passed by the gift. The principle on which the judgment of the court proceeded seems to apply with equal force to freeholds.

But “property” sometimes denotes merely the fact of ownership, and then it does not have the sweeping effect which it has when used in its more usual sense. As in *Doe d. Haw v. Earles* (d), where a testator gave all “effects at this time in my possession or that hereafter may become my property” to his wife, and it was held that “property” did not enlarge the meaning of “effects.” In a later part of the same will the testator used the word “property”

“Property”
used in
limited
sense.

(y) 2 B. & P. N. R. 214.

(z) But observe the tone of Lord Ellenborough’s remarks on this case in *Doe v. Langlands*, 14 East, 373.

(a) 7 Taunt. 79.

(b) It was referred to as an existing principle in *Buchanan v. Harrison*, 31

L. J. Ch. 82, and in *Re Cameron*, 26 Ch. D. 25.

(c) 3 L. R. Ir. 244, overruling decision of Court below, Ir. R., 6 C. L. 314. Compare *Loftus v. Stoney*, 17 Ir. Ch. 178, referred to post, p. 1016.

(d) 15 M. & Wels. 450.

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to denote the property before given to his wife, that is, effects merely. A similar construction prevailed in *Barnaby v. Tassell* (e).

With the foregoing cases may be compared those in which realty has been held to pass by the use of untechnical expressions (f).

Copyholds excluded from a gift of "property" by subsequent disposition of "copyholds."

It is a wholly different question, where a will contains two distinct devises, either of which would alone be sufficient to carry the property, under which of the two it shall be held to pass. Thus in *Chapman v. Prickett* (g), where a testator entitled to copyholds, which he had surrendered to the use of his will, devised his freehold messuages, stock in the funds, money, and debts, and all shares or property of which he might be possessed or entitled to, to trustees in trust to pay the rents of his freeholds and leaseholds and the dividends of his stock and shares to his wife for life, and afterwards to make division by sale or otherwise of his said freeholds, and to transfer "all stock or shares, my property, estate, and effects," equally among his children. By codicil he devised his copyhold estate to his wife for a term, and afterwards directed it to be sold for the benefit of his children as directed by the will, but did not actually devise the copyholds to the trustees. It was held that no estate in the copyholds passed to the trustees by the word "property" in the will. Tindal, C.J., observed that the general effect of the disposition of the copyhold by the codicil was the same as that of the freehold which had already passed by the will, viz., that the wife of the testator should receive the rents and profits during her life, and after her death a sale should take place and a division be made among the children. So that the disposition of the copyhold made by the codicil was unnecessary, except upon the supposition that the testator thought he had not disposed of it by the will.

Clear gift of realty in will not cut down by gift of "estate, furniture, &c." in codicil.

And it has been elsewhere noticed as an established rule, that a gift once clearly expressed in a will, shall not be cut down by ambiguous expressions contained in a codicil. It was mainly on this principle that in *Molynaux v. Rowe* (h), a devise of "real estate" to A. was held not to be affected by a codicil by which the testator gave "all his estate, household furniture, linen, china, and all other his personal property" to B.

Effect of mistake.

In *Hounsell v. Dunning* (i), a testatrix was entitled to some (e) L. R., 11 Eq. 363. analogous to *Wilde v. Holtzmeyer*, 5 Ves. 811.
(f) Post, p. 1011.
(g) 6 Bing. 602. See also *Acheson v. Fair*, 3 D. & War. 512, which is (h) 8 D. M. & G. 368.
(i) [1902] 1 Ch. 512.

copyholds as customary heiress of her deceased husband, but she erroneously supposed that they belonged to her son as his father's heir ; by her will she gave to her daughters all the share of her late husband's " estate " to which she was entitled on his decease ; she also gave them pecuniary legacies, and declared that she made this provision for them in lieu of the various freehold and copyhold lands of her late husband which descended to her son : it became unnecessary to decide the point, but Joyce, J., thought that the copyholds in question did not pass by the word " estate."

III. Words "Estate," &c., whether restrained by Collocation with Executorship.—Mr. Jarman continues (j): " Sometimes words adequate to comprise land have been confined to personal estate, from their association with the legatee's nomination to the executorship, which has been considered as explanatory, and restrictive of the general expressions to that species of property which was connected with the character of executor.

Devise associated with nomination to executorship.

" As in *Shaw v. Bull* (k), where one seised in fee of five messuages, by will devised two to his wife for life, remainder to his two daughters in fee ; the third messuage to his wife and her heirs ; the fourth to his wife and her heirs, she paying his legacies, in case his goods and chattels did not answer them all ; and, if she did not make provision for the payment of his legacies in her lifetime, that it should be lawful for the legatee, after her death, to sell the said messuage, to satisfy the legacies out of the value thereof. Then follows this clause, on which the question arose :—' And all the overplus of my estate to be at my wife's disposal, and make her my executrix.' Blencowe, J., said, if he had at first devised to his wife all his estate, this (the fifth) house would have passed to her ; but compare this clause with the subsequent words, ' and I make her my executrix,' it shows that his intent was to grant her such estate as she was capable of as executrix. He considered ' overplus ' to refer to the price of the house, after payment of legacies.

" Overplus of my estate " restricted to personalty by this association.

" It is to be observed, however, that this construction renders the words in question nugatory, since the appointment of the wife to be executrix was itself, in the then state of the law, a disposition of the whole personal estate ; a species of argument to which great attention is paid at this day, for in modern cases no principle is more conspicuous than an anxiety to give effect

Remark on *Shaw v. Bull*.

(j) First ed. p. 671.

(k) 12 Mod. 593, 2 Eq. Ca. Ab. 320, pl. 8.

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to every word of the will. It is impossible to reconcile this case with the general current of authorities (*l*).

“Executrix of all my goods, *lands*, and chattels.”

“Although it is indisputably clear that the word *lands* will carry real estate, notwithstanding it be collocated with words descriptive of personal property only (*m*); yet in several early cases (*n*) it has been decided, that where a testator appoints another executor of all his goods, *lands*, &c., he refers to such lands as the person may take as executor, namely, leaseholds; and accordingly real estate does not pass. Thus, in *Piggot v. Penrice* (*o*), freehold lands were held not to pass under the words, ‘I make my niece *executrix of all my goods, lands and chattels*,’ although the testator had no leaseholds (*p*). It was said that by this construction the word *lands* was not (as objected) useless, and to be rejected; for that, in all probability, there might be rents in arrear of those lands, which would pass to the niece by her being made executrix. This explanation, however, fails to show that any efficient signification was given to the word ‘*lands*,’ since it is clear the executorship would have entitled the niece to the arrear of rent. The word ‘*chattels*,’ too, was sufficient to pass any leasehold lands of which the testator might have been possessed at his death.

“Executor of all my *lands* for ever and leasehold property,” not so restricted.

“In *Doe d. Gillard v. Gillard* (*q*), real estate was held to pass under the words, ‘I do make, constitute and appoint R. G. my whole and sole *executor of all my lands for ever, and leasehold property* here or at Beeston.’ The question principally agitated was, whether the restrictive words ‘here or at Beeston,’ applied to both freehold and leasehold, or to leasehold lands only; and it was held that they were confined to the latter, and that the devise of the freehold lands was general, without any local restriction.

“Whatever opinion may be formed of the case of *Piggot v. Penrice*, it is not necessarily overruled by this case, where the will contained additional expressions, strongly aiding the construction adopted.

(*l*) See *Noel v. Hoy*, 5 Mad. 38, stated post, p. 1005.

(*m*) *Roe d. Walker v. Walker*, 3 B. & P. 375, stated post, p. 1020.

(*n*) 1 Roll. Ab. 613, 1 Eq. Ca. Ab. 209, pl. 12; see also *Clements v. Cassye*, Noy, 48.

(*o*) Pre. Ch. 471, 1 Eq. Ca. Ab. 209, pl. 13.

(*p*) “This circumstance does not seem to be very material; for, as such a

bequest operates upon all the leaseholds of the testator *at his death*, the fact of his having or not having any such at that period, does not mark his intention *at the making* of the will. See Lord Eldon’s judgment in *Wright v. Atkyns*, as reported G. Coop. 111, but as to which see *infra*.” (Note by Mr. Jarman.)

(*q*) 5 B. & Ald. 785; and see *Marret v. Sly*, 2 Sid. 75, ante, p. 455, n. (*l*).

“So, in *Noel v. Hoy* (r), a copyhold estate surrendered to the use of the will was held to pass under the following disposition: ‘In respect of worldly affairs, I cannot better manifest my love and attachment to my family, than in nominating (which I hereby do) my dearly beloved and most amiable wife A. F. M., the sole executrix of this my will, thereby *bequeathing* to her *all the property of whatever description or sort that I may die possessed of*, to be by her appropriated in any manner she may think proper, for the maintenance of herself and such of my children,’ &c. Sir J. Leach, V.-C., thought that the criticism upon the words ‘possessed of,’ and ‘appropriated,’ on which had been founded the argument for excluding the copyholds, was too nice.

“All the property I may die possessed of,” held to include land.

“Again, in *Thomas v. Phelps* (s), where the testator, as to his worldly estate, gave, devised and disposed of the same as follows: and then, after giving some pecuniary legacies, proceeded in these words: ‘I also give and bequeath the lease of the colliery of L. to my son J. P.; him and my daughter E. P. I do make, constitute and appoint my joint executor and executrix of this my last will and testament, *of all that I possess in any way belonging to me, by them freely to be enjoyed or possessed of whatsoever nature or manner it may be*, only my household furniture, which I give to my daughter who lives the longest single, and after her decease or marriage to be sold and equally divided between my remaining children,’ &c. Sir J. Leach, M.R., held, that the real estate passed by this devise, the words being equivalent to a gift of all the testator’s property. He observed, that the exception of the household furniture was of little weight; for where the prior words imported real as well as personal estate, it mattered not that the exception to the gift happened to be of personal chattels only (t).

“All that I possess in any way belonging to me.”

“So, in *Doe d. Pratt v. Pratt* (u), where a testator directed that his debts and funeral expenses should be paid by his executor thereafter named; and after giving two life annuities of 2l. 10s. each, and a legacy of 5s. to J. P., his heir-at-law, he appointed W. P. *whole and sole executor of all his houses and lands situate at F.* It was held, after an extensive review of the authorities, that the

(r) 5 Mad. 38.

(s) 4 Russ. 348.

(t) See also *Steignes v. Steignes*, Mos. 296; such an exception, though of little weight to show what is excluded (see however *Camfield v. Gilbert*, 3 East, 516, 2 M. & Sel. p. 454), is strong to prove what is intended to be included in the gift from which the

exception is made; see *Davenport v. Coltman*, 12 Sim. 588, 598, 603; and see *Hotham v. Sutton*, 15 Ves. 319, and other cases cited therewith, post, Chap. XXIII.; *Marshall v. Hopkins*, 15 East, 309.

(u) 6 Ad. & E. 180; *Doe d. Hickman v. Haslewood*, ib. 167; *Day v. Dameron*, 12 Sim. 200, stated post, p. 1012.

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houses and land at F. passed to W. P., and that he took an estate in fee.

General remark on preceding cases.

"These cases evince that little attention is now to be paid to the circumstance of the association of the devise with the appointment of the devisee to the executorship, as confining it to personal estate, if the words of the devise will fairly bear a wider construction; and *Thomas v. Phelps* also shows that an exception of articles of personalty affords no ground for cutting down the general words of the devise."

In the cases above cited the question was whether the executors took the real estate beneficially, but an appointment of a person as "executor" of the testator's property may of course operate to give him the land as trustee (v).

Power to sell "estate" to pay legacies.

In *Re Cameron* (w), a testator gave certain legacies, and empowered his executors to realize such parts of his estate as they should think fit to pay them; he did not dispose of any of his real estate, except a particular house: it was held that the provision for payment of legacies referred to that part of the estate which vested in the executors as such, namely, the personal estate, and did not charge the legacies on the real estate.

Land Transfer Act, 1897.

It may be a question whether the Land Transfer Act, 1897, has affected the rule of construction above considered. In the case of a testator dying since 1897, his real estate vests on his executors, and this would be an additional reason (to borrow Mr. Jarman's language) for disregarding the circumstance that the testator has, in devising his property by informal words, associated the devise with the appointment of the devisee to the executorship. But in such a case as *Re Cameron* (supra), it is submitted that the act would not affect the construction of the will.

Inapplicability of limitations, where restrictive.

IV.—Words "Estate" &c., whether restrained by the Nature of Limitations.—Mr. Jarman continues (x): "The introduction of limitations and expressions inapplicable to real estate has sometimes been made a ground for excluding such estate from words of general description, capable, ex vi terminorum, of comprehending property of that species."

The authorities on the subject, however, are somewhat conflicting. At the time when Mr. Jarman wrote, the introduction of limitations and expressions inapplicable to real estate had

(v) *Murphy v. Donnelly*, Ir. R., 4 Eq. 111.

(w) 26 Ch. D. 19.
(x) First ed. p. 675.

been held, in several cases, to be a sufficient reason for excluding it from a gift of the testator's "estate and effects" (y), while in other cases it was held that the mere introduction into some of the clauses of a will of expressions inapplicable to real estate, did not necessarily confine the word "estate" to personal estate (z).

In some of the cases bearing on this subject (for example, in *Doe v. Buckner*), the testator, in the preamble or exordium to his will, intimated an intention to dispose of all his real estate. "This circumstance," as Mr. Jarman points out (a), "has had various degrees of importance assigned to it. Most of the judges who have held the real estate to pass, have thrown it into the argument. It certainly shews that the testator commenced his will with the intention not to die intestate with respect to any portion of his property; but does not supersede the necessity of that intention being subsequently carried into effect by an actual disposition." It has had considerable weight assigned to it in cases where the testator has made no disposition of his residuary estate except by untechnical words, as by appointing some one to be his residuary legatee, or the like (b), a matter which is considered in a subsequent part of this chapter.

As to preamble intimating intention to dispose of whole estate.

The true principle governing the class of cases now under discussion was laid down in *Saumarez v. Saumarez* (c). In that case

Realty held to pass notwithstanding trusts in terms applicable only to personality.

(y) *Doe d. Spearing v. Buckner*, 6 T. R. 610, see post, p. 1008 n. (d); *Doe d. Hurrell v. Hurrell*, 5 B. & Ald. 18; *Woollam v. Kenworthy*, 9 Ves. 137; and *Pogson v. Thomas*, 6 Bing. N. C. 337. Some of these decisions seem to have proceeded on the ground that a limitation to the executors and administrators of a person was inapplicable to real estate (see per Shadwell, V.-C., 12 Sim. at p. 204), although a gift of land to A., his executors, &c., even under the old law, gave A. the fee (*Rose d. Vere v. Hill*, 3 Burr. 1881, Fearn, Posth., 144).

(z) *Doe d. Burkitt v. Chapman*, 1 H. Bl. 223; *Affleck v. James*, 17 Sim. 121. In *Newland v. Marjoribanks*, 5 Taunt. 268, the judges were divided in opinion. *Barclay v. Collett*, 6 Scott, 408, is cited by Mr. Jarman in the next section of this chapter, but so far as it has any bearing on the questions discussed in this chapter it seems more pertinent to the present section.

(a) First ed. 678.

(b) See *Doe d. Wall v. Langlands*, 14 East, 370, 2 Ed. 145, n. (a); *Gulliver v. Poyntz*, 3 Wils. 141, 2 W. Bl. 726;

Smith v. Coffin, 2 H. Bl. 444; *Grayson v. Atkinson*, 1 Wils. 333; *Pocock v. Bishop of Lincoln*, 3 Br. & B. 27; *Roe v. Gilbert*, ib. 85; *Saddler v. Turner*, 8 Ves. 617; *Doe v. Dring*, 2 M. & Sel. 448, 456; *Bradford v. Belfield*, 2 Sim. 264; *Sutton v. Sharp*, 1 Russ. 146; *Wilce v. Wilce*, 7 Bing. 664; and particularly *Hughes v. Pritchard*, 6 Ch. D. 24. The absence of such a clause was relied on in *Roe v. Yeud*, 2 B. & P. N. R. 214; *Doe v. Rout*, 7 Taunt. 79, 84; *Re Methuen and Blore's Contract*, 16 Ch. D. 696; but stated by Lord Hardwicke, in *Crichton v. Symes*, 3 Atk. 61, to afford no indication of intention.

(c) 4 My. & C. 331. See also *Morrison v. Hoppe*, 4 De G. & S. 234; *Stokes v. Salomons*, 9 Hare, 75; *Hunter v. Pugh*, 4 Jur. 571; *Mayor, &c., of Hamilton v. Hodsdon*, 6 Moo. P.C.C. 76, 11 Jur. 193, stated ante, p. 998; *D'Almaine v. Moseley*, 1 Drew. 629; *Fullerton v. Martin*, 22 L. J. Ch. 893, *Streatfield v. Cooper*, 27 Beav. 338; *Morris v. Lloyd*, 3 H. & C. 141; *Hamilton v. Buckmaster*, L. R., 3 Eq. 323; *Lloyd v. Lloyd*, L. R., 7 Eq. 458.

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Saumarez v.
Saumarez.

a testator, after giving certain directions about his dwelling-house, gave to his son R. his freehold land in D. (without words of limitation), and directed that the residue of his property, which he might leave at his death, might be divided between him and his two sisters in equal proportions, subject to the following restrictions. The testator then directed his son's portion to be placed in the names of trustees, and the interest to be paid to him (he being already tenant for life of the land). After his death his share to be divided between his children, and placed in the names of trustees, with a power to employ the interest for their maintenance and part of the capital for their advancement; and at their age of twenty-five to transfer the whole to them: with certain ulterior limitations in case R. died without issue. Lord Cottenham, notwithstanding the inapplicability of the trusts to real estate, held that the reversion of the estate in D. passed by the residuary clause, and that the trusts and limitations must be applied distributively to the real and personal estate. "In considering gifts of residue," he said, "whether of real or personal estate, it is not necessary to ascertain whether the testator had any particular property in contemplation at the moment. Indeed, such gifts may be introduced to guard against the testator having overlooked some property or interest in the gifts particularly described. If he meant to give the residue of his property, be it what it may, it is immaterial whether he did or did not know what would be included in it; and if so, it cannot make any difference that such ignorance is manifested upon the face of the will, unless the expressions manifesting it are sufficient to prove that the testator did not intend to use the words of gift in their ordinary, extended, and technical sense." And, applying himself to the particular will before him, he said: "The circumstance of the testator using expressions and giving directions applicable only to the personal estate may prove that he did not at the time consider or was not aware that this fee would be part of the residue; but if such knowledge be not necessary, as it certainly is not, to give validity to the devise, the absence of it, though so manifested, cannot destroy the operation of the general intent of passing all the residue of his property."

The cases of *Fullerton v. Martin* (d) and *D'Almaine v. Moseley* (e), both decided by Kindersley, V.-C., illustrate the same principle.

(d) 22 L. J. Ch. 893. In that case the V.-C. remarked of *Doe v. Buckner* that it would be decided differently at

the present day.

(e) 1 Drew. 629. See also the other cases cited ante, p. 690, note (a).

It is true that in *Coard v. Holderness* (*f*), a gift of all the testator's estate, effects and property, described in the most sweeping terms, was held by Romilly, M.R., that the use of the words "bequeath," "executors and administrators," "income" and "principal," and the absence of such words as "devise," "heir" and "rent," coupled with the general scope and object of the will, shewed the testator did not mean to dispose of his real estate, but whether the case was rightly decided or not, no general principle can be deduced from it (*g*).

In *Kirby-Smith v. Parnell* (*h*) a testator gave and bequeathed all his ready money, securities for money, stock in any of the public stocks of Great Britain, and all the rest, residue and remainder of his estate and effects whatsoever and wheresoever, upon trusts which were technically appropriate rather to personal than to real estate, but Buckley, J., held on the whole will that the dominant intention of the testator was to dispose of everything, and that the gift operated as a valid gift of his real estate. The learned judge relied on *Saumarez v. Saumarez*, *D'Almaine v. Moseley*, and *Fullerton v. Martin*, and treated *Coard v. Holderness* and *Longley v. Longley* (*i*), as decisions on the wording of particular wills, from which no general principle could be deduced.

In some cases where the words of a devise to trustees have been sufficiently ample to include real estate, but the trusts have applied to personalty only, the legal estate in the realty has been held to pass by the devise, with a resulting trust to the heir.

As in *Dunnage v. White* (*j*), where the testator, after devising certain real estate, and bequeathing some pecuniary legacies, proceeded as follows:—"And all the rest, residue and remainder, of my estate or effects, whatsoever and wheresoever, of what nature or kind soever, I give, devise (*k*), and bequeath unto my said trustees and executors after named and appointed, upon the trusts following: that is to say, that they my said executors do and shall, as soon as may be conveniently after my decease, make sale and absolutely dispose of my household goods and stock

"Estate or effects" held to include land, but trusts of will confined to personalty.

(*f*) 20 Bea. 147.

(*g*) The M.R. seems to have misapprehended the true ground of the decision in *Saumarez v. Saumarez*, supra. See *Stokes v. Salomons*, 9 Hare 75; *Buchanan v. Harrison*, 31 L. J. Ch. 74.

(*h*) [1903] 1 Ch. 483.

(*i*) Post, p. 1010.

(*j*) 1 J. & W. 583.

(*k*) That this word, when applied to

"effects" alone, will not carry real estate, see *Camfield v. Gilbert*, 3 East, 516; *Hall v. Hall*, [1891] 3 Ch. 389; [1892] 1 Ch. 361; but see *Phillips v. Beal*, 25 Beav. 25. Conversely, the word "bequeath" will not be sufficient to confine the effect of a gift otherwise capable of including real estate, *Whicker v. Hume*, 14 Beav. 518; *Gyett v. Williams*, 2 J. & H. 429.

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Resulting
trust for the
heir.

in trade, by public auction, for the most money that can be had or gotten for the same ; and also do and shall, with all convenient speed, collect in all debts due and owing to me at the time of my decease, together with all monies owing or belonging to me upon mortgage, bond, bill, note, specialties, simple contract, or otherwise howsoever ; and when the same shall be so collected and got in, to divide the same into six parts or shares, and to pay the same, when so divided, in manner following ; that is to say, four equal sixth parts thereof to certain persons named, and the remaining two-sixth parts thereof to invest in the public stocks or funds," &c. Sir T. Plumer, M.R., held it impossible not to construe the devise as comprising the real estate ; but that the testator having given both the real and personal property to the trustees, and having only said what was to be done with the personalty (for not a word of the disposition of the beneficial interest referred to real estate), the consequence was that the trust of the realty resulted to the heir-at-law (l).

This decision was followed in *Longley v. Longley (m)*, where a testator devised and bequeathed all his estate and effects to trustees, their heirs, executors and administrators, upon trust to convert his personal estate and stand possessed of the proceeds of sale, and of the rest and residue of his estate and effects, upon trust to invest the same in government or real securities, and to stand possessed of the investments upon trusts for the benefit of his wife, children, brothers and sisters : it was held by Romilly, M.R., that the real estate passed to the trustees, but that the trusts were "rigidly and exclusively" applicable to personal estate, and that there was a resulting trust of the real estate for the heir-at-law. It does not appear whether the testator owned any real estate at the date of his will, which was made fifteen years before his death (n).

(l) "It seems to have been overlooked in this case, that the freehold farm, in respect to which the question arose, had been contracted to be purchased by the testator before he made his will, *but had never been conveyed to him* ; so that there was no legal estate in the testator upon which that part of his Honor's decision which gave the estate to the trustees, could operate." (Note by Mr. Jarman.)

(m) L. R., 13 Eq. 133.

(n) As to the materiality of this circumstance, see per Jessel, M.R., in *Re Methuen and Blore's Contract*, 16 Ch. D. 696. Compare also the effect of

the decision in *Saumarez v. Saumarez* (supra) as stated by Wood, V.-C., in *Buchanan v. Harrison*, 31 L. J. Ch. at p. 82 : "Lord Cottenham says, and I entirely follow the reasoning, that where the testator used the word property he only meant personal estate, but he did mean to dispose of all his property whatever it was. He believed he was passing the whole of his estate, but believed it was personal property." The decision in *Longley v. Longley* was referred to by Buckley, J. (whether with approval or disapproval does not appear) in *Kirby-Smith v. Parnell*, supra.

V. General untechnical Words held to pass Land.—"In some cases," as Mr. Jarman remarks (o), "real estate has been held to pass under words, even more vague and informal than any which have yet been the subject of consideration. Thus, in *Hopewell v. Ackland* (p), where the testator devised as follows:—'I devise all my lands, tenements, and hereditaments to A. Item, I devise all my goods and chattels, monies, debts, and *whatsoever else I have (in the world (q)) not before disposed of*, to the said A., he paying my debts and legacies; and make him executor.' Trevor, C.J., held, that by these words an estate in fee passed; for it could not have any effect upon the personal estate, because that was given away as fully as possible by the words precedent; therefore it must extend to the remainders in the real estate.

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Real estate held to pass by vague and informal words.
"Whatsoever else I have not before disposed of."

"The reasoning of the learned Chief Justice deserves attention, though the point seems not to have been necessary to the construction that the devisee took a fee; for the prior devise was clearly adequate to carry all the lands, and the charge upon the devisee would enlarge his estate in those lands to a fee (r).

"So, in *Huxtep v. Brooman* (s), the words 'all I am worth' were held to comprise land in the will of a very illiterate testator. . . . This case may be considered as exhibiting the extreme point to which the decisions have gone, in applying general informal words to real estate. Nothing could be more comprehensive or more untechnical than the expression here used. The case was cited with approbation by Gibbs, C.J., in *Doe v. Rout* (t)," and by the Court of Exchequer in *Davenport v. Coltman* (u), where it was said never to have been doubted. The only apparent exception is a dictum of Sir E. Sugden, to the effect that it might be a little difficult to support it (v).

"All I am worth," held to carry land.

In *Pitman v. Stevens* (w), the testator devised as follows: "I give and bequeath all that I shall die possessed of, real and personal, of what nature and kind soever, after my just debts are paid. I do hereby appoint P. my residuary legatee and executor"; and, in a subsequent part of his will, he desired his legatee and executor to let his sister be interred in a certain vault, and recommended him to do something handsome for the testator's

"All that I shall die possessed of, real and personal," held to pass realty.

(o) First ed. p. 680.

(p) Salk. 239, 1 Com. 164.

(q) These words do not occur in Salkeld.

(r) See post, Chap. XLV.

(s) 1 Br. C. C. 437. As to the words "I make A. my sole heir," see *Taylor v. Web*, Sty. 301, 307, 319; 2

Sid. 75, ante, p. 455, n. (l). As to the expression "my fortune," see ante, p. 991.

(t) 7 Taunt. at p. 81, ante, p. 992.

(u) 9 M. & Wels. 481 stated post, p. 1013.

(v) 1 D. & War. 439.

(w) 15 East, 505.

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“Every thing
else I die pos-
sessed of.”

brother-in-law at his death, or when he should want anything to live on : it was held that P. took a fee in the real estate (x).

So, in *Wilce v. Wilce* (y), a testator commenced his will as follows :—“As touching such worldly property, wherewith it hath pleased God to bless me in this world, I give, devise and dispose of the same in the following manner and form.” He then proceeded to make several dispositions of land and goods, and concluded with the following residuary clause :—“All the rest of my worldly goods, bills, bonds, notes, book debts and ready money, and every thing else I die possessed of, I give to my son George, whom I make my whole and sole executor.” It was held, on the authority of the preceding cases, especially *Smith v. Coffin* (z), that certain real estate, not included in the specific devises, passed by this clause to the testator’s son George, and that he took the fee. Seeing what was the testator’s intention, as disclosed by the preamble, the Court could not but say he had employed sufficient words to carry it into effect (a).

And in *Evans v. Jones* (b), where a testator appointed his wife executrix, and continued—“First, I give and bequeath to my said wife all my household furniture, linen, glass, china, plate, farming stock, and all my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, or whatever I may be possessed of at the time of my decease” : it was held that the testator’s real estate passed to the wife.

In *Day v. Daveron* (c), a testator gave his house M. to his wife (without words of limitation), and his house N. to his wife for life, together with his household goods, &c. ; but if she married again (which she did not do), “the above property was to become the property” of his daughter for life, remainder to her children ; but if his wife remained unmarried, then, after her death, he gave house N. to the daughter for her life and her children. The testator then went on : “I appoint my wife sole executrix and residuary legatee to all other property I may possess at my decease. . . . Now concerning my funded property, I hereby give” one moiety to the wife and the other to the daughter.

“I appoint
my wife
executrix and
residuary
legatee to
all other
property I
may possess
at my de-
cease.”

(x) As to *Barclay v. Collett*, 6 Scott, 408, 4 Bing. N. C. 658, cited by Mr. Jarman in this section, see ante, p. 1007, n. (z).

(y) 5 M. & Pay. 682, 7 Bing. 664.

(z) Ante, p. 996.

(a) But as to its carrying the fee, see Chap. XLV.

(b) 46 L. J. Ex. 280. See also *War-*

ner v. Warner, 15 Jur. 141 ; *Phillips v. Beal*, 25 Beav. 25 ; *Re Gyles*, 14 Ir. Ch. 311, where a gift of “everything I may die possessed of, except the household furniture,” was held to pass real estate.

(c) 12 Sim. 200 ; *Warren v. Newton*, Dru. 464.

Sir L. Shadwell held that the wife, under the residuary clause, took the remainder in house M. He thought it clear, that this clause did not refer to personal property; for the testator almost immediately afterwards spoke of his funded property in a distinct sentence (d).

In *Davenport v. Coltman* (e), a testator, after certain pecuniary legacies, bequeathed to his wife for her life his freehold house at C., together with the use of plate, &c., and of interest of stock; and declared that, "at her decease, it was his will that A. and B. should divide equally between them, as residuary legatees, whatever he might die possessed of, except what was already mentioned in favour of others." And after appointing executors, he authorized them to sell certain leaseholds immediately, "but the house at C. must not be sold as long as my wife lives." On a case from Chancery, the Court of Exchequer certified their opinion that A. and B. were entitled in fee simple to the whole real estate of the testator at the death of the wife, subject, as to the house at C., to the wife's life estate. They relied partly on the generality of the expression "whatever I may die possessed of," which they thought was not to be limited to personal estate, being, in their opinion, equivalent to "all I am worth" (f), or "all I have" (g); but they also relied on the direction to postpone the sale of the house at C., which could only refer to a sale for convenience of division between A. and B. according to the terms of the residuary clause, and that, if any real property was included in that clause, all must be so. Sir L. Shadwell, V.-C., confirmed the certificate; observing that besides the terms "whatever I shall die possessed of" (which he thought would comprehend estates in fee simple), there was an exception of "what was already mentioned in favour of others," and that one of the things already mentioned was the possession of the freehold house for the life of the wife.

It is true that in *Monk v. Mawdsley* (h), Leach, V.-C., said that in their ordinary sense the words "possessed of" would not import real estate, but as the context in that case was sufficient to shew that the testatrix did not mean them to include real estate, the remark of the V.-C. is merely a dictum (i).

(d) As to the effect of appointing a person "residuary legatee," without any gift to him, see post, p. 1016 and ante, p. 1011.

(e) 9 M. & Wels. 481, 12 Sim. 588.

(f) *Huxtep v. Brooman*, 1 Br. C. C. 437, ante, p. 1011.

(g) See per Bayley, J., *Doe v. Mor-*

gan, 6 B. & Cr. at p. 518, 9 D. & Ry. 633.

(h) 1 Sim. 286. Compare remarks by the same judge upon the word "possessed" in *Noel v. Hoy*, and *Thomas v. Phelps*, ante, p. 1005.

(i) Compare *Cook v. Jaggard*, L. R., 1 Ex. 125, where the words were "or whatever I may be possessed of or

"A. and B. to take as residuary legatees whatever I may die possessed of."

"All I may die possessed of," held not to pass realty.

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"What little I have to call my own."

"My fortune" confined to personalty by context.

In *Henderson v. Farbridge* (j), it was held that the equity of redemption in a copyhold estate did not pass under an informal gift of "what little I have left to call my own."

In *Maitland v. Adair* (k), a testator devised his estate at T. to his nephew A., and bequeathed money legacies to several other relations; and by a codicil directed his undisposed-of money to be divided among his said relations in the proportion he had bequeathed (l) the other part of his fortune; Lord Rosslyn held that the word "fortune" must mean money legacies, and that A. was not entitled to a share in respect of the value of the T. estate.

"Rest and residue," held not to include real estate, notwithstanding previous devise of land.

In *Bebb v. Penoyre* (m), real estate was held not to be included in a devise of "the rest and residue," on the ground of the restraining effect of the immediate context, although there was a previous devise of land in the same will. The testator, after various devises and bequests, concluded his will in the following words:—"I order the lease of my house, with all the furniture (except the eight worked chairs), to be sold, and all the rest and residue to be divided among the four daughters of A., share and share alike; and I appoint C. and D. executors." It was contended, that the reversion in fee of a moiety of certain houses devised by the will for the life of the devisee, passed by the words "rest and residue." But Lord Ellenborough thought that these words, in the place in which they stood, and so accompanied, must mean property of a similar nature to the lease of the house and furniture before mentioned, that is, his personal estate. He considered the division ordered was to be made by the executors immediately afterwards named.

"All the rest."

But in *Attree v. Attree* (n), a testatrix gave a certain house and garden (which were leasehold) to A., then bequeathed several pecuniary legacies, and proceeded, "and all the rest to be divided between the daughters of B." It was held by Sir J. Romilly, that "rest" included the rest of all the property real as well as personal.

entitled to." In both these cases the wills were before the Wills Act, so that the persons to whom land was expressly devised only took life estates, and the question was whether the subsequent general words were sufficient to pass the remainders in fee, as in *Hopewell v. Ackland*, ante, p. 1011; and see the following cases where the residuary devises contained the word "estate" or "property": *Scott v. Alberry*, ante, p. 993; *Roe v. Gilbert*, ante, p. 994; *Day v. Davenport*, ante, p. 1012; *Saumarez*

v. Saumarez, ante, p. 1007.

(j) 1 Russ. 479. It was also held not to pass under a gift of "all my effects."

(k) 3 Ves. 231.

(l) As to this word vide ante, p. 1009, note (k).

(m) 11 East, 160. As to the effect of the context in restraining the force of such words as "estate," "property," &c., see ante, p. 1000.

(n) L. R., 11 Eq. 280.

And in *Smyth v. Smyth* (o), where a testator made his will thus, "I give to A. 100*l.*, also to B. 50*l.*; and lastly, I give my sheep and all the rest, residue, moneys, chattels and all other my effects to be equally divided among my four brothers (naming them) whom I appoint executors"; it was held by Sir R. Malins, V.-C., that "rest and residue" were sufficient to carry real estate, and were not cut down by the subsequent enumeration. Indeed, he thought the realty would pass under the word "effects" alone, but in this he perhaps went too far (p).

In *Re Andrew's Estate* (q), a testator, after giving his real estates "Et cetera." and all his personal estate and effects to his wife for her life, gave to certain relatives after her death "an equal share of my personal estates, &c. &c."; it was held that this latter gift included the real estate of the testator (r).

There are several cases in which such words as "I make A. B. my heir," have been held to operate as a general devise of the testator's real estate (s). "I make A. my heir."

In *Gould v. Gould* (t), a testator by his will gave his real estate to trustees upon trusts for his sister; by a codicil, in which he called his nephew his heir at law, he directed that the making of the codicil should not extend to give his trustees, for the benefit of his sister, any after-acquired freeholds or copyholds, but that the same should descend, as to freeholds to his heir at law, and as to customary estates, to his customary heir: it was held this did not prevent her from taking by descent after-acquired copyholds, she being the testator's customary heir.

VI. Words descriptive of Personality only, held, by force of Context, to include Real Estate.—"It remains to be observed," says Mr. Jarman (u), "that words applicable exclusively to personal estate have sometimes, by force of the context, been held to include land. This frequently happens where an expression is evidently used as referential to and synonymous with an anterior word, clearly descriptive of real estate; in which case its extent of operation is measured, not by its own inherent strength, but by the import of its synonym."

Words descriptive of personal estate only, held to carry land—when.

"Thus, in *Hope d. Brown v. Taylor* (v), where a testator, after

Word legacy held to refer to real estate antecedently devised.

(o) 8 Ch. D. 561.

(p) See post, p. 1019.

(q) 50 W. R. 471.

(r) As to the effect of the expression

"et cetera" see post, p. 1030.

(s) *Marret v. Sly*, 2 Sid. 75, s.c. sub nom. *Taylor v. Web*, Styles 301, 307,

319; *Rogers v. Rogers*, 3 P. W. 193; *Parker v. Nickson*, 1 D. J. & S. 177 ("I acknowledge A.B. to be my heir-at-law").

(t) 32 Bea. 391.

(u) First ed. p. 684.

(v) 1 Burr. 268. See also *Hardacre*

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devising certain lands to A., B. and C., and giving pecuniary legacies to B. and C., provided that, if either of the persons before named died without issue, then *the said legacy* should be divided equally between them that were alive: it was held that the word 'legacy' in this clause extended to the land before devised. Foster, J., observed that one of the persons named had no pecuniary legacy."

"Residuary legatee."

In several of the cases cited in the previous section, there was an appointment of a person to be the testator's residuary legatee of whatever property the testator might die possessed of, and although the words "residuary legatee" are properly applicable to personalty only (*w*), it was held in each of these cases that the appointment took effect as a devise of the testator's realty (*x*). And an appointment of a person to be "my residuary legatee" will have this effect if the testator shews an intention to dispose by his will of all his property, real as well as personal. For example, in *Hughes v. Pritchard* (*y*), where a testator began thus: "As to my estate which God has bestowed on me, I do make this my last will and testament as follows (that is to say):" he then devised certain freehold land to A. for life with remainder over, and another freehold farm to B. for life with other remainders over; next he gave pecuniary legacies, then a specific legacy, and afterwards more pecuniary legacies, "and I make A., C. and D. my residuary legatees": it was held by Jessel, M.R., and James and Bramwell, L.J.J., that the testator's real estate not specifically devised passed to A., C. and D.

"I appoint A. residuary legatee," held to carry real estate.

"I leave A. residuary legatee," held not to carry after-acquired real estate.

But in *Re Methuen and Blore's Contract* (*z*), a testatrix made

v. Nash, 5 T. R. 716; *Brady v. Cubitt*, Dougl. 31, 40. As to the words "share," "share aforesaid," "portion," and similar expressions, as applying to one or more of several preceding subjects, vide *Doe d. Stopford v. Stopford*, 5 East, 501; *Hardman v. Johnson*, 3 Mer. 347; *Doe d. Gibson v. Gell*, 2 B. & Cr. 680, 4 D. & Ry. 387; *Doe d. Driver v. Bowling*, 5 B. & Ald. 722; *Scrivener v. Smith*, 2 D. M. & G. 399.

(*w*) *Doe d. Roberts v. Roberts*, 7 M. & Wels. 382; *Lea v. Grundy*, 1 Jur. N. S. 951; *Windus v. Windus*, 21 Beav. 373, aff. 6 D. M. & G. 549, diss. K. Bruce, L.J.

(*z*) *Pitman v. Stevens*, 15 East, 505, ante, p. 1011; *Day v. Davenport*, 12 Sim. 200, ante, p. 1012; *Davenport v. Coltman*, 9 M. & Wels. 481, 12 Sim. 588; *Alleyne v. Alleyne*, 2 Jo. & Lat. 544, per Sugden, C.; *Evans v. Crosbie*, 15 Sim.

600. And see *Kellett v. Kellett* 3 Dow, 248, and *Singleton v. Tomlinson*, 3 App. Ca., 404, stated ante, p. 773; *Wildes v. Davies*, 1 Sm. & Gif. 475; in each of which the surplus proceeds of converted realty were held on the context to pass to persons appointed "residuary legatees."

(*y*) 6 Ch. D. 24. See also *Warren v. Newton*, Dru. 464 ("residuary legatee to all my property"); *Re Salter*, 44 L. T. 603, and *Loftus v. Stoney*, 17 Ir. Ch. 178 ("leave and bequeath" residue of "my properties" to children "as residuary legatees").

(*z*) 16 Ch. D. 696; see also *Gethin v. Allen*, 23 L. R. Ir. 236; *Hillas v. Hillas*, 10 Ir. Eq. 134; *Wills v. Wills*, 1 Dr. & W. 439; *Re Gyles*, 14 Ir. Ch. 311; *Cooney v. Nicholls*, 7 L. R. Ir. 107.

her will as follows:—"I commit to paper my wishes respecting the disposal of my property . . . Everything I am possessed of I leave to my sister for her life, after her decease I give and devise as here annexed. . . . My two nephews H. and F. I leave my executors, and the latter residuary legatee after the demise of my sister": Jessel, M.R., held that after-acquired realty of which the testatrix was possessed at her death did not pass by the will. He distinguished this case from that of *Hughes v. Pritchard* on the ground that here there was no direct indication of intention to give all property, real as well as personal, as there was in that case, and said that though the words here used might well pass everything which the testatrix had, including realty, to the sister for life, there was no indication of intention that the remainderman must necessarily take all that was given to the tenant for life. His Lordship attached some importance to the fact that at the date of the will the testatrix had no real estate.

A similar construction prevailed in *Re Morris (a)*; in that case the question was simplified by the fact that the "residuary legatee" was tenant for life of the testator's real estate under a preceding devise.

In fact, it may be laid down as a general rule that the mere appointment or nomination by a testator of a person as "my residuary legatee" will not operate as a devise to him of the testator's residuary real estate; and even where a testator throughout his will uses "bequeath" and "legacy duty" as applicable to real estate, this will not justify the Court in construing "residuary legatee" as equivalent to "residuary devisee," if the will specifically disposes of all the real estate which the testator was possessed of at the date of the will (b).

An appointment of three persons as joint executors of "my entire property, for the purpose of putting it to the best advantage of my sister, wife and children," operates as a devise of fee-simple lands (c).

"Executors of my entire property."

Upon the principle already stated, the word "effects" (though applicable strictly to personalty only (d)), has been held to

"Effects."

(a) 71 L. T. 179.

(b) *Re Gibbs*, [1907] 1 Ch. 465.

(c) *Murphy v. Donnelly*, Ir. R. 4 Eq. 111.

(d) *Camfield v. Gilbert*, 3 East, 516; *Henderson v. Farbridge*, 1 Russ. 479, ante, p. 1014; *Doe d. Hick v. Dring*, 2 M. & Sel. 448; *Doe d. Haw v. Earles*,

15 M. & Wels. 450; *Doe d. Morgan v. Morgan*, 6 Barn. & Cr. 512, ante, p. 997; but see the dicta of Malins, V.-C., *Smyth v. Smyth*, 8 Ch. D. 561. The decision itself was referred to without disapprobation by the C. A. in *Hall v. Hall*, [1892] 1 Ch. 361.

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comprehend the several particulars before mentioned, consisting of both real and personal estate (e).

"Said effects," held to comprehend land previously mentioned.

As in *Doe d. Chillecott v. White* (f), where a testator after making several pecuniary bequests, devised to A. the income of a certain cottage, and to E. the half of a certain estate; and all the residue of his goods, chattels, rights, credits, personal and testamentary estate, and also his lands, tenements and hereditaments, he gave to his wife for life, whom he made sole executrix; and he allowed her to give what she thought proper of "her said effects" to her sisters, the said A. and E., for their lives; and, after the above lives were expired, he gave all his lands to J., who was his heir-at-law: it was held that the power of the widow extended to all the real and personal estate given to her for life, including the cottage in which A. had a life interest.

"Effects" may extend to real estate.

So, in *Marquess of Titchfield v. Horncastle* (g) real estate was held on the special wording of the will to pass under a gift of effects.

"Said effects bequeathed to E." referred to land before devised.

So, in *Den d. Franklin v. Trout* (h), where the devise was to E. of "all my estate and effects whatsoever and wheresoever, which I shall be possessed of or entitled to at the time of my decease," in trust to pay funeral expenses and debts. The testator then subjected his "said effects bequeathed to E. to the following legacies," and went on to enumerate certain pecuniary legacies, and gave to S. a house in W. He directed that all the above legacies should be paid out of his effects by the said E. within twelve months after his decease, and then gave and bequeathed all the residue and remainder of his "said effects" to the said E., her heirs and assigns, for ever. It was held, that she took the remainder in fee in the house devised to S., (which was the testator's only real property,) by this devise. Lord Ellenborough relied much on the testator having included the house among the enumerated legacies, by which he had explained himself

(e) A gift of "real effects," as already mentioned, will, as a general rule pass real estate: *Hogan v. Jackson*, ante, p. 994.

(f) 1 East, 33.

(g) 2 Jur. 610. See also *Milsome v. Long*, 3 Jur. N. S. 1073; *Phillips v. Beal*, 25 Beav. 25; *Re Sheridan*, 17 L. R. Ir. 179. In *Att.-Gen. for British Honduras v. Bristowe* (6 App. Ca. at p. 149), where a testator used these words "I leave them and their heirs and assigns all my effects . . . (my lands and effects in Jamaica excepted),"

Sir M. E. Smith, in delivering the judgment of the Privy Council, said: "Their Lordships think that the word 'effects' would pass land." As to the influence of the words "of what nature and kind soever," following the word "effects," see *Doe v. Dring*, 2 M. & Sel. at p. 454.

(h) 15 East, 394. Mr. Jarman's note "as to the effect of some referential expressions of frequent occurrence" has been omitted; the cases cited by him will be found in Chap. XX.

to describe that property under the denomination of "effects" and "legacies." CHAP. XXVII.

In *Doe d. Haw v. Earles* (i), a testator made his will as follows : "I dispose of all my effects as follows :—all my household goods, live stock, furniture, plate, wearing apparel and other effects at this time in my possession, or that hereafter may become my property, to my wife" : and a second husband was to have no power of disposition over "any part of the property which was then or might thereafter be in his (the testator's) possession." Platt, B., admitting that the word "effects" alone could not include real estate, was induced by the context to think the testator had here used "effects" as synonymous with the word "property," and that real estate passed. But Pollock, C.B., and Parke, B., were of opinion that there was nothing in the will to extend the natural meaning of the word "effects," which they held meant personal things only.

In *Hall v. Hall* (j), a testator "gave, devised and bequeathed" to his wife all his furniture, goods, chattels and effects "whatsoever the same might be or wheresoever the same might be situate," and requested her to pay his debts, &c., and after the death of his wife he "gave, devised and bequeathed" to be equally divided amongst three of his children until they attained twenty-one, "the furniture and moneys or any property" which his wife might have become entitled to through his will or through any other source ; and after they attained twenty-one, he directed that "the furniture, goods, chattels and effects, whatsoever the same may be or wheresoever it may be situated," and any moneys his wife might be entitled to at the time of his decease, should be equally divided amongst his six children. The testator's personalty was of small value, the bulk of his property consisting of some real estate to which he became entitled about a year before he made his will. It was held by Fry, L.J., and by the Court of Appeal, that the testator intended to dispose of all his property, and that the real estate passed by the will.

Again, the phrase "worldly goods," though properly applicable only to personal estate, will include the realty if aided by the context. Thus, in *Wright v. Shelton* (k), where a testator gave to trustees all his worldly goods of what nature and kind soever and wheresoever they might be found, upon the trusts undermentioned ; his wife to have possession while she lived,

"Effects" held not to pass real estate.

"Devise" of "effects" "wheresoever situate."

"Worldly goods" held on the context to pass real estate.

(i) 15 M. & Wels. 450.

361.

(j) [1891] 3 Ch. 389 ; [1892] 1 Ch.

(k) 18 Jur. 445.

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but if she married, to quit possession : all his debts and legacies to be paid out of his personal estate and W. Close. To his son A. 20*l.* and H. Close : to his children B., C. and D. the rest of his worldly goods : it was held by Sir W. P. Wood, V.-C., that the real estate was included in the gift of "worldly goods."

"Personal estates," held sufficient upon the context to pass realty.

Even the expression "personal estates," or "personal estate and effects" (l), will carry realty if the testator has clearly shown his intention that it shall do so. As in *Doe d. Tofield v. Tofield* (m), where, after some pecuniary bequests and a particular devise of realty, the testator proceeded to give to his wife all his stock, &c., ready money, &c., "and personal estates whatsoever and wheresoever, subject nevertheless to the above legacies," during widowhood : but if she married she was to resign "all my personal estates to the after-mentioned legatees in manner following" : first, he gave and bequeathed to J. the house and premises in which he the testator then dwelt, with the closes adjoining, to hold in fee ; "and the remaining of my personal estates" to other persons in fee. The Court of K. B. were clearly of opinion that the wife took the real estate for her life (n).

Mr. Jarman observes (o) that the "cases in which words, in themselves clearly inapplicable to real estate, have been held to extend thereto by force of the context, are the exact converse of those discussed in the first division of the present chapter.

"Said house, goods and chattels," (omitting the word "lands" before used), did not pass lands.

"But in *Roe d. Walker v. Walker* (p), a testator devised to his wife a certain house, with all his *lands, goods and chattels*, whatsoever and wheresoever, for her life ; and if his aforesaid wife should die before his sons H. and R. came to the age of fifteen, then that his *house, lands, goods and chattels*, that is to say, the rents arising from the same, should be employed in bringing them up, until the age of fifteen. The testator then declared his will to be, that his aforesaid *house, goods and chattels*, equally should be divided between all his sons and daughters that should be living at that time, share and share alike. It was held, that under the last devise, the lands did not pass.

Remark on *Doe v. White*, *Den v. Trout*, and *Roe v. Walker*.

"It will be observed that in *Doe d. Chilcott v. White*, and in

(l) In "personal estate and property" or "personal property, estate and effects," the word "personal" will generally override the whole, ante, p. 999.

(m) 11 East, 246. See also *Cadman v. Cadman*, L. R., 13, Eq. 470 ; *Re Smalley*, 49 L. T. 662 ; *Re Wass* 95

L. T. 758.

(n) Compare *Re Andrew's Estate*, ante, p. 1015.

(o) First ed. p. 689.

(p) 3 B. & P. 375. Cf. *Lethbridge v. Kirkman*, 25 L. J. Q. B. 89, 2 Jur. N. S. 372.

Den d. Franklin v. Trout, the word 'effects' was used as synonymous with, and descriptive of the same subject as, the anterior expressions, which unquestionably comprised real estate; but in *Roe v. Walker*, the testator had in the third devise adopted precisely the same phraseology as in the first and second, with the omission of a single word, and that word the only one which applied to the land. It was too much, therefore, to infer that these words, with so material an omission, were intended to describe the same subject as the preceding expressions, however reasonable might be *the conjecture* that the omission was undesigned. If the testator in the third gift had used terms of description not exactly corresponding, so far as they went, with those of the preceding devises, the difficulty of adopting this construction might not have been so insuperable. It would not then have imposed upon the Court the necessity of treating the same words in the several gifts as descriptive of a different subject."

CHAPTER XXVIII.

WHAT WORDS WILL COMPRISE THE GENERAL PERSONAL ESTATE.

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"Estate,"
"property,"
&c.

I.—"Estate," "Property," &c.—When a testator makes use of such expressions as "all my estate," or "all my property," a question as to their effect can hardly arise, for these are words of the widest possible meaning (*a*). But if the testator adds some qualification or description—as where he bequeaths all his property in a particular locality to A. and all his property in another locality to B.; or where he disposes of "all my property, brewery, &c."—difficult questions may arise (*b*).

In *Re Johnson* (*c*), the testatrix made some specific bequests, and continued: "With the exception of the above legacies I direct that the remainder of my household property, including house in M., should be sold," &c.; it was held that the entire residuary personal estate passed.

Word
"effects,"
"goods," or
"chattels,"
whether it
comprises en-
tire personal
estate.

II.—Extent of words "Goods," "Chattels," "Effects," &c., when restrained by Context.—Mr. Jarman states the general rule thus (*d*): "The word *effects* (*e*), and even the word *goods* (*f*), or *chattels* (*g*), will, it seems, comprise the entire personal estate of a

(*a*) As to "estate" see ante, p. 990; as to "property" see *Re Prater*, 37 Ch. D. 481; *Doe v. Earles*, 15 M. & W. 450, ante, p. 1001. As to "fortune" see ante, p. 991, and *Slingsby v. Grainger*, 7 H. L. C. 273. As to "patrimony" see ante, p. 991.

(*b*) *Waite v. Morland*, 12 Jur. N. S. 763. As to the locality of shares, bonds and other choses in action, and as to gifts of personality described with reference to its locality, see Chaps. XXX. and XXXV.

(*c*) 92 L. T. 357.

(*d*) First ed. p. 692.

(*e*) *Hogan v. Jackson*, Cowp. 299; *Campbell v. Prescott*, 15 Ves. 500; *Hearne v. Wiggington*, 6 Madd. 119, post.

(*f*) See *Portman v. Willis*, Cro. El. 386, where it was held that leaseholds passed under a bequest of "the residue of my goods." See also *Anon.*, 1 P. W. 267.

(*g*) Co. Lit. 118 a.; *Tilley v. Simpson*, 2 T. R. 659, n., per Lord Hardwicke. So a bequest of all the testator's "moveables" would, it is said, if

testator, unless restrained by the context within narrower limits (*h*). Where, however, such general expressions stand immediately associated with less comprehensive words, they have been sometimes restrained to articles ejusdem generis; the specified effects being considered as denoting the species of property, which the larger term was intended to comprise; and this upon a principle, evidently analogous to that on which (as we have seen) the words 'estate' and 'property' have been confined to personalty by their juxtaposition with words descriptive of that species of property.

"As in *Cook v. Oakley* (*i*), where the testator (who was sailor on ship-board) gave to his mother if alive, his gold rings, buttons and chest of clothes, and to his loving friend F. (a shipmate), his red box, arrack and *all things not before bequeathed*, and made him sole executor. Sir J. Trevor, M.R., held, that the testator's share in a leasehold estate did not pass by these words.

Words "and all things" restricted by prior terms of description.

"The circumstance of a specific or pecuniary legacy being given to the same legatee (*j*), or of the general bequest being followed by dispositions of particular portions of the personal property to other persons, has commonly been considered to favour the supposition, that such bequest was not to comprise the general residue.

"Thus, in *Rawlings v. Jennings* (*k*), where the testator gave to his wife certain Bank stock, together with all his 'household furniture and effects, of what nature or kind soever,' that he might be possessed of at the time of his decease; and then bequeathed certain stock and money legacies to other persons, Sir W. Grant, M.R., held, that the bequest to the wife was confined to articles of the nature of those specified, and did not comprise the general residue; observing, that part of the property being given to her afterwards (*l*), the word 'effects' must receive a more limited interpretation.

Word "effects" restrained by the context.

unrestrained by the context, pass the whole purely personal estate; *Steignes v. Steignes*, Mos. 296.

(*h*) A gift of "effects," &c., in a particular house, country, or other locality, is of course not a general bequest (see Chap. XXX., where bequests of property in a particular place are considered). A bequest of effects, &c., in a particular house "or elsewhere" is, however, a general bequest: *In bonis Scarborough*, 30 L. J. Pr. 85.

(*i*) 1 P. W. 302; but it appears from R. L. 1715 A., fo. 191, b., that the M.R. based his decision mainly on the circumstance that the testator was not aware that he possessed the leasehold interest, and therefore could not have

intended to bequeath it. See also *Boon v. Cornforth*, 2 Ves. sen. 277; *Cavendish v. Cavendish*, 1 Br. C. C. 467; *Porter v. Tournay*, 3 Ves. 311; *Hunt v. Hort*, 3 Br. C. C. 311; *Re Ludlow*, 1 Sw. & Tr. 29.

(*j*) See *Trafford v. Berrige*, post, p. 1025, note (*t*).

(*k*) 13 Ves. 39.

(*l*) But according to the statement of the will in the report, the only other bequest to the wife is of the Bank stock, which is anterior. In *Parker v. Marchant*, 1 Y. & C. C. C. at p. 304, K. Bruce, V.-C., observed upon this case, that perhaps the word "household" belonged to the word "effects" as much as to the word "furniture": which would of course have a restrictive

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Remark on
Rawlings v.
Jennings.

"The words here were very general, but the manner in which the testator, after making the bequest in question, had gone on to give specific and pecuniary legacies, (though he did not complete the disposition of his personal estate by a residuary clause,) seemed hardly reconcileable with the supposition, that the prior gift to the wife was intended to embrace the general residue, as it is more natural, though certainly not invariable, for a testator to reserve his residuary disposition until the end of his will (*m*). Had the decision rested solely on the bequest of the Bank stock to the wife, its soundness would have been questionable; for the argument, that the express gift of part shows that a legatee is not to take the remainder, admits of this answer, that the testator may have intended to place him in the favoured position of a specific legatee pro tanto" (*n*).

Word
"goods"
restrained by
subsequent
gifts.

Again, in *Wrench v. Jutting* (*o*), where a testator bequeathed "all his household furniture, plate, linen, china, books, pictures and all other goods of whatever kind to A.," and then proceeded to direct that certain specified particulars of his property should be divided, after payment of his debts, as "follows: 50*l.* to B.; 100*l.* to C., &c.; 3,000*l.* to 4,000*l.*, or whatever remaining sum or sums, to A." Lord Langdale, M.R., said, that if the first clause had been the only one in the will, there would have been strong reason for extending the operation of the words "all other goods," &c.; but that the testator did not intend all his estate to pass was shewn by his subsequently stating what were his intentions as to a particular part of it. Those words must, therefore, be restricted to goods ejusdem generis.

Remark on
preceding
cases.

In each of the two last cases, the dispositions of particular portions of the personal property, which followed the disputed clause, comprised a gift to the same person who was entitled under the first clause; that, at least, was the ground (however unsupported by the actual fact) upon which Sir W. Grant expressly went in the case before him; and where other persons are

effect, *Marshall v. Bentley*, 1 Jur. N. S. 787; *Newman v. Newman* (No. 2), 26 Beav. 220; and compare *Michell v. Michell*, stated post.

(*m*) See 1 Russ. 146; 1 Y. & C. C. C. 301.

(*n*) And, accordingly, see *Leighton v. Bailie*, 3 My. & K. 267, post; *Hearne v. Wigginton*, 6 Mad. 119, post; *Brooke v. Turner*, 7 Sim. 671; *Rose v. Rose*, 17 Ves. 347.

(*o*) 3 Beav. 521. In *Collier v. Squire*,

3 Russ. 467, it was held that stock did not pass under a bequest of the testator's house, and all his household furniture, plate, china, books, linen and every other "article" belonging to him, both in and out of his house, and which might not be in his will mentioned; the M.R. remarking that the testator could scarcely say of stock that it might not be mentioned or included in the articles specified.

alone contemplated in the subsequent dispositions, the argument in favour of the restrictive construction is much weakened: for, as before observed, though the residuary clause is usually, it need not necessarily be, the last in the will: and any particular bequest which follows that clause may, if made to different legatees, reasonably be read as an exception out of the property comprised in it (p).

Mr. Jarman continues (q): "A more forcible argument in favour of the restricted construction, however, occurs where the testator has added to the equivocal words in question terms descriptive of a particular species of property, which those words in their larger sense would comprehend. In such case, the adoption of the more comprehensive meaning would have the effect of rendering the superadded expression nugatory; and make the testator employ additional language, without any additional meaning.

Subsequent
explanatory
restrictive
expressions.

"Thus, in *Timewell v. Perkins* (r), where the will was in the following words:—'I give to M. T. all mortgages, ground rents, judgments, &c., *whatever I have or shall have at my death*, as plate, jewels, linen, household goods, coach and horses, for her use.' Lord Hardwicke (s), held, that goldsmiths' notes and bank bills did not pass under the bequest: for though there was no doubt but the general words, *whatever I have or shall have at my death*, would have passed them; yet the particular words which followed, 'as plate, jewels,' &c., confined and restrained them to things of the same nature; his Lordship observing that it was so laid down in *Strafford v. Berridge* (t).

(p) See *Rogers v. Thomas*, 2 Kee. 8; *Martin v. Glover*, 1 Coll. 269; *Arnold v. Arnold*, 2 My. & K. 365; *In bonis Sheppard*, 48 L. J. Pr. 62. "A well established rule of construction," per Jessel, M.R., in *Lysaght v. Edwards*, 2 Ch. D. at p. 513.

(q) First ed. p. 694.

(r) 2 Atk. 102. But this case is of doubtful authority, and probably would not be followed at the present day. See *Fisher v. Hepburn*, and other cases cited, post. p. 1031.

(s) The judge was Fortescue, J.

(t) "[*Trafford v. Berridge*], 1 Eq. Ca. Ab. 201, pl. 14. A. bequeathed all his *goods, chattels, household stuff, furniture, and other things*, which were then, or should be, in his house at the time of his death. Decreed, that money in the house did not pass: for, by the words *other things* should be intended things of like nature and species with those before mentioned; see also *Anon.*, Finch, 8,

where a bequest of all the goods and chattels, plate, jewels, household stuff and stock upon the ground, in and belonging to the testator's house in N., was held not to include a sum of money found in the house; and *Roberts v. Kuffin*, 2 Atk. 112, where a bequest of all goods and things of every kind and sort whatever, which should be found in a certain closet, was held not to comprise a sum of money found in the closet. In the two last cases some stress was laid on the fact of a pecuniary legacy being bequeathed to the same legatee.

"The several preceding cases illustrate the application of the principle stated in the text, to bequests of personal moveable property answering to a certain locality." (Note by Mr. Jarman.) The question of gifts of chattels, &c., described with reference to their locality (which does not strictly belong here) is discussed in Chap. XXX., and

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"Goods,
wearing
apparel, of
what nature
and kind so-
ever, except
my gold
watch."

"So, in *Crichton v. Symes* (*u*), where a testatrix bequeathed to A. and B., all her *goods*, wearing apparel, of what nature and kind soever, except her gold watch. Lord Hardwicke was of opinion, that the words were not intended to be a residuary clause; his Lordship observing, that the testatrix afterwards gave a legacy of 50*l.* to her executor, and that there was not the word *residue*. . . . It was his opinion, that, as the words stood in the will, she intended to give only her wearing apparel, ornaments of her person, *household* goods and furniture, and no other parts of her personal estate; the testatrix here meant to give, not only what was properly clothes, but the ornaments of her person, and the exception of the gold watch showed the latitude of the expression.

"In some instances, however, the argument in favour of the restricted construction, founded on subsequent expressions, descriptive of a particular species of property, has not been allowed to prevail against the force of the previous general words.

Subsequent
expressions
held not to be
restrictive.

"Thus, in *Bennet v. Batchelor* (*w*), where a testator bequeathed unto P. (to whom he had before devised real estates, and had also given specific legacies) all his household goods, books, linen, wearing apparel and all other, not before bequeathed, *goods and chattels that he should be in possession of at the day of his decease*, except the plate and legacies before and thereafter given and bequeathed; and he also bequeathed to the said P. all monies due from his (the testator's) tenants, and other persons. Lord Thurlow held, that the whole residue passed by the bequest; observing, in reference to the latter words, that the testator might not know that the debts would pass by the words 'goods and chattels' (*x*).

Exception,
where explan-
atory of
doubtful
words.

"A conclusive ground for giving to equivocal words their larger signification, occurs where the bequest contains an exception of certain things, which such bequest, according to its restricted construction, would not comprise; the testator having in such a case afforded a key or explanation to his own ambiguous language, by showing that he considered that the bequest would, without the exception, have included the excepted articles. This question has generally arisen under gifts of goods and chattels, restricted to a certain locality; but the principle, it is obvious, is equally applicable to bequests not so restricted.

the meaning of such words as "furniture," "household effects," &c., in Chap. XXXV.

(*u*) 3 Atk. 61.

(*w*) 3 B. C. C. 28, 1 Ves. jun. 63; see

also *Fleming v. Burrows*, 1 Russ. 276, post, p. 1028.

(*x*) See also *Bland v. Lamb*, 2 J. & W. 399.

“Thus, in *Hotham v. Sutton* (y), where A., having two sons and a daughter, B., C., and D., after bequeathing for their benefit a sum of 12,700*l.* Consols, gave all the residue of her personal estate and effects to her youngest children, C. and D., as therein mentioned. A. on the day of making her will executed a codicil, and revoked so much of her will as related to the bequest to her son C., of a share of her ‘plate, linen, household goods, and other effects, (money excepted,)’ and gave the whole thereof to her daughter. The question was, whether the revocation extended to the general residuary personal estate, or whether the words ‘and other effects’ were not restrained by the prior terms to articles ejusdem generis. Lord Eldon decided in favour of the former construction. He observed, ‘The doctrine appears now to be settled, that the words “other effects” in general, mean effects ejusdem generis. I cannot help entertaining a strong doubt, whether this testatrix, if asked whether she meant effects ejusdem generis, or contemplated the share of all which she had considered her effects in the will, would not have answered that the latter was her meaning. Her expression is conclusive upon that. Money cannot be represented as ejusdem generis with plate, linen and household goods. The express exception of money out of the other effects shows her understanding, that it would have passed by those words; that express words were required to exclude it, and by force of that exclusion of the excepted article, she says, she thought the words of her bequest would carry things non ejusdem generis. This disposition must, therefore, be taken to comprehend all that she has not excluded, which is money only’ (z).

“Household goods and other effects, money excepted.”

“It will be observed, that Lord Eldon, in the last case, lays it down, that the words ‘other effects,’ in general, mean effects ejusdem generis (a); but such a position seems scarcely to accord with some subsequent decisions about to be stated; one of which,

“Other effects.”

(y) “15 Ves. 319. Compare this case with *Fleming v. Brook*, 1 Sch. & Lef. 318, where Lord Redesdale, on the authority of *Moore v. Moore*, 1 B. C. C. 127, held, that a bequest of ‘all my property, of whatever nature or kind the same may be, that may be found in A.’s house, except a bond of B. in my writing-box,’ did not pass a mortgage security, and another bond and certain bankers’ receipts, which were in the house, on the ground that choses in action had no locality for this purpose (a doctrine which is now well settled, 1 Ves. 273, 1 B. C. C. 127,

129, n.); and his lordship being of opinion that an exception in the will of one security was not sufficient evidence of the testator’s intention to pass all the other choses in action.” (Note by Mr. Jarman.) But the decision would probably not be followed at the present day; it is clear that choses in action may pass by a gift of property in a particular locality: see Chap. XXX.

(z) See also *Reid v. Reid*, 25 Bea. 469.

(a) So per Lord Redesdale, *Stuart v. M. of Bute*, 1 Dow, 84, 87.

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it will be seen, was determined by the same Judge who decided *Rawlings v. Jennings* (b), which case certainly carried the restricted construction to its extreme point; and probably was in Lord Eldon's view, when he advanced the above dictum.

"And all effects whatsoever," not restricted by association with more limited terms.

"Thus, in *Campbell v. Prescott* (c), where a testator gave to his sons A. and J. all his sugar-house, cupola and merchandize stock, with jewels, plate, household goods, furniture *and all effects whatsoever*, and appointed them executors; Sir W. Grant, M.R., held, that the whole personalty passed under this clause; remarking, that there was no case for the restrictive sense attempted to be put upon the words 'all my effects whatsoever.'

"Plate, &c., and effects that I shall die possessed of."

"So, in *Michell v. Michell* (d), Sir J. Leach, V.-C., held, that the personal estate of a testator passed under a bequest of all and singular his plate, linen, china, household goods, and furniture (e), *and effects that he should die possessed of*. His Honor considered that this construction of the word 'effects' was aided by the subsequent words, 'that I shall die possessed of,' and observed, that the expression was not household goods, furniture, and effects; but 'household goods *and* furniture *and* effects,' which imported a distinct sense in the word 'effects' (f).

"Or whatever else I may then be possessed of."

"Again, in *Fleming v. Burrows* (g), where a testator, after commencing his will with the words 'As for such temporal estate as God in his mercy hath bestowed upon me, I give and dispose of the same as followeth;' devised certain lands to his natural son D., adding, 'likewise my furniture, plate, books, and live stock, *or whatever else I may then be possessed of at my decease*, also my shipping and ropery concerns at W. and H.,' he paying the debts. It was contended that these words were to be confined to articles ejusdem generis with those specified before, i.e. furniture, &c., with which they stood immediately associated, and also on the ground of their being followed by the mention of specific articles, which were already included, if the previous words amounted to a general residuary gift; but Lord Gifford, M.R., held, on the authority of and the reasoning in *Bennett v.*

(b) Ante, p. 1023.

(c) 15 Ves. 500.

(d) 5 Mad. 69.

(e) Mr. Jarman's note on the meaning of the words "household goods" or "furniture," "live and dead stock," has been omitted, as it does not properly belong here; the cases which he refers to will be found in Chap. XXXV.

(f) See also *Hearne v. Wigginton*, 6 Madd. 119, where the testator, after

some specific bequest, willed all his "other effects" to D. to be sold for his benefit, and it was held that this gave D. the general residue, although some of the particulars comprehended in it were not strictly speaking the subject of sale.

(g) 1 Russ. 276; see also *Sutton v. Sharp*, ib. 146; and *In bonis Shephard*, 48 L. J. P. 62.

Batchelor (*h*), that the circumstances were inadequate to restrain the generality of the bequest.

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"Lastly, in the case of *Kendall v. Kendall* (*i*), where a testator, after bequeathing to his wife an annuity, proceeded thus: 'I also bequeath to my said wife all moneys, goods, chattels, clothing, &c., my property which may remain after paying the charges incident to my funeral, and such debts as I may owe at my death.' Sir J. Leach, M.R., held, that the residue, which consisted principally of stock, passed by these words: his Honor considering that the words 'clothing, &c.,' did not qualify the preceding general words.

"Moneys, goods, &c. my property which may remain."

"These cases indicate the disposition of the Judges of the present day to adhere to the sound rule, which gives to words of a comprehensive import their full extent of operation, unless some very distinct ground can be collected from the context for considering them as used in a special and restricted sense."

General remark on preceding cases.

The principle thus stated by Mr. Jarman is now clearly settled, and accordingly the general personal estate has been held to pass by such expressions as: "all my jewels, plate, linen, china, carriages, wines and other goods, chattels and effects" (*j*); "effects," followed by a reference to various particular kinds of property (*k*); "the residue of my property hereinbefore mentioned," the property expressly mentioned being "household furniture and other effects" (*l*); "furniture, plate, books and other personalty" (*m*); "personal property, consisting of money and clothes" (*n*) or other items (*o*); "household furniture, goods, ready money, and also all debts and securities belonging to me" (*p*).

Other cases decided on same principle.

A gift of household goods, furniture "and all other effects" is sufficient to pass the general personal estate, although it is

General gift, followed by specific gifts.

(*h*) Ante, p. 1026.

(*i*) 4 Russ. 360.

(*j*) *Parker v. Marchant*, 1 Y. & C. C. 290; 1 Ph. 356; *Harris v. James*, 12 W. R. 509; *Hodgson v. Jex*, 2 Ch. D. 122; *In bonis Shephard*, 48 L. J. Pr. 62; *Re Parrott*, 53 L. T. 12; *In bonis Jupp*, [1891] P. 300; *Anderson v. Anderson*, [1895] 1 Q. B. 749. In *Arnold v. Arnold*, 2 My. & K. 365, there was a specific bequest of "my wines and property in England," and it was held to include property not ejusdem generis with wine; see Chap. XXX.

(*k*) *Read v. Hodgins*, 7 Ir. Eq. R. 17.

(*l*) *Re Lloyd's Estate*, 2 Jur. N. S. 539.

(*m*) *Nugee v. Chapman*, 29 Bea. 290; *Martin v. Glover*, 1 Coll. 269; *Taylor v. Taylor*, 6 Sim. 246.

(*n*) *Dean v. Gibson*, L. R., 3 Eq. 713.

(*o*) *King v. George*, 5 Ch. D. 627; *Re Fleetwood*, 15 Ch. D. 594; *Tighe v. Featherstonhaugh*, 13 L. R. Ir. 401.

(*p*) *Arison v. Simpson*, Johns. 43. It has even been suggested that a bequest of "all my rights and credits" would pass the general personal estate: *Hutchinson v. Hutchinson*, 13 Ir. Eq. R. 382. See also *Bland v. Lamb*, 2 Jac. & W. 399; where the effect of some "very singular" testamentary papers in disposing of the testator's property was discussed, but not decided.

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followed by pecuniary and specific bequests (*q*), and even although specific bequests are given to the person who takes the residue under the general gift (*r*).

Presumption
against
intestacy.

The principle which underlies many of these decisions is that when a man makes a will, he is presumed not to intend to die intestate as to any part of his property (*s*).

“Et cætera.”

In *Steignes v. Steignes* (*t*), the testator made his will in French, and thereby gave to his wife, “besides all moveables, plate, jewels, pictures, linen, &c.” (except books), 6,000*l.* South Sea stock, “moveables” being the translation, in the probate copy, of the French word *meubles*; Sir J. Jekyll, M.R., said that by “moveables” the testator meant only corporeal things, and that the “&c.” could not extend it to incorporeal things, such as stock; in other words, “&c.” meant things ejusdem generis. *Newman v. Newman* (*u*) and *Barnaby v. Tassell* (*v*) are to the same effect.

In *Twining v. Powell* (*w*), the testatrix gave a house “and all therein” to A. for life; “at her death I give and bequeath the house, &c., &c. to R. :” it was held that R. was entitled to the chattels in the house.

In *Chapman v. Chapman* (*x*) the testator directed his widow to pay his debts, and then bequeathed to her “all my money, cattle, farming implements, &c.” subject to the payment to his brothers of legacies the amounts of which were left blank: it was held by Jessel, M.R., that this was a good residuary bequest. It may be observed that the will would have been insensible on any other construction, but the “et cætera” does not seem to have made any difference.

If the testator gives his residue in general terms, and then enumerates various particulars, concluding with “et cætera,” this does not restrict the meaning of the general words (*y*).

Special terms
following the
general, not
necessarily
restrictive.

In *Parker v. Marchant* (*z*), it was noticed by Sir J. K. Bruce, V.-C., as a circumstance favouring the unrestricted construction,

(*q*) *In bonis Sheppard*, 48 L. J. Pr. 62.

(*r*) *Fleming v. Burrows*, 1 Russ. 276. Compare *Bennett v. Batchelor*, 1 Ves. jun. 63, ante, p. 1026.

(*s*) *Re Lloyd's Estate*, 2 Jur. N. S. 539, ante, p. 1029, n. (*h*).

(*t*) *Mose*, 296. Compare *Hertford v. Lowther*, 7 Bea. 1, cited post, Chap. XXX.

(*u*) 26 Bea. 220.

(*v*) L. R., 11th Eq. 363.

(*w*) 2 Coll. 262.

(*x*) 4 Ch. D. 800.

(*y*) *Kendall v. Kendall*, 4 Russ. 360, ante, p. 1029; *Gover v. Davis*, 29 Bea. 222; *Mullaly v. Walsh*, 3 L. R. Ir. 244; *Loftus v. Stoney*, 17 Ir. Ch. 178.

(*z*) 1 Y. & C. C. 290. See also by the same judge 1 D. F. & J. at p. 416; and by Romilly, M.R., *Re Kendall's Trust*, 14 Bea. at p. 611; in this case the restrictive effect of the specific enumeration was removed by subsequent words.

that the general terms there followed the specific. But, as already shewn (a), a contrary order does not necessarily lead to a contrary result. In *Cambridge v. Rous* (b), the testatrix bequeathed "all the rest and residue of my property and effects whether in money or in the public funds or other securities of any sort or kind whatsoever." With reference to the words "whether in money or in the public funds" &c., Sir W. Grant, M.R., observed: "These are not words of restriction. They are rather words of enlargement. The object was to exclude nothing. Such an enumeration under a 'videlicet,' a much more restrictive expression, has been held only a defective enumeration, not a restriction to the specific articles" (c). So in *Fisher v. Hepburn* (d), where a testator expressed himself as follows: "As to all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, canal shares, plate, linen, china and furniture, I give, devise and bequeath the same to my wife, for her own use and benefit": Romilly, M.R., held the wife entitled to the general residue. And in a similar case (e), Sir W. P. Wood, V.-C., said, "The strong presumption is that the testator did not mean to do only what he might have effectually done by giving the enumerated articles simply." It scarcely need be added that it is immaterial that the enumeration comprises trivial things only, and omits all the important items of the personal estate. To hold the contrary would involve the admission of evidence to prove what the testator's personal estate consists of at the date of the will; which we have before seen is inadmissible (f). In *Re Roberts* (g), it was held that by a gift of "all my property leasehold and freehold which I now possess," all the testator's personal estate passed.

The application of the principle above stated is not necessarily affected by a direction that the property is to be sold; thus a bequest of "all my other effects to A., to be sold for his benefit,"

(a) *Bennett v. Batchelor*, ante, p. 1026.

(b) 8 Ves. 12.

(c) See *Bridges v. Bridges*, 8 Vin. Abr. 295 (Devise, O. h., pl. 13); see also *Chalmers v. Storil*, 2 V. & B. 222; *Nicholas v. Nicholas*, Taml. 269; *Ellis v. Selby*, 7 Sim. 352; *Everall v. Browne*, 1 Sm. & Gif. 368; *Choyce v. Ottey*, 10 Hare, 443; *Banks v. Thornton*, 11 Hare, 176; *Re Goodyear*, 4 Jur. N. S. 1243; *Gover v. Davis*, 29 Bea. 222; *Dean v. Gibson*, L. R., 3 Eq. 713; *King v. George*, 4 Ch. D. 435, 5 ib. 627; *Reeves v. Baker*, 18 Bea. 372; *Armstrong v. Buckland*, ib. 204.

(d) 14 Bea. 626. See also *Kendall v.*

Kendall, 4 Russ. 360; *Avison v. Simpson*, Johns. 43; *Re Maberley's Trusts*, 19 W. R. 522; *Tighe v. Featherstonhaugh*, 13 L. R. Ir. 401, supra. See also *Re Smalley*, 49 L. T. 662, where expressions following a gift of "personal property" were held to extend the gift so as to include realty. See ante, p. 1020.

(e) *Dean v. Gibson*, L. R., 3 Eq. at p. 717.

(f) *King v. George*, 5 Ch. D. 627; *Re Fleetwood*, 15 Ch. D. 594.

(g) 55 L. T. 498, per Cotton and Bowen, L.JJ., Fry, L.J., diss.

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Where there is a residuary bequest.

"It is to be observed, however," says Mr. Jarman (*i*), "that in all the preceding cases, there was no other bequest capable of operating on the general residue of the testator's personal estate, if the clause in question did not. Where there is such a bequest, it supplies an argument of no inconsiderable weight in favour of the restricted construction, which is then recommended by the anxiety always felt to give to a will such a construction as will render every part of it sensible, consistent and effective."

To this ground may be referred the case of *Woolcomb v. Woolcomb* (*j*), where the testator gave to his wife all the furniture of his parsonage house, and all his plate, household goods, and other goods, (except books and papers,) and all his stock within doors and without, and all his corn, wood, and other goods, belonging to his parsonage house; and gave the residue of his personal estate to J. The question was, whether ready money, cash, and bonds, should pass to the wife. It was held that the words "other goods" should be understood to signify only things ejusdem generis with household goods.

So in *Lamphier v. Despard* (*k*), where a testator, after devising certain real estates to his wife, bequeathed to her "all his household furniture, plate, house-linen, and all other chattel property that he might die seised or possessed of"; and after giving various legacies, he appointed A. his executor and residuary legatee: Sir E. Sugden held that all other chattel property meant all ejusdem generis; relying partly on the subsequent residuary gift. He thought, however, that the words would clearly not pass money; so that the clause could not be a general bequest of the entire personal estate.

And in *Re Hammersley* (*l*), a gift of "my household furniture, books, pictures, paintings, engravings, plate, linen, china, and other effects," to A. and B. in equal shares, was held to pass only articles ejusdem generis, and not to include jewellery, there being a subsequent residuary gift.

(*h*) *Hearne v. Wigginton*, 6 Madd. 119.

(*i*) First ed. p. 700.

(*j*) 3 P. Wms. 112, Cox's ed.; see *Marks v. Solomons*, 19 L. J. Ch. 555.

(*k*) 2 D. & War. 59; see also *Stuart v. Marquis of Bute*, 1 Dow, 73; *Barrett v. White*, 24 L. J. Ch. 724; *Smith v.*

Davis, 14 W. R. 942; *Mullins v. Smith*, 1 Dr. & Sm. 204; *Gibbs v. Lawrence*, 30 L. J. Ch. 170; *Campbell v. M'Grain*, Ir. R., 9 Eq. 397.

(*l*) 81 L. T. 150, citing *Anderson v. Anderson*, [1895] 1 Q. B. 749 (assignment by deed).

It would also seem, that where a testator makes a specific bequest of property in general terms, but describes it as "consisting of" certain specific things, belonging to him at the date of the will, and bequeaths his residue, this shews that he intended to restrict the specific bequest to the enumerated things: as in *Drake v. Martin* (m), where the testator made a specific bequest of "my property not in England and in the hands of my attorney abroad, Mr. W., consisting of Russian bonds &c." there was a residuary bequest, but Romilly, M.R., held that all the testator's property not in England passed by the specific bequest.

Even where there is no residuary bequest, the testator may shew by the context, or by a codicil, that general words used by him were intended to have a limited effect. Thus in *Att.-Gen. v. Willshire* (n), the testator made dispositions with regard to what he repeatedly referred to as "all my property," but it was held, partly from the context and partly from the terms of a codicil made on the same day, that a sum of 5,000*l.* consols belonging to the testator was undisposed of.

Restrictive effect of context.

If a testator directs that in the event of A. dying under twenty, "the said property and effects" shall go to B., this may refer to a share of the testator's property previously given to A., and not to the whole of the testator's estate (o).

III.—General Residue held to pass by Word "Money," and other informal Words.—Mr Jarman continues (p): "As words in themselves the most general and comprehensive may, we have seen, be narrowed by their juxtaposition with more limited expressions, so on the same principle, terms which, in their strict and proper acceptation, apply to a particular species of personalty only, have been held, by force of the context, to embrace the general residue. In several instances, the word 'money' (q) (which is often popularly used in a vague and inaccurate sense, as synonymous with *property*,) has received this construction" (r).

Word "money" held to extend to general residue.

(m) 23 Bea. 89.

(n) 16 Sim. 36. Compare *Sutton v. Sharp*, 1 Russ. 146; *Slingsby v. Grasinger*, 7 H. L. C. 273; *Wylie v. Wylie*, 1 D. F. & J. 410; s.c. *Enohin v. Wylie*, 10 H. L. C. 1; *Borton v. Dunbar*, 2 D. F. & J. 338; and *Stooke v. Stooke*, 35 Bea. 396, post, p. 1037.

(o) *Re Willomier*, 16 Ir. Ch. R. 389. There is no invariable rule which

refers the word "said" to the last antecedent; *Healy v. Healy*, Ir. R., 9 Eq. 418.

(p) First ed. p. 702.

(q) Mr. Jarman's note on the meaning of "money" in its strict acceptation is omitted, as it does not properly belong here; all the cases cited by him will be found in Chap. XXXV.

(r) This rule of construction does not apply to a gift of "cash" (*Nevinson v.*

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The result has generally been due either, first, to the testator having directed his funeral expenses, debts or legacies (which ordinarily constitute a charge on the general residue) to be paid out of the "money" (s); or, secondly, to his having shewn a clear intention to make a complete disposition of all his personalty, which intention can only be effected by adopting the enlarged interpretation of the word "money." For it is clear that if the word be used without any explanatory context, it will be construed in its strict sense (t); à fortiori, if the express purpose of the bequest be inconsistent with the notion that the testator could have intended so to apply the property alleged to be comprised in it. As where an officer on service, after bequeathing two small legacies, and directing his portmanteau and other articles to be sent home, desired that "the remainder of his money and effects should be expended in purchasing a suitable present for his godson," it was held that a reversionary interest in stock did not pass (u).

Where testator has charged funeral expenses on "money."

Of the first class of cases alluded to, we have an instance in *Legge v. Asgill* (v), where a testatrix, after bequeathing 200*l.* Long Annuities amongst several persons in specific legacies, proceeded to give a debt of 2,935*l.* due to her, to A. for her separate use; and added, "I believe there will be sufficient money to pay my funeral expenses," which she desired might be plain. The testatrix afterwards made a codicil to her will, commencing with the following words:—"If there is any money left unemployed, I desire it may be given in charity. My watch and pianoforte I give to C. The most useful of my clothes to be given to my present servant," and she concluded with some directions respecting the key of a trunk. The question was, whether the general residue,

Lady Lennard, 34 Bea. 487), or of "ready money" (*Re Powell*, Johns. 49; see *Bevan v. Bevan*, 5 L. R. Ir. 57), or of "money to my account" (*Hastings v. Hane*, 6 Sim. 67). As to the effect of a gift of money referred to as "invested," see *Stooke v. Stooke*, 35 Bea. 396; *Re Pringle*, 17 Ch. D. 819, cited post.

(s) Great stress was laid on this in *Chapman v. Chapman*, 4 Ch. D. 800, ante, p. 1030.

(t) See *Shelmer's Case*, Gilb. Eq. Rep. 200; *Hotham v. Sutton*, 15 Ves. 319; *Read v. Hodgins*, 7 Ir. Eq. Rep. 17; *Lowe v. Thomas*, Kay, 369, affirmed 5 D. M. & G. 315; *Larner v. Larner*, 3 Drew. 704; *Cowling v. Cowling*, 26 Bea. 449; *Byrom v. Brandreth*, L.R., 16 Eq. 475; *Williams v. Williams*, 8 Ch. D. 789; *Re Sutton*, 28 Ch. D. 464;

In bonis Aston, 6 P. D. 203. Compare the cases on the effect of "money" as a word of specific description, post, Chap. XXXV. So a legacy of stock does not come within the description of a "pecuniary legacy," *Douglas v. Congreve*, 1*½* Kee. 410; though in *Barclay v. Maskelyne*, 5 Jur. N. S. 12, stock legacies were held upon the context to be within a clause revoking "all monies bequeathed" to the legatees.

(u) *Borton v. Dunbar*, 2 Gif. 221, 2 D. F. & J. 338. Converse case—declared purpose too large for strict construction of "money," *Prichard v. Prichard*, L. R., 11 Eq. 232, stated p. 1037.

(v) T. & R. 265, n., and cited 4 Russ. at p. 369.

including the reversion of one-fourth of a sum of 10,000*l.* secured by a settlement, passed by these words. Lord Eldon considered that under the will, and especially having regard to the charge of the funeral expenses, the word "money" was intended to comprise the entire personal estate; and that it was impossible to put a different construction upon the same word in the codicil.

So, in *Rogers v. Thomas* (*w*), where a testatrix, after giving various pecuniary and specific legacies, bequeathed to the inhabitants of T. Row all which might remain of her money after her lawful debts and legacies were paid; and she went on to give other specific and pecuniary legacies: Lord Langdale, M.R., considered the charge of debts and legacies sufficient evidence of the testatrix's intention to include the general residue in the bequest of "all which might remain of her money."

"Money remaining" after debts and legacies.

It seems, indeed, that where a bequest of legacies, primarily payable out of the general estate, is followed by a gift of the residue or remainder of the testator's "money," the latter gift comprehends the general residue, although the testator has not expressly charged the legacies on his "money." Thus, in *Dowson v. Gascoin* (*x*), where a testatrix, after bequeathing certain specific and pecuniary legacies, concluded her will as follows: "I appoint A. and B. my executors, and bequeath 200*l.* to each for their trouble, and whatever remains of money I bequeath to E. D.'s five children." At the date of the testatrix's will and of her death, her personal estate consisted principally of stock, which, it was contended, would not pass under the word money; but Lord Langdale decided that the stock in question passed by the will (*y*).

Where there is a bequest of legacies, and a gift of the residue of testator's money.

So in *Re Pringle* (*z*), a gift of "all the rest of my money, however invested," preceded and followed by a number of pecuniary and

(*w*) 2 Kee. 8; see also *Kendall v. Kendall*, 4 Russ. 360; *Phillips v. Eastwood*, 1 Ll. & Go. 270; *Barrett v. White*, 24 L. J. Ch. 724; *Grosvenor v. Durston*, 25 Bea. 97; *Stocks v. Barré*, Johns. 54; *Re Maclean*, 11 T. L. R. 82; *In bonis White*, 7 P. D. 65; *Re Egan*, [1899], 1 Ch. 688, where the expression "any money that may be in my possession at my death" was held to pass a reversionary interest in personalty. But the principle will not govern cases where the bequest is of "ready" money, *Re Powell*, Johns. 49.

(*x*) 2 Kee. 14.

(*y*) See also *Lynn v. Kerridge*, West's Ca. t. Hardwicke, 172; *Lowe v. Thomas*, 5 D. M. & G. 315; *Langdale v. Whitfeld*, 4 K. & J. 426, 436;

Montagu v. Earl of Sandwich, 33 Bea. 324, where there was a specific bequest after the bequest of "money." These cases appear to overrule *Gosden v. Dotterill*, 1 My. & K. 56, although Wood, V.-C., in *Lowe v. Thomas* (Kay, 369) treated it as a binding authority. *Lynn v. Kerridge*, supra, was a strong case, as the will contained a general residuary bequest, but it is not quite clear whether it can be referred to the principle now under discussion, or whether it merely decided that the bequest of "moneys" included stock. See *Hart v. Hernandez*, post, p. 1038; *Re Maclean*, 11 T. L. R. 82.

(*z*) 17 Ch. D. 819. See *Hastings v. Hane*, 6 Sim. 67, stated post.

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specific legacies, was held to pass the general personal estate. Even a bequest of "any little money left" will operate as a residuary bequest and consequently as an exercise of a general power of appointment (a).

Not if there
be a distinct
residuary
bequest.

But the inference to be drawn from a charge of debts is not conclusive; since the testator may have intended so to charge the specific gift of "money" (b): and therefore if the will contains a distinct residuary clause, or otherwise gives evidence that the word is used in its strict sense, the enlarged construction is inadmissible notwithstanding the charge. Thus, in *Willis v. Plaskett* (c), where a testatrix made her will as follows: "I first direct my funeral expenses to be paid, and the remainder of what monies I die possessed of to be equally divided between A. and B. I also give to the said A. all my wearing apparel, trinkets and all other property whatsoever and wheresoever that I may die possessed of": Lord Langdale, M.R., said that when a testator directed the payment of his funeral expenses, there was an inference that he was referring to his general personal estate; but that, having regard to the other parts of this will, he was prevented from giving to the word "monies" its extended meaning.

Where there
is a clear
intent to
dispose of
the whole per-
sonal estate.

The second class of cases indicated above is illustrated by *Waite v. Combes* (d), where a testator, after declaring himself desirous of making a settlement of his affairs, appointed A. and B. his executors to take and receive all monies that might be in his possession or due to him at the time of his decease, and to prosecute for the recovery of the same, if necessary, to be by them placed in the British funds or otherwise laid out upon security and held in trust: Sir J. Parker, V.-C., thought the whole will pointed to a complete disposition of the personal estate, and that, at all events, a sum of consols passed under the word "monies" (e).

Even a wrong description of the manner in which the testator's

(a) *Re Douglas*, [1905] 1 Ch. 279.

(b) Per Leach, M.R., *Collier v. Squire*, 3 Russ. at p. 475.

(c) 4 Beav. 208; and see *Williams v. Williams*, 8 Ch. D. 789 (gift of residue in will not cut down by gift of "money" in codicil); *Re Mason's Will*, 34 Beav. 494. Cf. *Barrett v. White*, 1 Jur. N. S. 652; and consider *Chapman v. Reynolds*, 28 Beav. 221, especially with reference to the weight there attributed to the fact that the testatrix had no "money" in the strict sense.

(d) 5 De G. & S. 676. As to the

weight allowed to the fact that at the time of his death the testator had little besides the consols, qu.; and see *Gosden v. Dotterill*, 1 My. & K. 56, which on this point is good law. If the gift is specific such evidence is admissible, *Gallini v. Noble*, 3 Mer. 691.

(e) But the mere fact of "money" being so disposed of (e.g. to one for life, with limitations over), as to necessitate an investment, will not suffice to extend the natural import of the word, *Lowe v. Thomas*, Kay, 369, 5 D. M. & G. 315; *Larner v. Larner*, 3 Drew. 704; *Williams v. Williams*, 8 Ch. D. 789.

"money" is invested, will not prevent that word from comprising the residuary personal estate: as where a testatrix bequeathed "the remainder of my money in the Spanish bonds" to her nephews and nieces, "my intention being to divide my property equally between my two sisters' children" (f).

In *Prichard v. Prichard* (g), where a testator appointed an executor, and declared that the income arising from his principal money should be paid to his wife, while unmarried, for the support of herself and the education of his children, and at her death or marriage to be divided among them: it was held by Sir R. Malins, V.-C., that the declared purpose of the gift shewed that the whole personal estate was intended to pass, including leaseholds.

The decision in *Re Cadogan* (h), goes even farther, for in that case there was a simple gift of "the money of which I am possessed"; but the will was made two days before the testatrix's death, and her "money," in the strict sense of the word, only formed a trifling part of her property; on the strength of these circumstances, and the fact that part of the "money" was given to two beneficiaries for life with remainders to their children, Kay, J., held that the gift passed all the personal estate (i). In *Re Buller* (j) a gift of "all my money" except certain shares was held to pass the general residue, but Stirling, J., expressed some doubt whether *Re Cadogan* did not go too far. On the other hand, in *Hastings v. Hane* (k), where a testator after revoking "former dispositions of my property," and making various pecuniary and specific bequests, gave "any monies which may remain to my account after payment of the aforesaid sums and my debts" it was held by Shadwell, V.-C., that the words "to my account" prevented the gift of "monies which may remain" from operating as a gift of the general residue. So in *Stooke v. Stooke* (l), where a testator made various specific and pecuniary bequests, and then gave "the remainder of all my moneys, in whatever it may be, in bonds or consols or anything else," it was held that this passed money invested on any kind of security, including a life policy, but not leaseholds, furniture or other chattels. And in *Nevinson*

(f) *Patrick v. Yeatherd*, 33 L. J. Ch. 286.

(g) L. R., 11 Eq. 232.

(h) 25 Ch. D. 154. This decision was followed in *In bonis Bramley*, [1902] P. 106. See also *Stratton v. Hillas*, 2 Dr. & W. 51; *In bonis White*, 7 P. D. 65.

(i) In *Re Sutton* (28 Ch. D. 464) a gift of "the whole of the money over which I have a disposing power," was confined to money in the strict sense, but no reasons are given.

(j) 74 L. T. 406.

(k) 6 Sim. 67.

(l) 35 Bea. 396.

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v. *Lady Lennard* (m), where the testatrix, after giving the residue of all her money, referred to it afterwards as "cash," this was held to restrict the meaning of the word to money strictly so called.

Where
"money"
means general
personal
estate except
part.

It sometimes appears from the context that the testator means by "money," not the whole of his general personal estate, but all except a certain part of it. Thus, in *Barrett v. White* (n), Kindersley, V.-C., said that the testatrix by "money" meant all her personal estate other than plate, furniture, horses, carriages, &c. *Hart v. Hernandez* (o) was a similar case. So in *Lloyd v. Lloyd* (p) a direction to pay debts, &c., out of "money" was held to throw them primarily on the testatrix's personal estate other than the leaseholds and furniture, which were particularly referred to. And in *Re Townley* (q) it was held that a gift of "all my moneys" passed the general personal estate other than the furniture; part of the furniture was specifically bequeathed; as to the rest of it there was an intestacy.

"Money"
when strictly
construed.

But in cases which do not fall within any of the rules above referred to, the word "money" is strictly construed, thus in *Lowe v. Thomas* (r) a testatrix bequeathed to A. "the whole of my money" for his life, at his death to be divided between B. and C.; then followed trifling specific bequests to B. and C., with a final sentence declaring that the longest survivor of them was to become "possessor of the whole money"; it was held that a sum of stock did not pass by this bequest.

Unless for-
bidden by
the context.

And if the context shows that the word "money" is used in its strict sense, it will not receive the more extended construction, merely on the strength of even an expressed intention to dispose of all the estate. Thus, in *Ommanney v. Butcher* (s), where a testator, after commencing his will in the following form: "I, A. B., considering in what manner I should have my fortune disposed of, in case of my death, do make this my will:"—bequeathed numerous stock and a few money legacies; and after disposing of some books and other specific articles, he directed

(m) 34 Bea. 487.

(n) 24 L. J. Ch. 724. *Glendening v. Glendening*, 9 Bea. 324, appears to have been decided on the same principle, but there the testator added the word "goods"; the question was whether the gift of "money and goods" comprised money in the funds, and it was held that it did.

(o) 52 L. T. 217. It is not clear whether *Lynn v. Kerridge*, West. Rep. t. Hard. 172, was decided on this principle; see the remarks in *Hart v.*

Hernandez, supra.

(p) 54 L. T. 841.

(q) 53 L. J. Ch. 516. *Re Smith* (42 Ch. D. 302) seems to have been decided on the same principle.

(r) Kay, 369; 5 D. M. & G. 315.

(s) T. & R. 260. Compare *Hastings v. Hane*, ante, and *Enohin v. Wylie*, 10 H. L. C. 1, where a gift of "the whole of my capital, which shall remain with me after my death in ready money and in bank billets," was held not to pass a sum of stock.

the remainder of his books, and his jewels, plate and household furniture to be sold; and desired that his clothes and linen might be divided between his servants: he then gave a small pecuniary legacy to his executors, and added, "in case there is any money remaining, I should wish it to be given in private charity." Sir T. Plumer, M.R., was of opinion that the concluding clause did not comprehend the general residue; but was to be considered as applying to the residue of the produce of those articles which the testator had directed to be sold, after providing for the payments which were ordered to be made. A gift of "such money, stocks, funds, or other securities not hereafter specially devised, as I may die possessed of," does not constitute a gift of residue (*t*).

In *Hutchinson v. Hutchinson* (*u*) where the testator gave all his "lands, tenements, rights and credits," the opinion was expressed that the words "rights and credits" would have been sufficient by themselves to pass the general personal estate; but the context made the meaning clear.

"Rights and credits."

Other cases may be adduced, in which the general residue of a testator's personal estate has been held to pass under very informal words. As in *Leighton v. Barlie* (*v*), where a testatrix made the following indorsement on one of her testamentary papers: "I think there will be something left after the funeral expenses, &c. paid, to give to W. B., now at school, towards equipping him to any profession"; by another testamentary paper she bequeathed the sum of 500*l.* to W. B.; it was held by Leach, M.R., that under the indorsed memorandum, W. B. was the general residuary legatee.

Informal words held to pass general residue.

Again, in *Hodgkinson v. Barrow* (*w*), a testator, having several children by different marriages, gave his real and personal estate to trustees, upon trusts that did not exhaust the whole interest, but confiding in them to fulfil any memorandum he might leave; he made a codicil by which, after reciting the settlement made on his second marriage, he directed that whatever sums might come to the children of that marriage, or the children of his former marriage, with the exception of such sums as might come in right of their respective mothers, that his trustees would

(*t*) *In bonis Aston*, 6 P. D. 203.

(*u*) 13 Ir. Eq. R. 382.

(*v*) 3 My. & K. 267; see *Surtees v. Hopkinson*, 18 L. J. Ch. 188; *Wiggins v. Wiggins*, 2 Sim. N. S. 226; *Duhamel v. Ardovin*, 2 Ves. sen. 162; *Bland v.*

Lamb, 2 J. & W. 399 ("anything I have forgot"); *Fleming v. Burrows*, 1 Russ. 276 ("whatever else I may then be possessed of"); *Re Craven*, 99 L. T. 390 ("rest of my investments").

(*w*) 2 Phill. 578.

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And in *Re Bassett's Estate* (x), where legacies were given, and the will then went on, "after these legacies and my funeral expenses are paid, I leave to my sister A. without any power or control of her husband; in case of her death to be equally divided amongst his children or grand-children": it was held that this was a good gift of the residue. *Chapman v. Chapman* (y) is another example of an intention to dispose of the residue being inferred from the whole will.

Appointment of "residuary legatee." As a general rule, an appointment of A. "to be my residuary legatee," operates as a bequest of the testator's residuary personal estate to A. (z). But if there is a formal gift of the residue to another person, this may prevail (a).

(x) L. R., 14 Eq. 54. Compare *Bowman v. Milbanke* and the other cases in which it has been held that words of gift may be too vague to pass the residue; ante, p. 455.

(y) 4 Ch. D. 800.

(z) See *Hughes v. Pritchard*, 6 Ch. D. 24, and other cases cited, ante, p. 1016

(a) Post, Chap. XXIX.

END OF VOL. I.

